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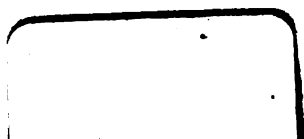
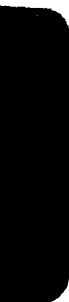
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**ANALYTICAL DIGEST**  
OF CASES PUBLISHED IN  
**THE LAW JOURNAL REPORTS**  
VOLS. I-IV. NEW SERIES,  
AND IN  
**ALL THE REPORTS,**  
FROM  
**1831 to 1835**  
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*In the Ecclesiastical and Admiralty Courts,*  
**BY THE HOUSE OF LORDS, THE PRIVY COUNCIL,**  
**AND ELECTION COMMITTEES OF THE HOUSE OF COMMONS,**

*AT NISI PRIUS,*

AND IN  
*The Court of Review in Bankruptcy,*  
**FROM MICHAELMAS TERM 1831 TO TRINITY TERM 1835**  
**INCLUSIVE.**

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**BY JOHN GREENWOOD, ESQ.**  
**OF LINCOLN'S INN, BARRISTER-AT-LAW.**

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# A LIST OF REPORTS AND ABBREVIATIONS

## USED IN THIS DIGEST.

<i>Abbreviations.</i>		<i>Reports.</i>	<i>Courts, &amp;c.</i>
Ad. & E.	-	Adolphus & Ellis's Reports	King's Bench.
B. & Ad.	-	Barnewall & Adolphus's Reports	
Bing.	-	Bingham's Reports	Common Pleas.
Bing. N.C.	-	Bingham's New Cases	
Bligh, N.S.	-	Bligh's Reports, New Series	House of Lords.
C. & F.	-	Clarke & Finnelly's Reports	
C. & J.	-	Crompton & Jervis's Reports	Exchequer.
C. M. & R.	-	Crompton, Meeson, & Roscoe's Reports	
Cr. & M.	-	Crompton & Meeson's Reports	Nisi Prius.
C. & P.	-	Carrington & Payne's Reports	
C. & R.	-	Cockburn & Rowe's Reports	Election Cases.
Curt.	-	Curteis's Reports	
D.	-	Deacon's Reports	Ecclesiastical Courts.
D. & Ch.	-	Deacon & Chitty's Reports	
D. & Cl.	-	Dow & Clarke's Reports	Bankruptcy.
D. & Cl. A.C.	-	Dow & Clarke's Additional Cases	
Dowl. P.C.	-	Dowling's Practical Cases	House of Lords
Doug.	-	Douglas's Reports	
Hag.	-	Haggard's Reports	{ King's Bench, Common Pleas, and Exchequer.
Hag. Ec.	-	Haggard's Ecclesiastical Reports	
Kn.	-	Knapp's Reports	King's Bench.
K. & O.	-	Knapp & Ombler's Reports	
Law J. (N.S.) Bankr.	-	Law Journal Reports, (New Series,)*	Admiralty.
Law J. (N.S.) Chanc.	-	_____	Ecclesiastical Courts.
Law J. (N.S.) C.P.	-	_____	Privy Council.
Law J. (N.S.) Exch.	-	_____	Election Cases.
Law J. (N.S.) Exch. Eq.	-	_____	Bankruptcy.
Law J. (N.S.) K.B.	-	_____	Chancery.
Law J. (N.S.) M.C.	-	_____	Common Pleas.
Law J. Stat.	-	Abridgment of the Statutes.	Exchequer.
M. C.C.	-	Moody's Crown Cases	Exchequer in Equity.
M. & K.	-	Mylne & Keen's Reports	{ Magistrates' Cases { King's Bench, Common Pleas, and Exchequer.
Mont.	-	Montagu's Reports	
Mont. & A.	-	Montagu & Ayrton's Reports	Exchequer Chamber.
Mont. & Bl.	-	Montagu & Bligh's Reports	
M. & Ro.	-	Moody & Robinson's Reports	Chancery.
Mo. & Sc.	-	Moore & Scott's Reports	
N. & M.	-	Neville & Manning's Reports	Common Pleas.
P. & K.	-	Perry & Knapp's Reports	
R. & M. C.C.	-	Ryan & Moody's Crown Cases	King's Bench.
Russ. & M.	-	Russell & Mylne's Reports	
Sc.	-	Scott's Reports	Election Cases.
Sim.	-	Simons's Reports	
Tyr.	-	Tyrwhitt's Reports	Exchequer Chamber.
Y. & C.	-	Younge & Collyer's Reports	
Yo.	-	Younge's Reports	Chancery.

\* See the next leaf for Names of the Barristers who contributed the Reports.





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**ABATEMENT.**

[See **INSOLVENT—PLEADING.**]

- (A) **ABATEMENT OF ACTION.**
- (B) **ABATEMENT OF LEGACY.**
- (C) **PLEA IN ABATEMENT.**

(A) **ABATEMENT OF ACTION.**

[See **PRACTICE (Com. Law)**, Death of Parties.]

Verdict for defendant in an action of *assumpsit*—rule to shew cause why there should not be a new trial. Before the rule came on to be heard, the defendant died:—Held, that the rule should still be argued; as, in case it was discharged, the judgment would relate to the term in which it was granted, when the defendant was living. *Anderdon v. Lord Foley*, 2 Law J. (n.s.) K.B. 214.

(B) **ABATEMENT OF LEGACY.**

[See **LEGACY.**]

(C) **PLEA IN ABATEMENT.**

[See provisions respecting pleas in abatement for nonjoinder of co-defendant, misnomer, &c., 3 & 4 Will. 4, c. 12, ss. 8, 9, 10, 11; 11 Law J. Stat. 98.]

A plea of privilege as attorney of another court is a plea in abatement, and if it be not verified by affidavit, plaintiff may sign judgment. *Davidson v. Chilman*, 1 Bing. N.C. 297, s.c. 1 Sc. 117; s.p. *Davidson v. Watkins*, 3 Dowl. P.C. 129.

An affidavit of the truth of a plea in abatement, that the promises in the declaration were made  
**DIGEST, 1831—1835.**

jointly with another, cannot be sworn before the day on which the declaration is delivered.

If the defendant reside at such a distance as to render it impossible to obtain an affidavit of verification within the time allowed for pleading in abatement, an application should be made to enlarge the time, for the purpose of enabling him to procure such affidavit.

An affidavit by the London agent of the defendant's attorney, that "he has been informed, and believes, that the defendant has a good defence upon the merits," is sufficient to support an application to set aside a judgment on a plea in abatement on payment of costs. *Johnson v. Popplewell*, 1 Law J. (n.s.) Exch. 201, s.c. 2 C. & J. 544; 2 Tyr. 716.

A transposition in the Christian names of the defendant, in the title of the affidavit to verify a plea in abatement, is a variance which makes the plea irregular.

*Semble*—That "one of the defendants in the cause" is a good addition to the deponent, in an affidavit of verification of a plea in abatement, within Rule 5, Hil. term, 2 Will. 4.

Costs not allowed on setting aside a plea in abatement for irregularity. *Poole v. Pembrey*, 2 Law J. (n.s.) Exch. 169, s.c. 3 Tyr. 387; 1 Dowl. P.C. 693.

**ABODE.**

In actions against Justices, the "place of abode" of the plaintiff's attorney required by 24 Geo. 2,

c. 44, s. 1, to be indorsed on the notice of action, is sufficiently described by stating his place of business, though he, in fact, sleeps and resides elsewhere. *Roberts v. Williams*, 5 Tyr. 583.

The place of abode of an attorney's clerk making an affidavit of debt, is correctly described as the office of his employer. *Alexander v. Milton*, 1 Law J. (N.S.) Exch. 148, s.c. 2 C. & J. 424; 2 Tyr. 496; 1 Dowl. P.C. 570.

### ABORTION.

*Semble*, that, so far as the nature of the thing administered is concerned, the question on an indictment on the statute 9 Geo. 4, c. 31, s. 13, is a question of the intention of the party administering it, and not of the noxious or innoxious character of the article itself. *Res v. Coe*, 6 C. & P. 403. [Vaughan]

It is an answer to an indictment on the second section of 43 Geo. 3, c. 58, for the single felony, that the woman was not pregnant. *Res v. Scudder*, 1 R. & M. C.C. 216.

### ACCESSARY.

[See PRINCIPAL AND ACCESSARY.]

### ACCOMPLICE.

In a case of felony the testimony of the wife of an accomplice is not such evidence as a jury ought to rely upon as confirmation of the statement of the accomplice. *Res v. Neal*, 7 C. & P. 168. [Parke]

Proving by other witnesses that a robbery was in fact committed in the mode in which an accomplice states it to have been committed, is not such a confirmation of the accomplice as is required to warrant a conviction on his evidence. *Res v. Webb*, 6 C. & P. 595. [Williams]

If an accomplice be confirmed only as to collateral facts, which do not connect either the accused with the offence, or the accused and the accomplice together, it is not sufficient. *Res v. Addis*, 6 C. & P. 338. [Patteson]

A jury may, if they please, act upon the evidence of an accomplice, without any confirmation of his statement. *Res v. Hastings*, 7 C. & P. 152. [Denman]

### ACCORD AND SATISFACTION.

[See ASSUMPSIT, Pleadings in.]

An acceptance for 20*l.* payable two months after date, of a bill of exchange, which had no drawer's name to it, held a good satisfaction of a debt of 11*l.* then due to the person to whom the accepted bill was delivered, and who received it in satisfaction of that debt, although no drawer's name had been affixed to it, and it remained in his hands.

At least the holder's right to sue on the original debt was suspended until it was due and dishonoured. *Simon v. Lloyd*, 4 Law J. (N.S.) Exch. 195, s.c. 2 C. M. & R. 187.

An annuity bond was executed by two brothers, one as principal, the other as surety. By agreement afterwards, between them and a third brother, for the settlement of their several claims and debts, and for the apportionment of property to meet the latter, the annuity bond was included.

The surety in that bond was afterwards compelled to pay; and his representative brought an action against their principal to be reimbursed:—Held, that the agreement was an accord, in respect of the annuity bond; and that as third parties were bound by that agreement, the surety was also bound, and that the action could not be maintained. *Cartwright v. Cooke*, 1 Law J. (N.S.) K.B. 261, s.c. 3 B. & Ad. 701.

In an action against one of several joint contractors, a receipt had been given by the plaintiff for a portion of the sum claimed, agreed to be taken for debt and costs in that action. This was held to be no satisfaction of the whole amount, nor a release of the remainder, and therefore no bar to an action against another joint contractor, brought to recover the sum that remained due. *Watters v. Smith*, 1 Law J. (N.S.) K.B. 31, s.c. 2 B. & Ad. 889.

Plea to a declaration in assumpsit, that the plaintiff undertook by an agreement in writing, that if the defendant would execute a mortgage of certain premises to the amount claimed by them, when called upon so to do, (that amount to carry interest, and to be paid by instalments,) that no proceedings should be instituted against him in respect of the debt, unless default were made in payment of the instalments; that he was always ready to execute the mortgage, but had never been called upon:—Held to be bad. *Allies v. Probyn*, 4 Law J. (N.S.) Exch. 227, s.c. 2 C. M. & R. 408.

### ACCOUNT.

(A) IN GENERAL.

(B) BILL FOR.

(C) ACCOUNT STATED.

(A) IN GENERAL.

M, a partner with D and B, acted as agent for P & Co. till 1809; at which time a balance was due to M, and bills accepted by him were outstanding, and afterwards paid by the firm in which he was a partner. D, B, and M, were appointed under a special contract, and acted as agents for P & Co. from the time when M ceased to be their agent in 1809 until 1814. In taking the account between P & Co. and D, B, and M:—Held, that the accounts between P & Co. and M were properly excluded; and that, as these accounts were not liquidated, nor capable of immediate liquidation, a debt from P & Co. to M could not be allowed in compensation (set-off) against a debt or balance owing from D, B, & Co. to M, if such debts could at all, by the law of Scotland, be set off against each other.

Charges by an agent for printing documents, the effect of which is to save his personal labour in writing, ought not to be allowed in account with his principal.

A judgment ought not to be varied, nor a cause remitted, on account of improper charge of interest

upon a balance, if it is of trifling amount; especially if there is an omission to charge interest upon balance on the other side of the account. *Dovns v. Pitcairn*, 4 Bligh, n.s. 550.

L, a partner in a firm at St. Thomas, employs a firm at St. Thomas to supply articles to fulfil a contract, which the St. Thomas's firm do, believing the contract to have been entered into on behalf of the Grenada firm. The other partners in the Grenada firm write to St. Thomas's firm to disclaim this contract:—Held, that the Grenada firm were liable for all advances in respect of the contract made by the St. Thomas's firm previously to the day of their receipt of the disclaimer, or subsequently to it, in consequence of liabilities which they had previously incurred, and that the Grenada firm were entitled to credit for all payments made in respect of the contract prior to that day, or subsequently to it, if specifically made in respect of the account then due, and for the balance of all payments made generally in respect of the contract subsequently to that day, after satisfying the amount due to the St. Thomas's house by L alone.

An account current kept by the St. Thomas's house of all their transactions with the Grenada house, both prior to and after the disclaimer of the contract:—Held, not to be evidence of specific appropriation by them of the sums they had received. *Smith v. Ure*, 2 Kn. 188.

#### (B) BILL FOR.

[See BANKER—LIMITATIONS, STATUTE OF, Where available—PARTNERS, Actions and Suits.]

A bill for an account will lie against a banker by his customer. A mere general charge, that accounts are intricate, and cannot be taken without the assistance of a court of equity, is not sufficient to sustain a bill for an account, unless the bill state circumstances from which it may fairly be presumed that the charge is true. *Bowles v. Orr*, 1 Cl. & F. 464.

Upon a bill filed by L against M his solicitor, for a general account and taxation of his bill of costs, and a decree directing the examination of the parties upon oath, M filed interrogatories for the examination of L, which he refused to answer; and, thereupon, an affidavit was filed by M under an order of Court verifying the allegation of facts suggested in his interrogatories:—Held, under the circumstances, that this affidavit ought to be considered as evidence of the debt, and of the advances of money constituting the debt by M to L. *Morgan v. Evans*, 8 Bligh, n.s. 717.

A, who was domiciled in America, gave to B, one of his sisters, one-fourth of the residue of his property for her life, subject "at her death to be equally divided among her children, should she have any." Upon a suit in the proper court in America, B having no children, it was decreed, that the fund should be paid to her. This decree was made upon a bill taken *pro confesso* against parties, who were out of the jurisdiction, there being two executors within the jurisdiction, upon whom the decree operated. One of these absent defendants having received the funds of B, under a power from her, upon a suit against him for an account, and on objection raised that B was entitled to no more than a life interest under the will, it was held, that such

a question could only be raised by proceeding in the court in America to rehear the cause.

An agreement liable to be impeached for fraud cannot be made void in a suit for an account, without a suit to have it declared void. *Gordon v. Brown*, 4 Bligh, n.s. 569.

The Court will direct an account of past partnership transactions, though the bill does not pray a dissolution; but it will make no order for carrying on partnership concerns, unless with a view to a dissolution. *Richards v. Davies*, 2 Russ. & M. 347.

Where, under the usual decree for an account of a testator's debts, a claim is made in respect of a debt, the amount of which is not ascertained, the Master ought to take the necessary accounts for ascertaining the amount. *Baker v. Martha*, 5 Sim. 380.

Where the Master has taken an account, according to the old method, by charge and discharge, and not in the form of debtor and creditor, as directed by the 61st New Order, a party who has once acquiesced in the proceeding cannot afterwards object to that course. *Weale v. Rice*, 4 Law J. (n.s.) Chanc. 17.

#### (C) ACCOUNT STATED.

[See GOODS SOLD (1 Ad. & E. 488)—INSOLVENT DEBTOR, Actions by Assignees—PLEADING—PARTNERS, Rights and Interests.]

The defendant having been indicted for a nuisance, and not being prepared to plead within the time prescribed by the practice of the Court of Quarter Sessions, the prosecutor said he should press for judgment for want of a plea, unless the defendant would consent to pay the costs of the day; and, the matter being brought before the Court, the Court said that the defendant must either plead and take his trial, or he might be allowed to traverse on payment of the costs of the day. The parties then conferred together, and an agreement was come to, and the following memorandum was signed by the counsel on both sides:—"Traversed to the next sessions, by consent, the defendant paying the costs of the day, including counsel's fees, the prosecutor giving a copy of the replication one month before the sessions." The prosecutor afterwards got his bill of costs taxed, and the defendant was served with a copy of the allocatur, and was applied to for the amount; the defendant objected to two items, which the prosecutor's attorney agreed to take off. The defendant's attorney then offered to give his cheque for the amount, but, not being pressed for, it was not given. The defendant on a subsequent application for payment by the prosecutor's attorney, requested the latter to apply to his attorney, who received his rents, and he would arrange or pay:—Held, that the arrangement at the sessions amounted to an agreement binding on the defendant, independently of the order of the Court; and that, taking such agreement in connexion with what took place subsequently, a count on an account stated, for the amount of the costs, was maintainable. *Porter v. Cooper*, 8 Law J. (n.s.) Exch. 330, s.c. 1 C. M. & R. 387; 1 Tyr. 456; 6 C. & P. 354.

Assumpsit for money had and received on an account stated upon this document: "Mr. W. Pierce, Soon after I arrive home, I undertake to pay you,

or I will remit you, 50*l*., which sum I hold of H. Pugh, my father-in-law, and by him am authorized to pay you. W. E." Pugh paid Pierce what he owed him, and being called as a witness by W. E. said, that he had never authorized him to pay the 50*l*. to Pierce:—Held, that the action was not maintainable against W. E. *Pierce v. Evans*, 4 Law J. (N.S.) Exch. 306, s. c. 1 C. M. & R. 294.

An entry in a bankrupt's examination of a certain sum being due to A, is evidence of an account stated between them, and is a sufficient acknowledgment to take the case out of the Statute of Limitations. An attorney's bill cannot be recovered on an account stated, though the amount has been admitted, without proof of the delivery of his bill. *Eicke v. Nokes*, 1 M. & R. 359.

The defendant's admission of something being due, without specifying how much, does not entitle the plaintiff to a verdict for nominal damages on an account stated. On that count the amount must be stated. *Kirtou v. Wood*, 1 M. & R. 253. [Tindal]

A tenant having become insolvent, his assignees paid one quarter's rent on being allowed to remove certain fixtures. It was not proved that they had occupied the premises:—Held, that the landlord could not recover the sum so agreed to be paid in assumpsit on an account stated. *Clarke v. Webb*, 3 Law J. (N.S.) Exch. 300, s. c. 1 C. M. & R. 29; 4 Tyr. 673.

An executor, who had paid their legacies to all the legatees except the plaintiff, and had rendered an account, stating, that he retained the amount of the plaintiff's legacy for the plaintiff, held liable in an action of assumpsit on an account stated. *Hart v. Minors*, 4 Law J. (N.S.) Exch. 275, s. c. 2 C. & M. 700.

### ACCOUNTANT.

Costs in employing an accountant in examination of books, &c. of an intestate, brought into the Master's office, whereby fraudulent dealing with the books was discovered, ordered to be paid, on petition, before the cause came on for further directions. *Jones v. Thompson*, 4 Law J. (N.S.) Chanc. 6.

### ACCUMULATION.

[See ADMINISTRATION—LEGACY.]

### ACKNOWLEDGMENT OF DEED.

[See INFANT, Rights and Incapacities.]

The affidavit verifying the certificate of the acknowledgment of a married woman taken by commission under the 3 & 4 Will. 4, c. 74, s. 83, may be filed subsequently to the filing of the certificate. *Anonymous*, 1 Sc. 52.

A married woman, residing at Paris, acknowledged a deed before commissioners specially appointed under 3 & 4 Will. 4, c. 74, s. 83, who signed a memorandum and certificate of the taking of such acknowledgment as required by the 84th section. The affidavit verifying the certificate and signatures required by the 85th section was made, not before the Juge de Paix, but before the English

consul at Paris:—Held, that such affidavit was irregular, as the consul was not authorized to take it by the 6 Geo. 4, c. 87, s. 20. *Ex parte Lady A. Heneage*, 3 Law J. (N.S.) C.P. 206.

### ACQUIESCENCE.

A creditor not a party to a suit, receiving money in satisfaction of his debt, under the Master's report, by which the interest of that debt is calculated, is bound by that report, and cannot dispute the correctness of the principle on which the calculation proceeds. *Hughes v. Wynne*, 2 Law J. (N.S.) Chanc. 28, s. c. 1 M. & K. 20.

### ACT OF PARLIAMENT.

[See EVIDENCE—STATUTE.]

### ACTION.

[See LODGER.]

- (A) WHERE MAINTAINABLE.
- (B) FORM OF.
- (C) COMMENCEMENT OF.

#### (A) WHERE MAINTAINABLE.

[See ARREST, Re-arrest—CORPORATION, Rights, Liabilities, and Disabilities—NEWSPAPER.]

If an injury be occasioned partly by the negligence of the plaintiff, and partly by that of the defendant, the plaintiff cannot maintain any action. *Williams v. Holland*, 6 C. & P. 23. [Bosanquet]

An action lies against a party who, by carelessness or negligence in excavating his own grounds, either causes or accelerates the fall of an adjoining house. *Dodd v. Holmes*, 3 N. & M. 739.

Where a person builds his house to the utmost extremity of his own land, and the owner of the adjoining land digs in his own land, and in so doing removes that which forms some support to his neighbour's house, and the latter falls, the former is not (merely in right of possession, without alleging it to be an ancient house) entitled to maintain an action against the latter.—*Quære*, however, whether, supposing the declaration alleged it to be an ancient messuage, he could not? *Wyatt v. Harrison*, 1 Law J. (N.S.) K.B. 237, s. c. 3 B. & Ad. 871.

Where a public company has the right by law of taking up the pavement of the street for the purpose of laying down pipes, the workmen they employ are bound to use such care and caution in doing the work as will protect the King's subjects (themselves using reasonable care) from injury; and if they so lay the stones as to give such an appearance of security as would induce a careful person, using reasonable caution, to tread upon them as safe, when, in fact, they are not so, the company will be answerable in damages for any injury such person may sustain in consequence. *Drew v. New River Company*, 6 C. & P. 754. [Tindal]

If a horse and cart are left standing in the street without any person to watch them, the owner is

liable for any damage done by them, though it be occasioned by the act of a passer-by in striking the horse. *Illidge v. Goodwin*, 5 C. & P. 190. [Tindal]

In an action on the case for damage done to the plaintiff's cab, by the negligent driving of the defendant's cart, the defendant is liable, though his servant was not in fact driving, but a stranger sitting with him, to whom the servant had intrusted the reins. *Booth v. Mister*, 7 C. & P. 66. [Abinger]

If a servant driving his master's cart on his master's business, make a detour from the direct road for some purpose of his own, his master will be answerable in damages for any injury occasioned by his careless driving, while so out of the road. But if a servant take his master's cart without leave, at a time when it is not wanted for the purpose of business, and drive it about solely for his own purposes, the master will not be answerable for any injury he may do. *Joel v. Morrison*, 6 C. & P. 501.

No action will lie by the reversioner for an injury to his reversionary interests, by reason of a trespass committed on the land by a stranger during a subsisting tenancy, although that trespass may have been committed under a claim of a right of way. *Baxter v. Taylor*, 2 Law J. (n.s.) K.B. 65, s. c. 4 B. & Ad. 72; 1 N. & M. 11.

In an action for maliciously suing out a commission of bankrupt, it is not sufficient to prove merely that the commission was superseded, as a supersedeas may proceed upon strict legal grounds, and does not, therefore, furnish evidence of the want of probable cause. *Hay v. Weakley*, 5 C. & P. 361. [Tindal]

Declaration in case, stated, that the plaintiff was the inventor of a metallic hone, which he used to wrap up in certain envelopes, and complained, that the defendant sold bones wrapped up in papers similar to those of the plaintiff's, in consequence whereof, the plaintiff was prevented from selling so many of his bones, and the bones of the plaintiff were deteriorated in sale, from the bones of the defendant being of an inferior quality. The jury negatived the fact of their being of an inferior quality:—Held, immaterial, as the gist of the action was the fraud, in selling the defendant's bones wrapped up in papers belonging to, or made to imitate those of, the plaintiff. *Blofield v. Payne*, 2 Law J. (n.s.) K.B. 68, s. c. 4 B. & Ad. 410; 1 N. & M. 353.

If A, being the author of a law book, sell the copyright to B, and B publish a third edition of the work, edited by another, but not stated to be so, and which purchasers were likely to suppose was edited by A, such edition having errors and mistakes in it calculated to injure the reputation of A as an author:—Held, at Nisi Prius, that, for this, an action lies by A against B. The question, whether an edition purports to have been edited by A, is a question for the jury; but the question, whether the alleged errors and mistakes be so or not, and whether they are such as are calculated to injure the reputation of A as an author, are questions for the Court. *Archbold v. Sweet*, 5 C. & P. 219, s. c. 1 Mo. & R. 162. [Tenterden]

The plaintiff's father prepared and sold a medicine called "Dr. Johnson's Yellow Ointment," for which no patent had been obtained. The plaintiff, after his father's death, continued to sell the same. The defendant sold a medicine under the same name

and mark:—Held, that no action could be maintained against him by the plaintiff. *Singleton v. Bolton*, 3 Doug. 293.

Quare, whether an action on the case will lie for arresting a witness or other person when he is privileged. *Stokes v. White*, 3 Law J. (n.s.) Exch. 321, s. c. 1 C. M. & R. 223; 4 Tyr. 786.

#### (B) FORM OF.

An action on the case lies against the defendant, though the injury with which he is charged be immediate, and the act by which such injury is caused be violent, provided the injury, and the act, of which it is the effect, be attributable to negligence and want of skill, and be not wilful. *Williams v. Holland*, 2 Law J. (n.s.) C.P. 190, s. c. 10 Bing. 112; 3 Mo. & Sc. 540; 6 C. & P. 23.

A master sitting in a gig by the side of his servant, is liable in trespass for an immediate injury occasioned by the driving of the servant. *Chandler v. Broughton*, 2 Law J. (n.s.) Exch. 25, s. c. 1 C. & M. 29; 3 Tyr. 220.

#### (C) COMMENCEMENT OF.

The suing out, and not the service, of the writ of summons, is the commencement of the action for all purposes since the Uniformity of Process Act. *Alston v. Underhill*, 2 Law J. (n.s.) Exch. 238, s. c. 1 C. & M. 492; 3 Tyr. 427; 2 Dowl. P.C. 26.

### ADJOURNMENT.

[See JUSTICES.]

### ADMINISTRATION.

[See EXECUTOR AND ADMINISTRATOR—STAMP.]

- (A) WHEN AND TO WHOM GRANTED.
- (B) LIMITED.
- (C) BOND.
- (D) PRACTICE.

#### (A) WHEN AND TO WHOM GRANTED.

The Court refused to grant administration *cum test. ann.* to A B, as the attorney of the Orphan Board at the Cape of Good Hope, acting on behalf of the next-of-kin, but subsequently granted it to a creditor, the next-of-kin having been cited by a decree on the Royal Exchange. *In the goods of Reitz*, 3 Hag. Ec. 766.

A domiciled Frenchman having by his will appointed an executor, but no residuary legatee and administration *cum test. ann.* (granted, after citing the executor, to the son's attorney in 1828) being brought in, the Court, doubting whether it ought not to require the ambassador's certificate, ultimately, on justifying security, and on the French consul-general's certificate (confirmed by an affidavit), that by the French law the next-of-kin was entitled to the residue, granted the administration to the son without citing the nude executor, he having never applied for the grant, though the deceased died upwards of thirteen years before. *In the goods Anne Dormoy*, 3 Hag. Ec. 767.

A resident, but not domiciled in France, makes

testamentary paper relating to personalty in France and to personalty and realty in England; and a second paper, solely relating to personalty in France, and disposing of the whole of it to a woman with whom he cohabited, but appoints no executor in either paper, nor residuary legatee nor devisee of his property in England; his widow is entitled to administration with both papers annexed—*Spratt v. Harris*, 4 Hag. Ec. 405.

The Court granted administration to the unsuccessful party (though the younger daughter), the minor's grandchildren joining in the prayer for such grant, and, on the application of the other daughter, directed the securities to justify in respect of her interest. *Coppin v. Dillon*, 4 Hag. Ec. 375.

Administration of a domiciled Scotsman granted to an agent appointed by the Court of Session, *factor loco tutoris* to the infant children. *In re Johnston*, 4 Hag. Ec. 182.

Administration *de bonis non* to a feme covert granted to the representatives of the husband, an appearance having been given and administration prayed by the next-of-kin of the wife; the Court directing, that though the modern practice had been otherwise, such grants should for the future pass to the husband's representatives, unless cause to the contrary were shewn. *Fielder v. Hanger*, 3 Hag. Ec. 769.

Administration with the will annexed granted to the wife of a residuary legatee, as his attorney, under a memorandum in his handwriting. *In re Elderton*, 4 Hag. Ec. 210.

Administration to a feme covert (after the death of her husband, who survived but took no grant) decreed to her next-of-kin, entitled by settlement to her property. *In re Pountney*, 4 Hag. Ec. 289.

Administration, with a deed of assignment (to take effect on the death) annexed, granted to the assignee as universal legatee in trust, on consent of all parties entitled, under an intestacy. *Shingler v. Pemberton*, 4 Hag. Ec. 366.

A paper, not found in the deceased's repositories, never traced into his possession, never recognised nor alluded to by him, by declaration or act, but transmitted anonymously to the parties in interest in 1820 (the deceased having died in May 1819), treated by them at that time as a forgery, but propounded as her will in 1831; rejected evidence of the probability of the disposition and of similitude of handwriting (which moreover was contradictory) being insufficient to support such a paper, and the other evidence leading to the conclusion that the deceased had not written, and could not, from bodily infirmity, have written such a paper at the time it purported to bear date; and a claim of relationship by a party asserting himself to be cousin-german and next-of-kin, resting upon no documentary proof, but upon evidence of declarations contradictory in themselves and inconsistent with the real facts of the case, pronounced against, but without costs; and an administration granted to the Crown, as of the deceased dying intestate without known relations, confirmed. *Rutherford v. Maule*, 4 Hag. Ec. 213.

An informal declining by letter to take the office of executor is insufficient. Till the refusal is recorded in court, no person can take the administration. *Long v. Symes*, 3 Hag. Ec. 776.

#### (B) LIMITED.

Motion for an administration limited to a debt due to a bankrupt's estate, and paid into a bank after the death (but not to the credit) of the assignee of such estate, rejected. *In the goods of Hinton*, 3 Hag. Ec. 793.

Administration (to the nominee of the remitter of a bill of exchange payable to the order of the deceased, but not indorsed) limited to receive, and to give a discharge to a third party for, the said bill, and to apply the same to the use of the remitter, refused. *In re Lord Rivers*, 4 Hag. Ec. 355.

A feme covert having made a will of her separate property, but appointed no executor, the Court refused to grant a limited administration, with the paper annexed, to the legatees therein named; but, according to the course of office, granted a general administration *cum testamento annexo* to the husband. *Salmon v. Hays*, 4 Hag. Ec. 386.

Administration, with a will annexed, granted to an attorney of the executor, who was abroad, not revoked, but pronounced to have ceased and expired, on application of the executor for probate, and on affidavit that no suits were pending. Future grants *durante absentia* to be further limited, until the executor or party entitled to administration duly apply for and obtain a grant. *In re Cassidy*, 4 Hag. Ec. 360.

#### (C) BOND.

In a suit for inventory and account, and to make distribution, on application that an administration bond should be pronounced forfeited, on the ground of a *devastavit* by the administrator's appropriating the property to his own use, and that the bond might be delivered out of the registry in order to be put in suit against sureties, the Court (a declaration, instead of the inventory and account, being allowed) referred to the registrar to report what residue remained to be distributed, and to allot portions; and on such report (which was not objected to), assigned the administrator to pay to each distributee his respective share; and, the administrator alleging that he had become bankrupt and obtained his certificate, directed the bond to be attended with, but declined to pronounce it forfeited. *Young v. Shelton*, 3 Hag. Ec. 780.

A husband resident abroad directed, on the application of creditors, to give justifying security resident within the jurisdiction of the Court, on taking a grant of administration to his wife. *In re Noel*, 4 Hag. Ec. 207.

#### (D) PRACTICE.

The Court rejected, with costs, a petition praying that a bond creditor in a large amount should be joined or substituted in an administration decreed to a simple contract creditor, the deceased's confidential solicitor, who had entered into articles with sureties to pay the debts rateably, and who was approved, as such representative, by the executors (who had renounced), and also by the bond creditor. The Court never forces a joint administration. *Coe v. Hume and Thompson*, 4 Hag. Ec. 398.



## ADMINISTRATION OF ESTATE.

A testatrix having given legacies to be paid to such children as should attain twenty-one, and also a sum, which, in the meantime, was to accumulate, to be paid to A, an infant, in case he attained twenty-five, gave the residue of her property to the plaintiff for life, &c. The time allowed to accumulate would have expired before A attained twenty-five.

The Court directed the latter sum to be raised and to accumulate for the statutory period, and then, that the future interest and the interest upon the then accumulations, till the time of payment, should fall into the residue; that a sufficient sum of stock should be raised to satisfy the other legacies, the dividends upon which, till they were paid, should be paid to the tenant for life.

Part of the residue consisted of a redeemable annuity.

The Court directed that the annuity should be sold, and that, until the sale, the receipts should form part of the residue. *Crawley v. Crawley*, 4 Law J. (N.S.) Chanc. 265.

## ADMIRALTY, COURT OF.

[See EVIDENCE—INSURANCE—RANSOM BILL.]

[Regulation of Practice of Vice Admiralty Courts abroad, 2 Will. 4, c. 51; 10 Law J. Stat. 107.]

In a cause of possession, the Court will not examine the title of a person in *bond fide* possession of a vessel till it is impeached. Where the only title rests on a conditional assignment of a vessel as a security not reduced into possession, the Court of Admiralty has not jurisdiction to disturb the person actually in possession under a subsequent sale, nor does it vary the case, because the question comes before it on appeal from the Vice Admiralty Court, which has exercised the jurisdiction, more especially as the merits disclosed did not appear to warrant the decision. Sentence reversed. Vessel restored with demurrage. *John (Horn)*, 2 Hag. 305.

An appeal may be presented after twelve months have elapsed from the sentence, the delay being occasioned by unavoidable circumstances. *John (Horn)*, 2 Hag. 306.

## ADMISSIONS.

[See EVIDENCE, Admission.]

## ADOPTION.

[See PRACTICE OF JUDICIAL COMMITTEE.]

An adoption by a widow after her husband's death, without any authority from him, is invalid in the Zillah of Etawa, in the provinces ceded by the Nabob of Oude in 1801. *Raja Haimun Sing v. Keerner Gunsheam Sing*, 2 Kn. 203.

The greatest strictness in evidence is required to prove an adoption in a Hindoo family. *Sootrugum Satputty v. Sabitra Dye*, 2 Kn. 287.

## ADULTERY.

If, in an action for adultery, it appears that the wife has died since the commencement of the action, the jury should give damages for the loss of the so-

ciety of the wife from the time of the discovery of the adultery to the time of the wife's death, and also for the shock to the feelings of the husband; and this is so, though it appear that there was no suspicion of the wife's infidelity till she was on her death-bed, and though the husband continued to treat her kindly up to the time of her death.

Letters written by the wife to her husband are not receivable in an action for crim. con., if written at a time when, at least, an attempt at adultery had been made by the defendant; but a draft, in the defendant's handwriting, of a letter by the wife, in answer to a letter of Mrs. B. to the wife, is receivable in evidence, as is the letter of Mrs. B. *Willon v. Webster*, 6 C. & P. 198. [Coleridge]

In an action for crim. con., evidence on the part of the plaintiff to shew the amount of the defendant's property is not admissible; but in an action for a breach of promise of marriage, it is otherwise. *James v. Biddington*, 6 C. & P. 589. [Alderson]

In an action for crim. con., where the adultery was committed on board a ship during a voyage, a witness may be asked on the part of the plaintiff, whether the wife did not keep a journal, and whether she stated for what purpose she kept it. *Jones v. Thompson*, 6 C. & P. 415. [Tindal]

In an action for crim. con., evidence of marriage *de facto*, and cohabitation, followed by proof of a criminal intercourse between the defendant and a woman, who passed for the plaintiff's wife is sufficient to go to a jury without absolute proof of the identity of the former woman and the latter.

*Semble*—Evidence of a marriage by a person present is sufficient without proving expressly the reading of the service. *Hemmings v. Smith*, 4 Doug. 33.

It is not a bar to an action of crim. con. that the plaintiff allowed the defendant to remain in his house after a suspicion of his wife's fidelity had been intimated to him. *Foley v. Lord Peterborough*, 4 Doug. 294.

In an action for crim. con., evidence may be given in reduction of damages, that the wife, before the criminal intercourse took place, had complained of her husband's treatment of her. *Winter v. Wroot*, 1 M. & Ro. 404.

In an action for crim. con., letters written by the wife to third persons, before she became acquainted with the defendant, and in which she mentioned her husband, are receivable in evidence to shew the terms on which they were with respect to affection. *Willis v. Bernard*, 6 C. & P. 342. [Tindal]

## ADVANCEMENT.

A father having transferred stock from his own name into the joint names of his son and of a banker whom both the father and son employed, told the banker to carry the dividends of the stock, as they were received, to the son's account. Under this direction, the dividends were enjoyed by the son as long as the father lived.

Held, on the father's death, first, that the son was entitled to the stock absolutely.

Secondly, that a codicil to the father's will, executed two years after the transfer, could not be read to qualify or explain the effect of the transaction. And—

Thirdly, that the expression in the codicil respect-

ing the stock, being of a very doubtful and obscure nature, would not raise a case of election against the son. *Crabb v. Crabb*, 3 Law J. (n.s.) Chanc. 181, s. c. 1 M. & K. 511.

Upon a sale of lands in Scotland, belonging to W 8, by agreement, under which the price is, by the conveyance, made a charge upon the lands, under bond given by the purchaser, (but not delivered,) by which the purchase-money is secured to the vendor for life, and upon his death to his sons and their heirs, the trustee under a sequestration of a surviving son held entitled, in her right, to sell his interest in the bond, subject to the life-rent of the father. *Spence v. Ross*, 4 Bligh, n.s. 510.

### ADVERSE POSSESSION.

[See EJECTMENT, Where maintainable—LIMITATIONS, STATUTE OF.]

A having received the profits of land after his marriage, dies leaving a son. His widow enters, and enjoys the land more than fifty years; and by her will, in which she declares that the property descended to her from her mother, devises it to a son by a second husband. This possession is not necessarily adverse. Declarations made by the widow before the time of making her will, that A's son would have the estate after her death, are admissible as evidence that A's possession was in his own right; and the declarations in the will are admissible to shew that the property had descended to the testatrix. *Doe d. Roffey v. Harbrough*, 1 N. & M. 422, s. c. 3 Ad. & E. 67.

Generally the possession of one tenant in common is the possession of all, so as to prevent the Statute of Limitations running in favour of the one in possession, against the others.

One of three tenants in common held the sole possession for fourteen years, and then joined with another of the three in a sale of their interests:—Held, that the possession for that fourteen years was not adverse against the third tenant in common; nor did the sole possession warrant the presumption of an actual ouster of that third tenant, so as to render the possession of the purchaser adverse as against the third tenant after the purchase. *Doe d. Thorn v. Phillips*, 1 Law J. (n.s.) K.B. 187, s. c. 3 B. & Ad. 753.

To a bill filed for payment of a rent-charge, one of the defendants pleaded twenty-six years' possession, without accounting for or paying over to the plaintiff any part of the rents and profits. Plea allowed; but, under the circumstances, ordered to stand over till a co-defendant had answered, pleaded, or demurred. *Baldwin v. Peach*, 1 Y. & C. 453.

### ADVOWSON.

[*Mirehouse v. Rennell*, 5 Law J. K.B. 320, s. c. 7 B. & C. 113, 1 Law J. Dig. 10; affirmed in the House of Lords, 1 Cl. & F. 527; 7 Bligh, n.s. 241.]

### AFFIDAVIT.

- (A) IN GENERAL.
- (B) HOW AND WHEN ENTITLED.

- (C) BEFORE WHOM TO BE SWORN.
- (D) WHEN SWORN.
- (E) FORM AND REQUISITES OF.
- (F) FILING OF.
- (G) DEFECTIVE.
- (H) COSTS.
- (I) AFFIDAVIT OF MERITS.
- (J) COMMISSIONERS FOR TAKING.

#### (A) IN GENERAL.

[See AMENDMENT—BAIL, Affidavit to hold to bail—NEW TRIAL, Motion for—PRACTICE.]

The Court will not reject the affidavit of a party in his own cause, on a certificate by the clerk of the peace, that he has been convicted and received judgment for perjury. *Gilbert v. Whalley*, 1 Law J. (n.s.) Exch. 176, s. c. 2 Tyr. 595.

An affidavit cannot be referred for impertinence after an affidavit in answer to it has been filed. *Chimelli v. Chawet*, You. 384.

Affidavits sworn in support of or in answer to one rule, will not be allowed to be used on another, (though substantially embracing one of the objects of the former rule) where any doubt exists as to the practicability of assigning perjury thereon in reference to the rule upon which it is sought to use them. *Quelle v. Boucher*, 1 Sc. 283.

#### (B) HOW AND WHEN ENTITLED.

[See BAIL, Affidavit to hold to bail.]

Affidavits on a motion to set aside proceedings upon a bail-bond may be entitled either in the original action or in the action against the bail. *Lines v. Chetwode*, 1 Law J. (n.s.) Exch. 79, s. c. 2 Tyr. 177; 2 C. & J. 332; 1 Dowl. P.C. 321.

An affidavit in support of a motion to cancel a bail-bond by reason of an arrest under a wrong name, must be entitled in the right name of the defendant. *Finch v. Cocker*, 3 Law J. (n.s.) Exch. 93, s. c. 2 C. & M. 412; 4 Tyr. 285.

Where a suit is commenced in an inferior court, and the defendant sues out a *habeas corpus cum causa*, it operates so far as a removal of the cause, that affidavits, on shewing cause against the rule for discharging the prisoner, may be entitled in the cause. *Perrin v. West*, 4 Law J. (n.s.) K.B. 232, s. c. 5 N. & M. 291.

Where a cause is removed by a writ of false judgment, the affidavit should be entitled in the cause in error. *Watson v. Walker*, 1 Law J. (n.s.) C.P. 94, s. c. 8 Bing. 315, 414; 1 Mo. & Sc. 437.

"Phillips, assignee," &c. is an irregular mode of describing a plaintiff in entitling an affidavit. *Phillips v. Hutchinson*, 3 Dowl. P.C. 20.

Affidavit entitled "Geo. Shrimpton v. Wm. Carter the elder, sued as Wm. Carter," where the action was by Geo. Shrimpton v. Wm. Carter, rejected. *Shrimpton v. Carter*, 3 Dowl. P.C. 648.

An affidavit on the part of the defendant, which is entitled C D, the defendant, at the suit of A B, the plaintiff, cannot be read. *Richard v. Isaac*, 1 C. M. & R. 136, s. c. 4 Tyr. 863.

The addition of "widow" to the name of a party in the title of a cause is not necessary. *Miller v. Miller*, 2 Sc. 117.

Affidavits entitled in a cause, without giving the plaintiff the addition of "assignee," cannot be used in a cause where the plaintiff sues as assignee. *Wright v. Hunt*, 1 Dowl. P.C. 457.

(C) BEFORE WHOM TO BE SWORN.

An affidavit sworn before an examiner of the Court of Chancery in Ireland, may be used in the Court of Chancery in England—6 Geo. 4, c. 30. *Hely v. Blakeney*, 2 Law J. (N.S.) Chanc. 185.

*Semble*—that an affidavit to found a criminal information for a libel published in England, upon a person being in parts beyond seas, may be sworn abroad. *Rez v. Editor of the Satirist*, 3 N. & M. 532.

It is no objection to an affidavit sworn in Scotland, that it is taken before a Justice of the Peace, and not before a Lord of Session. *Watson v. Williamson*, 2 Law J. (N.S.) Exch. 81, s. c. as *Watson v. Williams*, 1 Dowl. P.C. 607.

An affidavit purporting to be sworn before a public commissioner is admissible without proof of the commission; proof of the commissioner's acting as such is sufficient. *Rez v. Howard*, 1 M. & Ro. 187. [Patteson]

An affidavit to shew cause against a rule for an attachment against a witness, for disobeying a subpoena, in a cause in the Court of Exchequer, may be sworn before a Judge of either of the other courts. *Phillips v. Drake*, 2 Law J. (N.S.) Exch. 232, s. c. 2 Dowl. P.C. 45.

(D) WHEN AND WHERE SWORN.

Affidavits sworn before commissioners must state in the jurat the place where sworn; and on shewing cause against a rule for a criminal information, on its appearing that the affidavits in support of the rule were defective in that respect, the Court refused time to amend, and discharged the rule. *Rez v. Cockshaw*, 3 Law J. (N.S.) M.C. 10, s. c. 2 N. & M. 378.

An affidavit more than a year old, cannot be used on moving for a rule. *Burt v. Owen*, 1 Dowl. P.C. 691.

Affidavits may be used in shewing cause, though sworn after the time named for shewing cause in the rule. *Hicks v. Marreco*, 3 Tyr. 216. *Percival v. Hodley*, ib. 217.

Where an application was made to a Judge at chambers to set aside a judgment which he referred to the Court, and a rule nisi was obtained therein on an affidavit of merits:—Held, that the affidavits used before the Baron in opposition to the summons, might be read, in shewing cause against that rule, though not resworn, the question and motion being the same. *Worthington v. Price*, 4 Law J. (N.S.) Exch. 292, s. c. 2 C. M. & R. 315.

(E) FORM AND REQUISITES OF.

[See MISNOMER.]

An affidavit, in which the word "oath" was omitted, was held insufficient. *Oliver v. Price*, 3 Dowl. P.C. 261.

Appearing to oppose a rule does not waive an objection to the form of the affidavit upon which the rule was obtained, such as the omission of the christian name of one of the parties in the title of the cause. *Clothier v. Ess*, 3 Mo. & Sc. 216.

A particular date in an affidavit, where that date

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is essential, must be stated positively. *Willes v. James*, 1 Dowl. P.C. 498.

Office copy of affidavit stated that the deponent said instead of saith:—Held bad. *Howarth v. Hubberty*, 5 Tyr. 391.

The residence of an attorney's clerk need not be given in an affidavit made by him jointly with his master, in which the residence of the latter is stated. *Bottomley v. Belchamber*, 4 Dowl. P.C. 26.

As to where 1 Reg. Gen. H. T. 2 W. 4, s. 5, as to the addition of deponents, need not be strictly complied with, see *Green v. Foster*, 2 Dowl. P.C. 191.

A deponent complies sufficiently with 1 Reg. Gen. H. T. 2 W. 4, s. 5, by describing himself as "late clerk to," &c. *Simpson v. Drummond*, 2 Dowl. P.C. 473.

In an affidavit used in shewing cause against a rule, the deponent was described as of "Laurence Pountney, in the city of London," without stating whether pariah, place, or lane: Held sufficient. *Miller, dem.; Miller, ten.* 2 Sc. 117.

Where, in an affidavit to found a motion, the addition of a deponent is omitted, the Court will not inquire whether the facts sworn to by a co-deponent are sufficient to support the application. *Rez v. Justices of Carnarvonshire*, 5 N. & M. 364.

The deponent's addition must be inserted in an affidavit, although he is a party in the cause.

Therefore, an affidavit describing the deponent as "the above-named defendant," is defective. *Lawson v. Case*, 2 Law J. (N.S.) Exch. 216, s. c. 1 C. & M. 481; 3 Tyr. 489; 2 Dowl. P.C. 40.

Where a defendant makes an affidavit in a cause, his addition need not be given. *Jackson v. Chard*, 2 Dowl. P.C. 469.

"Assessor" is not a good description of a deponent in an affidavit. If an affidavit be joint, an objection to the description of one of the deponents does not render the statements of the others inadmissible. If an affidavit purports to be signed by a deponent, it will be no objection that it is signed in a foreign character, and there is no statement in the jurat to shew that the deponent is a foreigner, and that the writing in question is his signature. *Nathan v. Cohen*, 3 Dowl. P.C. 370.

If an illiterate person is sworn in court, or before a commissioner, the fact of the affidavit being read over to him, and the fact of his understanding it, must be stated in the jurat. *Haynes v. Powell*, 3 Dowl. P.C. 599.

A line drawn through two words in the jurat of an affidavit, leaving them, however, perfectly legible, is an erasure within the rule of court, Michaelmas Term, 37 Geo. 3, and vitiates the affidavit, though the omission or retention of the words would not vary the affidavit. *Williams v. Clough*, 1 Ad. & E. 376.

The alteration of a figure in the date of an affidavit in the jurat by writing one figure over another, does not constitute an erasure or interlineation within the meaning of the rule. *Jacob v. Hungate*, 3 Dowl. P.C. 457.

(F) FILING OF.

In all cases of application to the Court, whether successful or not, the affidavits in support of them must be filed. *Johns v. Mills*, 1 Dowl. P.C. 510.

Affidavit used to ground a motion, ought always to be filed, whether the motion is granted or refused.

C

*Ex parte Dias*, 2 Dowl. P.C. 92: s. f. *Ex parte Elderton*, *ibid.* 568.

On a motion to enlarge a rule on the revenue side of the court, the affidavit need not be on the file one day previously. *Attorney General v. Jeyes*, 1 Law J. (N.S.) Exch. 118, s. c. 2 C. & J. 352.

The Court will not allow affidavits to be filed in support of a rule for setting aside an award, subsequent to the rule being obtained. *Perring v. Kymer*, 4 Law J. (N.S.) K.B. 98, s. c. 4 N. & M. 477.

Affidavits will not be taken off the file. *Plant v. Butterworth*, 5 Tyr. 188.

#### (G) DEFECTIVE.

[See PRACTICE, C. L. Proceedings, where set aside.]

#### (H) COSTS.

Where long affidavits are filed in support of a motion, a great part of which is unnecessary, the Court will refer them to the Master, and make the party applying pay the costs of the unnecessary affidavits. *Lewis v. Woolrych*, 3 Dowl. P.C. 692.

#### (I) AFFIDAVIT OF MERITS.

[See ABATEMENT.]

An affidavit of merits in an unusual form deemed insufficient. *Hockley v. Sutton*, 3 Law J. (N.S.) Exch. 303.

An affidavit of merits that the defendant has a good and sufficient defence on the merits, without words applying it to the particular action, is insufficient. *Tate v. Bodfield*, 3 Dowl. P.C. 218.

*Semble*—that an affidavit of merits made by the defendant's attorney as to his belief, from instructions received, is insufficient, where the defendant himself might make the affidavit. *Brown v. Austin*, 4 Dowl. P.C. 161.

#### (J) COMMISSIONERS FOR TAKING AFFIDAVITS.

Power of superior courts of law and equity at Westminster, to grant commissions for taking affidavits, extended to Scotland and Ireland. 3 & 4 Will. 4, c. 42, s. 42; 11 Law J. Stat. 98.

### AFFIRMATION.

[See CORONER'S INQUEST.]

Affirmation of Quakers or Moravians allowed in all cases where an oath is required. 3 & 4 Will. 4, c. 49; 11 Law J. Stat. 108: and so of Separatists, 3 & 4 Will. 4, c. 82; 11 Law J. Stat. 154.

#### AFFRAY.

[See ASSAULT, Pleading and Evidence—CONSTATABLE.]

#### AGENCY.

See the *Newry case*, that agency must be proved, before proof of bribery. P. & K. 149, C. & R. 174.

#### AGENT.

[See PRINCIPAL AND AGENT—ADMINISTRATION—BARON AND FEME, Liabilities of Husband.]

### AGISTMENT.

[See TITHES, Modus.]

### AGREEMENT.

[See CONTRACT—LEASE.]

The terms in which a man puts a request, are not to be considered as conditions binding on him and his issue, to all time, to use the subject-matter of that request in a certain manner, and in no other. *Clerk v. Adam*, 1 C. & F. 242.

### AGREEMENT BOND.

[See SPECIFIC PERFORMANCE.]

### ALIAS.

[See PRACTICE, Concurrent Writs.]

### ALIEN.

[See PRACTICE OF THE JUDICIAL COMMITTEE.]

A resided in Pennsylvania before the declaration of American independence, and had a son B, born there also before that period. In 1783 A came to England to obtain compensation for his losses as an American loyalist. In 1785, he returned to Pennsylvania, where he died. B never was in England. *Semble*—that both A and B were American subjects; and that A became so by returning to Pennsylvania in 1785; and that a claim to lands could only (if at all) be made through them, under the stat. 37 Geo. 3, c. 97, s. 24.

What A said in England, as to why he came, is evidence. *Doe d. Stansbury v. Arkwright*, 5 C. & P. 576. [Parke]

F F, an alien, purchased freehold and leasehold property before obtaining letters of denization, and the conveyance was taken in the names of persons not under any disability, and no trust was declared in his favour; and he also purchased other leasehold property after he had obtained letters of denization, and then, by his will, made after he had obtained letters of denization, he devised and bequeathed his freehold and leasehold property and personal estate to be sold by his executors, and directed his heir-at-law to concur in the sale of the freeholds, and gave the residue of his property, after payment of his debts and legacies, to his brother and sister. The brother and sister were both aliens, residing in foreign parts, and the Crown claimed the freehold and leasehold property purchased by the testator before his denization, on the ground of the incapacity of an alien to hold any interest in real estate, either legal or equitable, and on the ground that the letters of denization could not alter that defect in the testator's title. And a claim was further made to all the testator's freehold and leasehold estate devised to the aliens, because the brother and sister, being aliens, could not hold it, and that it vested immediately in the Crown:—Held, first, that the letters of denization from the Crown act by way of confirmation of title to authorize a person to dispose of real es-

tate purchased before denization. Secondly, that the aliens to whom the produce of the estates when they were sold was directed to be paid, were as much incapacitated from taking the produce of real estate which had descended on the heir, as they would have been had the real estate been expressly devised to them. Thirdly, that, to the extent of debts and legacies, the devise was good against the Crown, but, beyond that, the Crown would take the real estate and chattels real of which the produce was devised to the aliens. And, fourthly, that the bargain and sale by the executors, to the extent of debts and legacies, would be sufficient to divest the estate out of the Crown. *Foardria v. Goudey*, 3 Law J. (N.S.) Chanc. 171, s. c. 3 M. & K. 383.

### ALIMONY.

After sentence of separation by reason of gross cruelty and adultery on the part of the husband, the real estate being 6000*l.* a year, subject, as alleged by the husband, to large incumbrances, the mother's jointure having been 1000*l.*, and the wife's pin-money 500*l.* a year, the Court allotted 1000*l.* a year permanent alimony, allowing the husband to deduct from that sum any payment, on account of pin-money above 200*l.* a year, the sum agreed to be paid to the wife, for the maintenance of the children. *Mytton v. Mytton*, 8 Hag. Ec. 657.

The reduction of the husband's income, by unprofitable speculations, is no ground for a proportionate reduction of permanent alimony allotted twenty years before. *Neil v. Neil*, 4 Hag. Ec. 273.

In estimating the amount of alimony to be allowed a wife after a separation, on the ground of cruelty, the husband is not entitled to a deduction, out of what would otherwise be payable by him out of his income, in respect of money left by wills since the marriage to his wife's separate use, nor in respect of his wife's salary as a lady-in-waiting to the Queen; but he is entitled to such deduction in respect of a pension from the Crown granted to his wife. *Westmeath v. Westmeath*, 3 Kn. 48.

### ALLOTMENT.

[See INCLOSURE.]

### AMBASSADOR.

[See ARREST, Privilege from.]

Although an ambassador's servant may be privileged as to his person, it does not follow that all his goods are privileged also, so as to enable the sheriff to apply to set aside a *fi. fa.* issued against them; and a clear case of privilege must be made out to the satisfaction of the Court, or else they will not interfere either on behalf of the sheriff or the person privileged. *Quere*, whether a chorister, who merely officiates at a chapel where a foreign ambassador attends divine service, is privileged as being the servant of an ambassador? When application is made for relief or indulgence, it ought to be made without delay. *Fisher v. Begren*, 1 Dowl. P.C. 588. See s. c. 2 Law J. (N.S.) Exch. 13.

### AMBIGUITY.

[See WIAL.]

### AMENDMENT.

[See BAIL, Discharge of—PRACTICE.]

#### 1. AT LAW.

- (A) IN GENERAL.
- (B) AFFIDAVITS.
- (C) PROCESS.
- (D) COPY OF WRIT.
- (E) RETURN OF WRIT.
- (F) DECLARATION.
- (G) PLEA.
- (H) DEMURRER.
- (I) RECORD.
- (K) RULES AND ORDERS.
- (L) ORDER OF REFERENCE.
- (M) AWARD.

#### 2. IN EQUITY.

- (A) IN GENERAL.
- (B) BILLS.
- (C) DECREES.
- (D) COSTS.

#### 1. AT LAW.

##### (A) IN GENERAL.

*Quere*—whether the Court have power to revise the direction of the Judge at Nisi Prius, in directing an amendment under 9 Geo. 4, c. 4. *Parks v. Edge*, 2 Law J. (N.S.) Exch. 94, s. c. 1 C. & M. 429; 3 Tyr. 364.

If both parties are present when a Judge gives one time to amend pleadings, no formal service of the order on the other is required. *Pennel v. Lawson*, 2 Law J. (N.S.) Exch. 271.

Under what circumstances amendment is not allowed after argument. See *Begbie v. Hayne*, 4 Law J. (N.S.) C. P. 308, s. c. 2 Bing. N.C. 124; 2 Sc. 193; and *Bramah v. Baker*, 4 Law J. (N.S.) C.P. 81, s. c. 1 Bing. N.C. 48; 1 Sc. 364.

##### (B) AFFIDAVITS.

[See AFFIDAVIT.]

Affidavit in support of motion for costs of the day, for not proceeding to trial, allowed to be amended. *Larken v. Bovill*, 2 Tyr. 746.

Where the names of the deponents are omitted in the jurat, through the inadvertence of the Judge's clerk, it will be amended by direction of the Judge. *Ex parte Smith*, 2 Dowl. P.C. 607.

##### (C) PROCESS.

A *capias* cannot be amended by the substitution of one form of action for another. *Mills v. Gossett*, 1 Sc. 313.

The Court will allow a writ of summons to be amended where the effect of refusing the amendment would be, to deprive the party of his remedy; but not otherwise.

Therefore, a writ of summons in an action by executors, may be amended by adding the name of

a co-executor, where, if a new action were brought, the Statute of Limitations would be a bar. *Lakin v. Massie*, 3 Law J. (N.S.) Exch. 203, s. c. 2 C. & M. 685; 4 Tyr. 839.

A Judge has no power to alter the sum indorsed upon a writ of summons, for the purpose of reducing the plaintiff's claim within that which may be referred to and decided by the sheriff and his jury, under the 3 & 4 Will. 4, c. 42, s. 17. *Trotter v. Bass*, 4 Law J. (N.S.) C.P. 94, s. c. 1 Bing. N.C. 516; 1 Sc. 403.

Where the amount of the judgment was stated incorrectly in the body of a writ of *ca. sa.*, but the indorsement was right, the Court gave leave to amend it after the defendant had applied to set it aside. *Arnell v. Wetherby*, 4 Law J. (N.S.) Exch. 123, s. c. 1 C. M. & R. 831; 5 Tyr. 485. 3 Dowl. P.C. 464.

The Court refused to allow an amendment of a writ of *ca. sa.* to the prejudice of the bail; but granted it on payment of all costs, and giving the bail time to render the defendant. *Bradley & others v. Baillie*, 1 Sc. 78.

If a *ca. sa.* is tested of a term previous to the judgment, or when issued under the statute 1 W. 4, c. 7, s. 13, if not tested on the day it issues, it is irregular, but the Court will permit the teste to be amended, (on payment of the costs,) even as against the bail. *Englehart v. Dunbar*, 2 Dowl. P.C. 202.

Plaintiff having recovered 33*l.*, arrested the defendant on a *ca. sa.* for 34*l.* The Court refused to discharge the defendant out of custody, and allowed the process to be amended by inserting the true sum, it not being shewn that the variance was intentional, or that the defendant was damnified. *McCormack v. Melton*, 1 Ad. & E. 331, s. c. 3 N. & M. 881.

In *sci. fa.* on a judgment of more than a year old, if the writs of *sci. fa.*, which have been returned *nihil*, the award of execution, the *ca. sa.*, and the warrant, are issued in a different christian name from the one stated in the judgment as that of the plaintiff, the Court will allow the proceedings to be amended by substituting the one stated in the judgment, although the *ca. sa.* has been executed and returned. *Thorpe v. Hook*, 1 Dowl. P.C. 501.

#### (D) COPY OF WRIT.

Though the Court will amend a writ, because it is the act, and kept as a record in the custody of the Court, they will not amend the copy, which, with its memoranda and indorsements, must, by the 2 Will. 4, c. 39, s. 4, be delivered to the person arrested, inasmuch as such copy is not the act, nor is it in the custody of the Court; but it is the act of the party, and it is in the custody of the defendant, to whom by the statute it must be delivered. *Byfield v. Street*, 2 Law J. (N.S.) C.P. 171, s. c. 10 Bing. 27; 3 Mo. & Sc. 406.

#### (E) RETURN OF WRIT.

Where plaintiff's attorney, after he had ceased to act for plaintiff, entered into the service of defendant, and caused the under-sheriff to return on a *fi. fa.* a sum as levied for plaintiff greater than had come to plaintiff's hands, the Court directed the return to be amended according to the fact. *Green v. Glassbrook*, 2 Bing. N.C. 143, s. c. 2 Sc. 261.

#### (F) DECLARATION.

##### [See EJECTMENT.]

Under particular circumstances, the Courts will, even after argument on a rule for entering a non-suit, and after judgment pronounced, grant leave to amend the declaration, on payment of costs. *Laythorp v. Bryant*, 1 Sc. 338.

In an action for the disturbance of a right of ferry, the declaration was allowed to be amended, after the cause had been taken down to the assizes, and the record withdrawn, by introducing new counts, in which the termini of the ferry were varied, and also the description of the person liable to toll. *Morris v. Evans*, 1 Dowl. P.C. 657.

In *quare impedit* by the Crown, for a presentation forfeited by simony, the declaration (of Hilary Term, 1833) stated the simoniacal contract to have been made between A, B, and C, and the consideration to have been the granting of a lease of lands, parcel of the rectory, at an inadequate rent. In Hilary vacation, 1834, counts were added, by leave of a Judge, stating the contract to have been between A and B only, and the consideration to have been the giving up of the profits of the benefice, and executing a resignation bond: Held, that these counts did not state a new cause of action, and, therefore, might properly be added under a Judge's order. *Rez v. Archbishop of York*, 1 Ad. & E. 394, s. c. 3 N. & M. 453.

In an action against the sheriff for taking insufficient pledges in a replevin bond, the Court allowed the declaration, which was in the common form, to be amended (upon payment of costs), by alleging, instead of a recovery in the original action, a reference by the consent of the sureties and the defendant, and the result of that reference, and also by adding a new count. *Dale v. Gordon*, 2 Mo. & Sc. 632.

Where plaintiff had been misled by defendant as to the nature of a charter-party, the Court permitted plaintiff to amend by striking out a count in covenant on a charter-party, and declaring for freight not upon the charter-party.

And this after many years had elapsed since the commencement of the action, the defendant having been the cause of the delay. *Aylwin v. Todd*, 1 Bing. N.C. 170.

In an action by executors, the defendant pleaded in abatement the non-joinder of one executor (who had not proved). The Court allowed the proceedings to be amended on payment of costs, as the Statute of Limitations would have been a bar to a fresh action. In future, no such amendment will be allowed, except to avoid the operation of the Statute of Limitations. *Lakin v. Watson*, 3 Dowl. P.C. 633; s. c. as *Lakin v. Massie*, 3 Law J. (N.S.) Exch. 203; 2 C. & M. 685; 4 Tyr. 839.

Plaintiff declared by the name of "William Moody," and the cause proceeded to issue in that name. It was sworn that the party intended as plaintiff was John Moody, but there appeared to be a William Moody, a son of John, who was connected with the transaction in question. The Court refused a rule to amend the proceedings by inserting the name of John instead of William, observing, that if he, John Moody, were really the person originally intended as plaintiff, the misnomer could not be

taken advantage of at the trial. *Moody v. Aslatt*, 4 Law J. (N.S.) Exch. 78, s. c. 1 C. M. & R. 771.

Where plaintiff obtains leave to amend the declaration, with liberty to the defendant to plead *de novo*, a former plea, if applicable to the amended declaration, will stand, and the defendant need not plead *de novo*. *Fagg v. Borsley*, 2 Law J. (N.S.) Exch. 274, s. c. 1 C. & M. 770; 3 Tyr. 905; 2 Dowl. P.C. 157.

Plaintiff commenced his action in Hilary term, 1831, and declared in trover; the parties went to issue, and plaintiff was put under a peremptory undertaking to try. In Michaelmas term, 1832, having been advised that the action was misconceived, he moved for leave to substitute a count in detinue for that in trover, and add one in debt; and it was sworn that no new ground of action was contemplated. Leave refused. *Green v. Milton*, 4 B. & Ad. 369, s. c. 1 N. & M. 673.

In an action by the assignees of a bankrupt, the declaration may be amended, by the insertion of the name of the official assignee as a plaintiff, unless the defendant can make an affidavit that he has defended the action solely by reason of the non-joinder of such assignee. *Baker v. Neave*, 2 Law J. (N.S.) Exch. 40, s. c. 1 C. & M. 112; 3 Tyr. 233.

Upon demurrer to a declaration in a penal action, the Court will not allow the plaintiff to amend, when they perceive that the violation of the statute, for which the action is brought, is occasioned by the negligence of the officer, not by the fault of the party; for example, in a penal action against an attorney for acting as such, not being duly enrolled. *Mathews v. Smith*, 4 Law J. (N.S.) C.P. 193, s. c. 1 Bing. N.C. 375; 1 Sc. 706.

Under the rule of Michaelmas 1654, s. 17, a party may amend his declaration after a plea in abatement on payment of costs, but the Court, or a Judge, may allow him to amend without costs. *Wall v. Lyon*, 2 Law J. (N.S.) C.P. 37, s. c. 9 Bing. 410; 2 Mo. & Sc. 393, 579, 736.

#### (G) PLEA.

[See FOREIGN LAW.]

After demurrer by defendant to plaintiff's replication, and argument, and judgment against the defendant, he applied to a Judge at chambers, and on an affidavit that new and important matter had come to his knowledge, obtained an order to amend. The Court, after some hesitation, discharged a rule to rescind such order; at the same time, they expressed an opinion, that the course pursued by the defendant was irregular, as he should have applied to amend before argument and judgment against him. *Atkinson v. Baynton*, 4 Law J. (N.S.) C.P. 207, s. c. 1 Bing. N.C. 740; 1 Sc. 424.

A defendant having pleaded only the general issue in an action of slander, applied on the day before the trial to a Judge for leave to add a plea of justification, which was refused, and the cause was tried without it:—Held, that this formed no ground for an application for a new trial. *Kirby v. Simpson*, 4 Law J. (N.S.) Exch. 153.

#### (H) DEMURRER.

If, to a declaration in debt, defendant plead as on promises, in abatement, that the several supposed promises in the said declaration, &c. were, and each of them was, made by the said defendant jointly with

one J E, who is still living, to wit, &c., and pray judgment of said writ and declaration, and that the same may be quashed; and the plaintiff demur to such plea; and his demurrer be in form a demurrer to a plea in bar, instead of to a plea in abatement:—The Court will allow him to amend such demurrer, upon payment of costs, though such irregularity appears to be a discontinuance. *Maunder v. Hughes*, 2 Law J. (N.S.) C.P. 69.

#### (I) RECORD.

[See 3 & 4 Will. 4, c. 42, ss. 23, 24; 11 Law J. Stat. 98.]

[See EJECTMENT—ERROR—REFLEADER—VARIANCE, Between Pleadings and Evidence.]

A court of law has authority over its own record, which it may amend, even after error brought. *Melish v. Richardson*, 1 C. & F. 224, s. c. 6 Bl. N.S. 70.

A Judge at Nisi Prius cannot amend the award of the *venire facias* on the Nisi Prius record. *Adams v. Power*, 7 C. & P. 76. [Bolland]

Where the Nisi Prius record has been altered after it was passed by one of the parties, without an order from the Judge, the Court will try the cause as it stands on the record, and will not amend it at Nisi Prius by striking out the alteration or the part of the declaration in which the alteration was made. *Drummond v. Burt*, 1 M. & Ro. 186 [Tenterden]; and see *Whitehead v. Scott*, note *ibid*.

The Court have power under 3 & 4 Will. 4, c. 42, to amend in all cases where the party could not have been misled by the mistake, although, even by such amendment, a new and distinct contract may be substituted for the one declared on. Thus, it was held, that where the declaration was upon a promise to pay, and the evidence was to *guarantee* payment, the Judge was justified in amending the declaration, by substituting the word *guarantee* for *pay*. *Hanbury v. Ella*, 3 Law J. (N.S.) K.B. 147, s. c. 1 Ad. & E. 61; 3 N. & M. 438.

In general, the Judge at Nisi Prius will amend any variance which does not go at all to affect the matter really in dispute between the parties, and which was not likely to mislead the opposite party. Therefore, where a general warranty of the soundness of a horse was declared on, and a warranty "except in one foot," was proved, the Judge allowed the declaration to be amended, the real dispute between the parties being, whether the horse was a roarer. *Hemming v. Parry*, 6 C. & P. 580. [Alderson]

Where, in an action by indorsee against indorser, a bill payable to the order of the defendant was described in the declaration as payable to the order of the maker, and the defendant did not suggest or prove the existence of any other bill:—Held, that the discretion of the Judge was properly exercised, in allowing an amendment under the statute. *Parkes v. Edge*, 2 Law J. (N.S.) Exch. 94, s. c. 1 C. & M. 429; 3 Tyr. 364.

Declaration stated, that, in consideration that the plaintiff would sell goods to the defendant for 600*l*., to be paid for by approved bills, falling due before the 15th of February 1832, the defendant undertook to pay the plaintiff the said sum, by approved bills falling due before the said, &c. At the trial, the plaintiff proved a written contract, corresponding with that set out in the declaration, except that the

payment was to be in approved bills, falling due by the 15th of February:—Held, that, although the declaration did not profess to set forth any contract in writing, this variance was amendable by the Judge at Nisi Prius, under the statute 9 Geo. 4, c. 15, s. 1. *Lamey v. Bishop*, 4 B. & Ad. 479, s. c. 1 N. & M. 332.

Declaration in case charged the defendants with negligence as carriers. At the trial, it appeared from the evidence, that the defendants, if liable at all, were liable as wharfingers, on a special contract to forward; and during the summing up the plaintiff applied to the Judge to amend the declaration. He refused to amend, but left it to the jury to say, whether it was a contract to forward, and they found that it was. He then directed the verdict to be entered for the defendants, but the special finding to be indorsed on the postea, that the Court might proceed thereon, according to the 3 & 4 Will. 4, c. 42, s. 24. The Court granted a new trial, with leave to the plaintiff to amend his declaration, on payment of costs.

*Semble*, the more correct course would have been, that the amendment should have been made by the Judge, and the trial postponed to a future day, pursuant to section 23. *Parry v. Fairhurst*, 4 Law J. (N.S.) Exch. 168, s. c. 2 C. M. & R. 190.

Where a plea alleged a justification to an assault, on the ground that the plaintiff was making an affray in the defendant's house, and had assaulted the defendant, wherefore he gave him in charge to a constable; but there was no evidence, at the trial, of the assault upon the defendant, though the rest of the plea was proved:—Held, that, under the 3 & 4 Will. 4, c. 42, the Judge at the trial might amend the plea, by striking out the allegation of the assault. *Timothy v. Simpson*, 4 Law J. (N.S.) Exch. 81, s. c. 1 C. M. & R. 757; 5 Tyr. 244.

In debt on bond, a variance between the penalty in the bond declared upon, and in the bond given in evidence, is within 3 & 4 Will. 4, c. 42, s. 23, and therefore may be amended. *Hill v. Saller*, 3 Law J. (N.S.) Exch. 84, s. c. 2 C. & M. 420; 4 Tyr. 271.

Where a plaintiff in his declaration alleged, that by reason of his possession of a water grist-mill, he ought to have the benefit of a watercourse, and complained of a diversion by the defendant; and it was found specially by the jury, that the plaintiff was entitled to the stream by reason of the possession of certain closes, and not by possessing the mill, and that the defendant had diverted the stream, by which damage accrued to plaintiff's mill:—Held, that there was no power to amend the declaration and pleadings, so as to adapt them to the right found by the jury.

*Quere*, however, whether the plaintiff was not entitled to have a verdict entered upon that finding generally, without damages. *Frankum v. the Earl of Falmouth*, 4 Law J. (N.S.) K.B. 26, s. c. 2 Ad. & E. 452; 4 N. & M. 330.

In trespass for taking "mirrors and handkerchiefs," the defendant justified taking the mirrors; but by mistake omitted to justify the taking of the handkerchiefs:—Held, that this omission could not be amended on the trial. *John v. Currie*, 6 C. & P. 618. [Parke]

In ejectment on a joint demise by two, the plaintiff was not allowed to amend under statute 3 & 4 Will. 4, c. 42, s. 23, by substituting several demises.

*See d. Pools v. Errington*, 1 M. & Ro. 343. [Taunton]

If, on the trial of ejectment, it appears that the parish is mis-stated in the declaration, the Judge will allow it to be amended under the statute 3 & 4 Will. 4, c. 42, although the ejectment be for a forfeiture. *Doe d. Marriott v. Edwards*, 6 C. & P. 208; s. c. 1 M. & Ro. 319. [Parke]

It is too late to amend the record by increasing the term in ejectment after the cause has been called on. *Doe d. Manning v. Hay*, 1 M. & Ro. 243. [Parke]

A witness disobeyed a subpoena, and an action being brought, the declaration stated, that the plaintiff caused to be left with the defendant a copy of the writ of subpoena: the original writ of subpoena was directed to the defendant and two other persons; the copy served was directed to the defendant and John Doe; and held, that a Judge at Nisi Prius had authority, under 9 Geo. 4, c. 15, to allow the allegation of service of the subpoena to be amended, by inserting the fact of service as follows:—"A copy of so much of the said writ of subpoena as related to the said defendant." *Masterman and others v. Judson*, 1 Law J. (N.S.) C.P. 86, s. c. 8 Bing. 224; 1 Mo. & Sc. 367.

If a corporation aggregate sue for use and occupation of "standings, market-places, and sheds," and it appears that they allowed the defendant to take tolls from others who occupied sheds and standings, the Judge, at the trial, will allow the word "tolls" to be inserted in the declaration, the plaintiffs paying the costs of the amendment. *The Mayor, &c. of Carmarthen v. Lewis*, 6 C. & P. 608. [Parke]

In an action for damage by rioters, under 7 & 8 Geo. 4, c. 31, the Court will amend the writ and subsequent proceedings, by substituting the word "borough" for the word "hundred," if the plaintiff, by mistake, has proceeded against the inhabitants of the hundred, instead of the borough, and the time for bringing a new action has expired. *Horton v. the Inh. of Stamford*, 2 Law J. (N.S.) Exch. 274, s. c. 1 C. & M. 773; 3 Tyr. 869; 2 Dowl. P.C. 96.

A Judge at Nisi Prius has no authority, under 9 Geo. 4, c. 15, to amend a record setting forth the contents of a written document, which has been destroyed, from the oral testimony of witnesses called to prove those contents.

And, *quere*, whether he could amend from a copy produced as secondary evidence. *Brooks v. Blanchard*, 2 Law J. (N.S.) Exch. 275, s. c. 1 C. & M. 779; 3 Tyr. 844.

Error in the King's Bench upon a judgment at the Old Bailey, and one ground assigned was, that a material fact stated on the record was not true. This Court held such an averment inadmissible, and affirmed the judgment. The fact being as alleged by the defendant below, the Court of Oyer and Terminer afterwards ordered the record to be amended; and their clerk, by a rule of the Court of King's Bench, with the consent of the Crown, came into the latter court and made the amendment there. Upon motion afterwards, that the case might be again set down for argument:—Held, that this Court could not rehear it after the expiration of the term in which judgment was given, though the Attorney General consented; and that the only remedy was by writ of error to the House of Lords. *Rex v. Richard Carlile*, 2 B. & Ad. 971.



A Court of Requests Act provided, that a defendant sued elsewhere for a cause of action within the cognizance of the Court might plead the act; and if it should appear by the verdict that the cause was within the cognizance of that Court, then the plaintiff should be nonsuited, if the Judge or Judges who should try the cause should not, in open court, certify, as by the act was directed. In an action brought in a local court of record, the defendant pleaded the Court of Requests Act, and the cause appeared, by the verdict, to be within the cognizance of that Court. The Judges of the court of record were the mayor and bailiffs of the town, and they were assisted at the trial by the Recorder, who was not a Judge of the court of record; a certificate was given, pursuant to the act, but by the Recorder alone:—Held, that this did not satisfy the act.

On error brought, the entry on the proceedings sent up to this Court was, simply, "that it appeared by the certificate of the court of record that," &c. (without stating that the certificate was made in open court, or by whom it was made, except as above); but it was suggested, on affidavit, that the certificate had really been made in open court by the Recorder; that the proceedings sent up were merely a transcript of the record which remained below; and that the record of the court below had been amended there, by entering the certificate as having been made by the Judges who tried the cause, in open court; and it was moved, that this Court should amend the proceedings in conformity with the alteration said to have been made below. This Court refused the amendment; first, because they could not take notice that they had only a transcript before them, so as to be at liberty to amend in conformity with the record below; secondly, because, if the document before them were to be considered as a record, they had no power to make the amendment, it being contrary to the fact as to the person certifying. *France v. Parry*, 1 Ad. & E. 615.

#### (K) RULES AND ORDERS.

[See PRACTICE, Motions, Rules, and Orders.]

In an undefended cause, in which a promissory note was declared on as a bill of exchange, the Judge at the trial allowed the declaration to be amended, and also ordered, that the Judge's order for the defendant to admit the handwriting of himself and the indorsers should also be amended. *Moilliet v. Powell*, 6 C. & P. 238. [Alderson]

#### (L) ORDER OF REFERENCE.

Where the christian and surname are transposed by mistake in an order of reference, the Court will allow that mistake to be amended. *Price v. James*, 2 Dowl. P.C. 435.

#### (M) AWARDS.

[See *Ward v. Dean*, *infra*, ARBITRATION, Costs.]

### 2. IN EQUITY.

#### (A) IN GENERAL.

The Court has jurisdiction to make an order to amend, when it is incidental to any other order the Court is making. *Fyler v. Fyler*, 3 Law J. (N.S.) Chanc. 287.

In granting orders to amend, the Master is not at liberty to require more, in the affidavit, than the

18th order directs. *Howard v. Wallis*, 4 Law J. (N.S.) Chanc. 27.

#### (B) BILLS.

Plaintiff, after defendant had answered, amended by adding another defendant. After that defendant had answered, plaintiff again moved to amend, not requiring any answer from the original defendant: motion granted. *Evans v. Hughes*, 5 Sim. 666.

The plaintiffs (impropriate rectors) in certain tithes causes, were allowed to withdraw replication and amend their bills by making certain mortgagees of the share of one of the plaintiffs parties, on payment of 20s. costs in each cause. *Townsend v. Champenoun*, 1 You. 539.

Defendant filed a cross bill for a discovery. The plaintiff in the original suit took an office copy of, but did not answer the cross bill. After the hearing of the original cause, defendant amended his cross bill by praying relief:—Held, that under the circumstances, he was at liberty so to do. *Severn v. Fletcher*, 5 Sim. 457.

#### (C) DECREES.

[See PRACTICE, Equity, Appeals.]

#### (D) COSTS.

On the coming in of the answer, the plaintiff amended his bill by striking out inquiries respecting partnership accounts; there being nothing oppressive or vexatious in his conduct, a motion, that he might be ordered to pay the costs of the original bill, and of so much of the answer as related to the accounts, refused with costs. *Delawney v. Delawney*, 4 Law J. (N.S.) Chanc. 50.

#### ANATOMY.

Regulation of schools of, 2 & 3 Will. 4, c. 75; 10 Law J. Stat. 199.

#### ANCIENT LIGHTS.

[See LIGHTS.]

#### ANIMALS.

In an action for not sufficiently securing a fierce dog kept by the defendant, and by which the plaintiff was bitten, the plaintiff may recover, notwithstanding he had, on a previous day, been warned against going near the dog, if the jury think that the accident was not occasioned by the plaintiff's own carelessness and want of caution. *Curtis v. Mills*, 5 C. & P. 489. [Tindal]

In an action on the case for keeping dogs, well knowing them to be used and accustomed to bite cattle, &c. and which bit and worried the plaintiff's cattle:—Held, that the plea of not guilty puts in issue the scienter, it being of the substance of the issue.

Where the defendant, on being informed that his dog had bitten the plaintiff's cattle, offered to settle for them, if it could be proved that his dog had done it:—Held, this was some evidence to go to the jury of the scienter, though entitled to-but little weight; but that proof that the dogs were of a savage disposition, and had bitten the cattle of other

persons, was not evidence that the defendant knew they were accustomed to bite cattle. *Thomas v. Morgan*, 4 Law J. (N.S.) Exch. 362, s. c. 2 C. M. & R. 496.

### ANIMUS.

[See MOTIVE.]

### ANNUITY.

- (A) IN GENERAL.
- (B) CONSTRUCTION OF INSTRUMENTS CONNECTED WITH.
- (C) MEMORIAL.
- (D) APPORTIONMENT.
- (E) VACATING.
- (F) WHEN GRANT OF, VOID OR VOIDABLE.
- (G) PAYMENTS IN LIQUIDATION OF.
- (H) ACTION FOR.
- (I) PROCEEDINGS IN CASE OF BANKRUPTCY.

#### (A) IN GENERAL.

[See COVENANT—CORPORATION.]

Commissioners for the Reduction of the National Debt enabled to grant annuities on lives, 2 Will. 4, c. 59; 10 Law J. Stat. 124.

Where an annuity was secured by a charge on certain stock standing in the names of trustees, and an assignment of the dividends of the stock, but the grantee omitted to give notice of the annuity to the trustees, the grantee of an annuity subsequently granted was preferred to the grantee of the first annuity. A defendant, who was a trustee, and as such an accounting party with his co-trustees, was examined as a witness:—Held, that the circumstance of his having been examined did not prevent a decree being made against him and his co-trustees, no objection to the decree being made by him. *Hulton v. Sandys*, 1 You. 602.

B, by his marriage settlement, made in 1811, covenanted to secure upon certain estates an annuity of 400*l.* to his wife, for her life, in case she should survive him, in addition to the provision made for her by the settlement. He afterwards by a deed, executed in 1818, and intended to be made in pursuance of the covenant, granted an annuity of 400*l.* to his wife, which was made payable to her after his decease, during her widowhood. By his will made in 1830, after satisfying and confirming the settlement, he gave an annuity of 400*l.* to his wife, during her widowhood, in addition to the provision made for her by the settlement:—Held, that the widow was entitled both to the annuity granted to her by the deed, and the annuity given by the will. *Douce v. Lady Torrington*, 2 M. & K. 600.

#### (B) CONSTRUCTION OF INSTRUMENTS CONNECTED WITH.

Annuity payable out of real estate, clear of all taxes and outgoing:—Held, that the annuitant takes it clear of the legacy duty. *Louch v. Peters*, 8 Law J. (N.S.) Chanc. 187, s. c. 1 M. & K. 489.

#### (C) MEMORIAL.

[See BOND, Stamp.]

The grant of an annuity in consideration of the transfer of stock, is not within the 17 Geo. 3, c. 26, and need not be enrolled.

Had it appeared it was the intention of the grantor to convert the stock immediately into money—*Quære*, would it not have been within the statute?—*Semble*, it would. *Cumberland v. Kelley*, 1 Law J. (N.S.) K.B. 172, s. c. 3 B. & Ad. 602.

An annuity granted in consideration of a pre-existing debt, does not require enrolment under the 53 Geo. 3, c. 141. *Frost v. Frost*, 1 Law J. (N.S.) K.B. 228, s. c. 3 B. & Ad. 612.

Under statute 53 Geo. 3, c. 141, s. 2, the Court has no discretion as to setting aside an annuity deed, when the memorial does not truly state the consideration. It makes no difference that the deed has been in force more than six years. The deed will be set aside for such inaccuracy in the memorial, though the defect appears by affidavit only. *Ex parte Lewis*, 2 Ad. & E. 135.

The necessity of inrolling a memorial of an annuity charged upon land, of which the grantor is seized in fee, is not dispensed with by a covenant from the grantor, that the land is of greater annual value than the annuity, coupled with representations to the same effect made to the grantee, and by him *bona fide* received and acted upon. In ejectment by the grantee, it is therefore competent to the grantor to falsify the covenant and representation, and shew that the land is of less annual value. *Doe d. Chandler v. Ford*, 4 Law J. (N.S.) K.B. 268, s. c. 3 Ad. & El. 549; 5 N. & M. 209.

In the memorial of an annuity deed, it is not necessary to state a covenant by the grantor to insure his life for the benefit of the grantee, for that is a collateral matter. *Johnson v. Tweed*, 1 Dowl. P.C. 459.

An annuity was granted by deed for the lives of the several persons named in the deed, and the lives and life of the survivors and survivor of them; one of the persons, on whose life the annuity was granted, was named William Falconer Walker; but, in the annuity deed, and in the memorial of the annuity, he was named William Walker only:—Held, that he was sufficiently named within the meaning of the Annuity Act, 53 Geo. 3, c. 141, and that the memorial was sufficient. *Hulton v. Sandys*, 1 You. 602.

To a cognizance for the arrears of an annuity, the plaintiff pleaded, that a memorial of all the deeds, &c. by which the annuity was granted, the names of the witnesses, the consideration, &c. was not inrolled in the Court of Chancery: the defendants replied, that a memorial of all the deeds, &c., the names of the witnesses, the consideration, &c. was inrolled; and after setting out the memorial at length, concluded with a *prout patet per recordum*, and verification thereon:—Held, sufficient, on demurrer, alleging that the conclusion should have been to the country.

A judgment on a warrant of attorney being one of the securities, and the judgment being referred to, as entered up:—Held, that it need not be set forth in the memorial. *Richardson v. Tomkies*, 1 Law J. (N.S.) C.P. 156, s. c. 9 Bing. 51; 2 Mo. & Sc. 56.

In the memorial of a deed of annuity inrolled in the Court of Chancery according to the statute 53 Geo. 3, c. 141, s. 2, the record was in these words: "Person for whose—[omitting the word *life*] the annuity was granted":—Held, that such omission did not vitiate the deed, and that the statute was substantially complied with. *Flight v. Lord Lake*, 4 Law J. (N.S.) C.P. 263, s. c. 2 Bing. N.C. 72; 2 Sc. 126.

The non-inrolment of a bond securing an annuity cannot be objected to under a plea of *non est factum*, in an action of debt on the bond. *Mestayer v. Biggs*, 3 Law J. (N.S.) Exch. 292, s. c. 1 C. M. & R. 110; 4 Tyr. 466.

Where the memorial of an annuity deed stated the consideration to be—"Notes of the Governor and Company of the Bank of England," and it appeared, by affidavit, that it was paid by drafts on bankers and country bank notes, the Court held the annuity to be null and void, and set it aside. *Lewis v. Hooper*, 4 Law J. (N.S.) K.B. 27, s. c. 4 N. & M. 318.

[See below, (F), and *Faircloth v. Gurney*, 1 Law J. (N.S.) K.B. 134, s. c. 3 B. & Ad. 917.]

#### (D) APPORTIONMENT.

[See APPORTIONMENT—RENT-CHARGE.]

Testator gave an annuity, payable half-yearly, to his son for his maintenance and education until he attained twenty-one, and another annuity, payable in like manner to his daughter (who was adult) during the son's minority:—Held that, as the son was entitled to a proportional part of his annuity, from the last half-yearly payment up to his attaining twenty-one, the daughter was entitled to a like proportional part of her annuity. *Weigall v. Brome*, 6 Sim. 99.

#### (E) VACATING.

An application to set aside an annuity must be made *bond fide* on behalf of the grantor. *Faircloth v. Gurney*, 1 Dowl. P.C. 724.

#### (F) WHEN GRANT OF, VOID OR VOIDABLE.

[See BENEFICE.]

The plaintiff having contracted with the defendant for the purchase of an annuity of 80*l.*, to be secured partly by the transfer of a policy of insurance on the life of the defendant, the grantor, the amount of the annual premium upon the policy was in the annuity deed added to the annuity of 80*l.*, making the total annuity granted 113*l.* 19*s.* 6*d.*, and the annual premium on the policy the grantee of the annuity covenanted to pay:—Held, that that covenant was not a pecuniary consideration, or necessary to be specified in the memorial of the annuity; and that the annuity was properly described in the memorial as an annuity of 113*l.* 19*s.* 6*d.*

In the deed, by which the above annuity was granted, the defendant charged his rectory of St. Clement Danes with the annuity, but the warrant of attorney, which accompanied the annuity deed, gave no authority to sequester such rectory:—Held, that the deed was only void *pro tanto*, and that the warrant of attorney was unimpeachable.

The annuity deed recited the consideration for the annuity to have been paid in notes and sove-

reigns; the memorial expressed the payment to have been in notes only—and held, sufficient. *Faircloth v. Gurney*, 2 Law J. (N.S.) C.P. 61, s. c. 9 Bing. 622; 2 M. & P. 822.

#### (G) PAYMENTS IN LIQUIDATION OF.

Where an annuity is secured by a covenant and warrant of attorney, and all the arrears have been paid, the Court will not restrain the executors of the grantor from paying his simple contract debts until they have set apart a fund to answer the future payments, unless a case of past or probable misapplication of assets is made out. *Read v. Blunt*, 5 Sim. 567.

#### (H) ACTION FOR.

If the grantor of an annuity treat the annuity as an existing contract, and pay the grantee the stipulated sum for many years, and he then cancels the securities and avoids the annuity for a defect in the memorial; and if, to an action brought against him by the grantee, to recover the consideration money, he pleads the Statute of Limitations, such statute will be computed to run from the time at which the annuity was avoided, not from the time at which the consideration money was originally paid. In such case, money had and received is a proper form of action, although the annuity deed be uncanceled. *Couper v. Godmond*, 2 Law J. (N.S.) C.P. 162, s. c. 9 Bing. 748; 3 Mo. & Sc. 219.

A and B, in consideration of 800*l.* paid to them by C and D, severally and respectively granted, covenanted, and agreed, to and with C and D, their heirs, &c., to pay to the said C and D, their executors, &c., one annuity or yearly sum of 30*l.* in the shares and proportions following, viz., the sum of 16*l.*, being one moiety of the said annuity or yearly sum, unto C, and the sum of 14*l.*, the remaining moiety thereof, to D, the said moieties to be respectively paid quarterly. The deed contained several provisions for securing the annuity, which were all given to C and D jointly, and a joint warrant of attorney, to enter up a joint judgment; a reversion of a close of land was granted to them jointly, and a joint power of attorney was given to them to sell stock. Lastly, the annuity was made redeemable by the payment to both of one entire sum:—Held, that the interest in the annuity was joint, therefore the covenant was joint, and that C could not maintain an action alone.

The defendant pleaded, that he was desirous of redeeming the annuity, and did, for that purpose, by and with the consent of plaintiff and D, who dispensed with the seven days' notice in writing, pay to the plaintiff and D, the several sums mentioned in the grant, as in full, for the repurchase of the same; and that plaintiff and D did accept, receive, and take the same as in full for the repurchase; that he paid all arrears, and repurchased and redeemed the said annuity, according to the provisions in the indentures. This plea was according to the covenant for repurchase contained in the deed. The plaintiff protested the dispensation of the seven days' notice, and traversed all the rest. Having obtained a verdict, upon the trial of this issue—it was held, that he was entitled to judgment. *Lane v. Drinkwater*, 4 Law J. (N.S.) Exch. 32, s. c. 1 C. M. & R. 599; 5 Tyr. 40.

## (I) PROCEEDINGS IN CASE OF BANKRUPTCY.

[See BANKRUPT, Effect of Certificate.]

## ANTICIPATION.

[See SETTLEMENT, Construction of.]

A clause against anticipation annexed to a life interest in a trust fund bequeathed to a female infant, does not prevent her after she comes of age, and before marriage, from effectually assigning her whole interest in the legacy. *Brown v. Pocock*, 4 Law J. (N.S.) Chanc. 15; s. c. 2 M. & K. 189; 5 Sim. 663; 2 Russ. & M. 210.

Bequest of dividends of stock to a feme covert for life, not to be subject to the debts or controul of her then present, or any other husband, and without power to charge, or anticipate the growing payment thereof:—Held, that the legatee, on becoming discover, might validly dispose of her entire life interest. *Jones v. Satter*, 2 Russ. & M. 208.

## APOTHECARY.

[See SURGEON AND APOTHECARY.]

## APPEAL.

- (A) WHEN AND TO WHAT COURTS.
- (B) NOTICE OF.
- (C) LIMITATION TO.

[See ADMIRALTY—LICENCE—MANDAMUS—PRACTICE OF THE ECCLESIASTICAL COURTS.]

## (A) WHEN AND TO WHAT COURTS.

By a charter of justice to a colonial court, power was given to any party to appeal to the King in council, against any final judgment, decree, or sentence of the Court, or any rule or order having the effect of a final or definitive sentence, and which appeal should be subject to the regulations therein mentioned. In a subsequent part of the charter there was a reservation to the King in council, upon the petition of any person aggrieved by any judgment or determination of the Court, to appeal therefrom, upon such other terms, and subject to such other regulations and restrictions, as to His Majesty should seem fit:—Held, upon a petition for leave to appeal, that no appeal could be allowed, except from a final judgment, decree or sentence, or rule or order having the effect of a definitive sentence. *In re Mahon and Pariente*, 2 Kn. 66.

Memorials to the King in council complaining of, and appealing against a scheme for the distribution of part of the booty taken in the war in the Deccan, which had been approved of by the Lords Commissioners of the Treasury, having been referred to a committee of Council, they, without hearing the memorialists upon the merits of their case, advised His Majesty to refer the consideration of them to the Lords Commissioners of the Treasury.

*Semble*—that the Privy Council will not exercise jurisdiction as a court of appeal from the decisions of the Lords Commissioners of the Treasury, as to grants by the Crown, of property accruing to it by

virtue of its prerogative. *Case of the Army of the Deccan*, 2 Kn. 103.

The statute 9 Geo. 4, c. 61, for regulating the granting of licences to innkeepers, &c. by section 27 enacts, "That any person, who shall think himself aggrieved by any act of any Justice done in execution of that act, may appeal against such act, to the Quarter Sessions," &c.—Held, that the words "person who shall think himself aggrieved," mean a person immediately aggrieved, as by refusal of a licence to himself, by fine, &c., and not one who is only consequentially aggrieved; and therefore, that where Magistrates had granted a licence to a party to open a public house not before licensed, within a very short distance of a licensed public house, the occupier of the latter house could not appeal against such grant. *Rez v. Justices of Middlesex*, 3 B. & Ad. 936.

An act of parliament of Great Britain declared, that all laws passed by the legislature of a colony should be valid and binding within the colony, and directed, that the colonial court of appeal should be subjected to such appeal as it was previously to the passing of the act, and also to such further and other provisions as might be made in that behalf by any act of the colonial legislature:—Held, that an act having been passed by the colonial legislature, limiting the right of appeal to causes where the sum in dispute was not less than 500*l.* sterling, a petition for leave to appeal, in a cause where the sum was of less amount, could not be received by the King in council, although there was a special saving in the colonial act of the rights and prerogatives of the Crown. *Cutliff v. Aylwin*, 2 Kn. 72.

## (B) NOTICE OF.

[See SESSIONS, Appeal.]

## (C) LIMITATION TO.

An inclosure act directed, that the commissioner thereby appointed should, by his award, or by some previous writing to be annexed thereto, ascertain the quantity of wheat equal to the annual value of the tithes in the parish of W, and should afterwards determine the value of such wheat in money, and charge and apportion the amount on the lands and tenements in W, which sum was to be paid to the rector quarterly, the first payment to be on the 25th of March next after the execution of the award, or such earlier day as the commissioner, by his award or by such previous writing, should appoint; and the tithes were to cease from the apportionment of such rent, or at such other time as the commissioner, by any writing, should appoint. The act also directed, that, if any person should feel himself aggrieved by anything done in pursuance thereof, he might appeal to the Sessions within four calendar months next after the cause of complaint should have arisen.

The commissioner, by writing, dated the 3rd of October 1832, fixed the corn rent in the proportions stated in a schedule which was annexed, and appointed the payments to begin from the 25th of December then next, and the tithes to cease from the 29th of September then last. His award was not till January 1833. The rector appealed at the Easter Sessions, April the 9th, 1833, on the ground that his equivalent for the tithes was assessed too low:—Held, that the previous writing of the commissioner was operative before the making of the award; that

the cause of complaint arose on the execution of the cause; and, therefore, that the appeal was too late.

The act directed, that all notices necessary to be given by the commissioner should be given by advertisement in a certain paper, and by affixing such notice on the church-door eight days before the time for doing the business to be notified. The commissioner, on executing the above writing, sent the appellant a copy of the schedule, with notice of the tithes having been extinguished, and the corn rents assessed; but the schedule in no way referred to the writing. He also published notices in the newspaper and on the church-door, declaring that he had assessed the corn-rents by writing of the 3rd of October, which was deposited with the clerk (whose address was given) in London; and these last-mentioned notices further stated the days when the tithes were to cease, and on which the rents were to be payable. It also appeared, by a correspondence, that the matter, which formed the ground of the appeal was, in fact, known to the appellant before the 13th of December 1832.

Held, that, supposing any notice to the appellant to have been necessary, (and, *semble*, it was not,) he had, by the communications above stated, sufficient notice of the cause of complaint to have appeared within four months. *Rex v. Nockolds*, 3 Law J. (N.S.) M.C. 87, a.c. 1 Ad. & E. 245; 3 N. & M. 334.

#### APPOINTMENT.

[See POWER.]

Voluntary appointment declared void as against creditors, under the circumstances. *Whittington v. Jennings*, 3 Law J. (N.S.) Chanc. 157.

#### APPORTIONMENT

*Of Rents, Rent-charges, and Annuities.*

[See 4 Will. 4, c. 22, 12 Law J. Stat. 33, amending 11 Geo. 2, c. 19, respecting the apportionment of rents, annuities, &c.]

[And see LANDLORD AND TENANT, Rent, Eviction—RENT-CHARGE—ANNUITY.]

#### APPREHENSION.

[See ASSAULT, Defence.]

#### APPRENTICE.

[See 3 & 4 Will. 4, c. 63; 11 Law J. Stat. 3.]

[And see FREEDOM—MASTER AND SERVANT—POOR, Settlement—PRIZE MONEY.]

Defendant agreed with plaintiff's father to receive plaintiff, who was a minor, into his service on trial, and to take him as apprentice, if approved of. Plaintiff went into the service, and worked for the defendant nearly two years. After several applications made during that time by the father, defendant told the father, that the plaintiff should serve out the two years, and then be bound, the father paying defendant 10*l*. This was agreed to; but de-

fendant shortly after quarrelled with plaintiff, and told him to go home about his business. Plaintiff went home, and on the father applying to defendant for an explanation, the latter told him to go and do his worst. The father then caused a letter to be written to defendant by his attorney, requiring him either to take plaintiff as his apprentice, or recompense him for his work; but no satisfactory answer was given, and plaintiff, by his next friend, brought an action to recover compensation for his service.

The Judge put it to the jury on these facts, whether, or not, the defendant's conduct was such as warranted the father in considering the contract for an apprenticeship as rescinded. And he further stated, that, if they thought it was, they were to give plaintiff such compensation for his work as they thought proper. The jury found a verdict for the plaintiff, with damages by way of compensation for his services.

Held, that the direction was right, and the verdict not to be disturbed. *Phillips v. Jones*, 1 Ad. & E. 333.

The master of an apprentice is entitled to the wages earned by him in a man of war, and may recover them from the captain, although the latter had no notice of the apprenticeship beyond the assertion of the apprentice. *Eades v. Vandeput*, 4 Doug. 1.

#### APPROPRIATION.

[See GOODS, Bargained and Sold—MONEY HAD AND RECEIVED—PAYMENT.]

#### ARCHDEACON.

[See CLERGY.]

#### ARBITRATION.

- (A) SUBMISSION.
- (B) ORDER OF REFERENCE.
- (C) EFFECT OF REFERENCE.
- (D) REVOCATION.
- (E) ARBITRATOR.
  - (a) *In general.*
  - (b) *Authority.*
  - (c) *Fees.*
- (F) UMPIRE.
- (G) AWARD.
  - (a) *Publication of.*
  - (b) *Form and Construction of.*
  - (c) *Effect of, and within what time.*
  - (d) *Setting aside.*
  - (e) *Relief against.*
- (H) CERTIFICATE.
- (I) REMEDIES.
- (K) PLEADING AND EVIDENCE.
- (L) COSTS.

#### (A) SUBMISSION.

[See PARTNERS, Rights and Interests of.]

Submission by rule of court, Judge's order, order of Nisi Prius, or with agreement that such submission may be made a rule of court, shall not be revocable without leave of the Court or a Judge—3 & 4 Will. 4, c. 42, s. 39; 11 Law J. Stat. 98.

Where the time originally fixed for making an award had been allowed to pass, through the neglect of the plaintiff's attorney before the order of reference was obtained from the Associate, the Court refused to interfere to compel the defendant to enter into a new submission; but left the plaintiff to go on with the cause. *Doe d. Fisher v. Saunders*, 1 Law J. (N.S.) K.B. 273, s.c. 3 B. & Ad. 783.

In an agreement of reference empowering an arbitrator to settle and fix an annuity to be purchased by executors for the widow of their testator, and "in case the said arbitrator shall award any such annuity, he shall or may award the same, with a proviso that, in case of a deficiency of assets of the testator, the annuity, or the fund from which the same shall arise, shall abate in the same manner as if it were a provision in the will," the word "shall" is imperative; and the arbitrator is bound to insert the proviso in his award. *Crump v. Adney*, 2 Law J. (N.S.) Exch. 150, s.c. 1 C. & M. 355; 3 Tyr. 270.

*Quære*—Whether the statute 9 & 10 Will. 3, c. 15, authorizes the parties to a reference to make their submission a rule of court in more than one court. *Winpenny v. Bates*, 1 Law J. (N.S.) Exch. 132, s.c. 2 C. & J. 370; 2 Tyr. 466.

#### (B) ORDER OF REFERENCE.

Where from the misconduct of the arbitrator, the original order of reference cannot be obtained, a duplicate may be made a rule of court. *Thomas v. Philby*, 2 Dowl. P.C. 145.

#### (C) EFFECT OF REFERENCE.

The treasurer of a company incorporated by act of parliament, in whose name the company are to sue and be sued, but whose body and goods are expressly exempted from the effect of process, does not waive this privilege by referring to arbitration an action in which he is the nominal party on behalf of the company. *Corpe v. Glyn, Glyn v. Corpe*, 1 Law J. (N.S.) K.B. 272, s.c. 3 B. & Ad. 801.

On a reference by order of Nisi Prius, to settle all matters in difference between two partners, and to decide which of them shall be entitled to receive certain bills of costs, the arbitrator has authority to direct, not only that one of the partners shall be at liberty to collect and retain all sums of money due for business, &c., but also, that he shall be at liberty to use the name of the other partner, either alone, or jointly with his own, in suing for the same. *Burt v. Wigley*, 4 Law J. (N.S.) C.P. 176.

Held, that a reference to arbitrators to balance accounts, and settle all matters in dispute respecting the leaving and occupying of two corn-mills and a dwelling-house, did not authorize them to decide on the costs of an action for fixtures, at least up to the time of paying money into court, when the submission was entered into. *Stratton v. Green*, 8 Bing. 437, s.c. 1 Mo. & Sc. 668.

Where several jointly claim a sum of money, and the cause of action is referred, and one of the parties so jointly claiming dies, the arbitrator cannot award the sum to be paid to the survivors and the executors of the deceased. *Kent v. Cox*, 3 Doug. 406.

#### (D) REVOCATION.

[See *ante*, (A) SUBMISSION, as to restraint on revocation of, under 3 & 4 Will. 4, c. 42, s. 39.]

The authority of an arbitrator cannot be revoked after he has made his award. *Phipps v. Ingram*, 3 Dowl. P.C. 669.

On an extent in aid, a submission of all matters in difference between the crown debtor and debtor paravaile, without the authority of the Crown, is revoked by a discharge of the latter, under the Act for the Relief of Insolvent Debtors; and, therefore, an award subsequently made is bad. *Rex v. Bingham*, 1 Law J. (N.S.) Exch. 62, s.c. 2 C. & J. 130; 2 Tyr. 46.

#### (E) ARBITRATOR.

##### (a) In general.

There is no ground for the distinction between legal and unlearned arbitrators. Each is equally conclusive judge of matters referred to him, whether of law or of fact. *Jupp v. Grayson*, 4 Law J. (N.S.) Exch. 8, s.c. 5 Tyr. 150; 1 C. M. & R. 523. See also *Ashton v. Poynton*, *post*, p. 24.

##### (b) Authority.

[See CONTRACT, Evidence.]

Arbitrator empowered to compel attendance of witnesses, and administer an oath in cases of submissions by rule of court, or order of Judge, or at Nisi Prius, or with agreement to make the submission a rule of court, and where it has been ordered or agreed in the submission that the arbitrator shall administer an oath. 3 & 4 Will. 4, c. 42, s. 41, 42; 11 Law J. Stat. 98.

Where a defendant submitted all matters in difference to arbitration, and the arbitrators required him, in pursuance of a power given to them for that purpose, to produce certain books and papers, and an attachment was moved for against him for not producing them:—Held, that he could not, by affidavit, bring before the Court the question, whether those books related to matters in difference between them or not; though it was expressly sworn, that the books merely related to old accounts which had long since been settled, and which it had been agreed between them should form no part of the reference, because, by the general terms of the submission of all matters in difference, it was left in the discretion of the arbitrator to say what were matters in difference and what were not. *Arbuckle v. Rice*, 4 Dowl. P.C. 174.

##### (c) Fees.

Where an award is taken up by one party, and all the costs paid to two of three arbitrators, the third arbitrator has no remedy against either party in the cause:—*Semble*, an arbitrator has no action for his fees. *Burroughes v. Clarke*, 1 Dowl. P.C. 48.

A cause being referred, the arbitrator, in 1825, received from the plaintiff's attorney 87l. for his fees and expenses. In 1827 the parties went before the Prothonotary, when he allowed only 35l. The defendant now, after a lapse of eight years from the time the payment was made, (the attorney, who paid the money, having died in the interim,) applied to the Court to order the arbitrator to refund the difference:—Held, that the application was too late. *Bravier v. Bryant*, 3 Mo. & Sc. 844.

#### (F) UMPIRE.

The appointment of an umpire must be the act of the will and judgment of both arbitrators; it must

be a matter of choice, and not of chance. Therefore, in no case will the award of an umpire, who is chosen by lot, be good. *Ford v. Jones*, 1 Law J. (N.S.) K.B. 104, s.c. 3 B. & Ad. 248.

Where the parties themselves assent to the mode of choosing an umpire by lot, and the arbitrators pursue that course, the award of the umpire so chosen will be valid. *Tunno v. Bird*, 3 Law J. (N.S.) K.B. 5, s.c. 5 B. & Ad. 488; 2 N. & M. 328.

Where, under a submission of reference, the cause was referred to two, and if they could not agree, then to a third, conjointly with them, and if the three could not agree, then the award was to be made by any two of them:—Held, that an award, made by the two arbitrators after they had called in the assistance of the umpire, which was not submitted to the umpire, was bad. *In the matter of arbitration between Allen and Perring*, 4 Law J. (N.S.) K.B. 199, s.c. 5 N. & M. 374.

#### (G) AWARD.

[See ATTORNEY, LIEN—COVENANT, Pleading, and Damages—EJECTMENT, Pleading and Evidence.]

##### (a) Publication.

*Semble*—an award may be said to be published, when they who are interested have notice that it is ready for delivery, on payment of reasonable costs. *Musellbrook v. Donkin*, 2 Law J. (N.S.) C.P. 71, s.c. 9 Bing. 605; 2 Mo. & Sc. 740.

An award is published as soon as the parties have notice that it is ready for delivery, upon payment of the charges, whether those charges be reasonable or not. *M'Arthur v. Campbell*, 4 Law J. (N.S.) K.B. 25, s.c. 5 B. & Ad. 518; 3 Ad. & E. 52; 4 N. & M. 208.

##### (b) Form and Construction of.

[See *Thorp v. Cole*, post, (K) Pleading.]

An action of trespass for taking goods was referred, principally with a view of determining the right of property in the goods; the defendants contending that the plaintiff had no property in them, but that they belonged to a third person; another complaint in the declaration was, that the defendants had committed an assault upon the plaintiff's wife, *per quod consortium amisit*; and all other matters in difference were also referred. No evidence was given before the arbitrator to prove the *per quod*, but there was only one assault proved to have been committed on the wife, and the plaintiff abandoned his claim to part of the goods. The arbitrator made his award, merely ordering the verdict which had been entered for the plaintiff to stand, and the damages to be reduced to 36*l.*, but made no award respecting the right of property in the goods:—Held, that the award was sufficiently final. *Bird v. Cooper*, 4 Dowl. P.C. 148.

An agreement of reference stated, that disputes had arisen between G and a navigation company, respecting certain goods shipped by G on board of the company's vessels, and which G complained had not been delivered; that G commenced an action in Scotland against the company for the recovery of the goods or their value, of the damages sustained by the non-delivery, and of the costs incurred in the action; and that the parties agreed to refer the said differences to arbitrators, the costs of the reference and award, and also of the action, to be in their discretion. The arbitrators awarded that

238*l.* were due from the company to G; that the said sum, with 30*l.*, the costs of the reference and award, should be paid by the company on a certain day; and that the company should keep the goods which were then in their possession:—Held, (*Parke, J. dubitante*.) that this was a sufficient adjudication upon all the matters referred: Held, also, that the award of the goods to the company was not void as an excess of authority. *Gillon v. the Mersey and Clyde Navigation Company*, 3 B. & Ad. 493.

An agreement, containing several stipulations, was entered into, and partly carried into execution; after which, one of the parties filed a bill in Chancery, praying that it might be rescinded on certain terms; and the other party not answering, an injunction was granted, restraining him from proceeding to enforce the agreement until he should have answered, and the Court of Chancery should have made further order. The parties then referred the suit and all matters in difference between them to arbitration; and it was provided by the submission, that all proceedings in the suit should be stayed until the time for making the award, when, if none were made, either party might proceed; but that the injunction should have its full effect till dissolved. The arbitrator awarded upon the matters of the agreement, and directed certain things to be done, the performance of which was to be taken in full satisfaction of all the matters in difference. He also awarded that each party should bear his own costs of the Chancery suit; but he made no further order as to the suit, nor did he direct that the agreement should be rescinded; and, on motion to set aside the award for these omissions, it became a question whether or not the arbitrator had fully decided upon all the matters of the agreement:—Held, that the award was bad, inasmuch as it neither ordered the agreement to be rescinded, nor clearly determined all the matters of it; and as it did not put an end to the Chancery suit. Orders to the number of eleven, of different Judges, enlarging the time for making the above award, were made a rule of court by a single rule. *In the matter of Tribe & Upperton*, 3 Ad. & E. 295.

An arbitrator, to whom a cause and all matters in difference were referred, directed a verdict to be entered for the plaintiff, and certain works to be done by the defendant. He then added, that as disputes might arise respecting the performance, the plaintiff, if dissatisfied with it, might, (on giving notice to the defendant,) bring evidence before the arbitrator of the insufficiency of the work, and the defendant might also give evidence on his part, in order that a final award might be made concerning the matters in difference; but if no proceedings were taken by the plaintiff within two months after the work was done, the award then made should be final: and he enlarged the time for making his further and final award, if requested, to six months:—Held, that the latter part of this award was bad, as it assumed to reserve a power over future differences; but that it might be rejected, and the former part was final, and might stand. *Manser v. Heaver*, 3 B. & Ad. 295.

In an action for work and labour, money paid, &c. against two partners, all matters in difference in the cause between the parties are referred to a legal arbitrator. In the particulars of demand in

the action, and before the arbitrator, credit is claimed by the plaintiff for the amount of certain cheques given to one of the defendants. The arbitrator awards a certain sum to the plaintiff, but especially states in his award, that the cheques or the money paid in respect thereof, were claimed as matters in difference in the cause, and declares and determines that they are not matters in difference in the cause:—Held, that the award is not final, and is therefore void. *Samuel v. Cooper*, 4 N. & M. 520.

An award recited that the parties had been in partnership as builders, and that disputes had arisen, and were depending, touching their accounts, reckonings, and dealings, and as to the division of certain partnership messuages and buildings, of which they were possessed, and that they had agreed to refer them to arbitration, and that the arbitrators should have power to direct a division of the said messuages and buildings; and that each had agreed to execute to the other a conveyance of the messuages, according to such division as the arbitrators should award. The arbitrators then awarded, that the defendant should pay a sum to the plaintiff in full of all demands, in respect of a moiety of the partnership property, estate, and effects; and that the plaintiff should execute a conveyance of his interest in the partnership buildings, which the defendant should take, charged with two large mortgages; and that all debts owing to and by the partnership, should be paid and received by them in equal moieties, and if one advanced more than the other, he should be reimbursed. It was objected, that the award was not final; that it was uncertain, and inconsistent; and that the arbitrators had not properly pursued their authority, in directing the purchase by one partner of the whole, instead of making a division:—Held, that these objections were not sustainable, and that the award was valid. *Wood v. Wilson*, 4 Law J. (N.S.) Exch. 193, s.c. 2 M. & R. 241.

By a Judge's order, all matters in difference in a cause were referred to an arbitrator, so as the award should be made on or before a certain day, or on or before such further or ulterior day, as he should from time to time appoint and signify in writing under his hand, to be indorsed on the said order, and as the said Court or a Baron thereof might order. The arbitrator made an enlargement, but it was not confirmed by a Judge's order; and afterwards two orders for enlargement were made by a Baron of the court, with the consent of the parties, but these were not indorsed by the arbitrator:—Held, that an award made before the expiration of the time limited by the last order, was valid.

The arbitrator found, that a sum of money was due and owing from the defendants, and directed that it should be paid on or before a certain day, and, if it were then paid, all further proceedings should cease:—Held, first, that this was a final, and not a conditional award; secondly, that, though the arbitrator had exceeded his authority, in fixing a particular day of payment, the award was only invalid to that extent. *Bennell v. Haxman*, 4 Law J. (N.S.) Exch. 99, s.c. 1 C. M. & R. 935; 5 Tyr. 509.

In an action on the case by D against A for disturbance of common, the defendant pleaded not guilty, on which issue was joined. In actions of trespass by A against D and L, and against D,

L and P, the defendants pleaded not guilty, and several special pleas justifying under rights of common over the *locus in quo* in themselves, as the servants of each other, and as the servants of one H. In the first action of trespass, issues were joined on these pleas; but the second action of trespass had proceeded only as far as the pleas, when, by an order of Nisi Prius, it was directed, that a verdict should be entered for the plaintiff in the action on the case, and in the first action of trespass: that the three causes should be referred to arbitration, and that the arbitrator should direct, whether the verdict should stand, or a nonsuit or nonsuits be entered, and should ascertain the right of common and all other rights of the parties to the reference in relation to the premises referred to in the pleadings: that the costs of the causes and of so much of the reference as might relate to the said causes, should abide the event of the said causes respectively; and the residue of the costs be in the discretion of the arbitrator. Liberty was also given to H, and any other person having, or claiming to have, right of common, to become parties to the reference; and the object of the reference was declared to be, that the rights of the commoners and the extent of certain woods and coppices should be ascertained, secured, and regulated, as concerned the parties thereto. The arbitrator awarded in the action on the case, that the plaintiff had just cause of action on certain counts in the declaration, and that a verdict should be entered accordingly; and for the defendant on the other counts. In the second action, he awarded, that the defendants were not guilty of the trespasses mentioned in the declaration, and that a verdict should be entered accordingly; and in the third action, that the plaintiff had no cause of action; and he then proceeded to declare the rights of the parties as to the enjoyment of the common, and the inclosing of the woods and coppices in future, and awarded that A should pay all the costs of the reference and award:—Held, that the arbitrator had substantially complied with the terms of the reference; that after he had found the general issue for the defendants in the first action of trespass, the other issues became immaterial, except with a view to costs, and he was not bound to dispose of them, unless required by the parties so to do; that the roll might be made up in the same manner as if the cause had been tried and the jury had been discharged from finding a verdict upon the special issues; and that it was not necessary to determine anything as to the rights of H, as he had not become a party to the reference. *Dibben v. the Marquis of Anglesea*, 4 Law J. (N.S.) Exch. 278, s.c. 2 C. & M. 722; 4 Tyr. 926; 10 Bing. 568.

If an award be pursuant to the terms of the submission, it will be good, although not final upon all matters referred. Thus, where, by the submission to arbitration, the decision of the arbitrators was to be final, "except as to such items as the said referees should reserve for the decision of any court of law or equity," and the arbitrators, reciting the submission, decided some points, but reserved others,—the award was held good, as the latter must have been considered to have been reserved for the decision of a court of law or equity, according to the terms of the submission. *Croker v. Pugh*, 1 Law J. (N.S.) K.B. 72.



By an agreement of reference between A and B, which stated that A claimed a yard and pump therein as his exclusive property, but that B, after notice not to do so, had entered the yard and taken water from the pump, and that there was a hedge and ditch dividing the lands of A and B, which A alleged that B had removed into his (A's) land, all matters in difference were referred to C, who was further empowered to direct how, and by whom, and in what manner, the yard and pump, and hedge and ditch, should thereafter be enjoyed and occupied, and who should have the care and management thereof. C awarded that the yard and pump were the sole and exclusive property of A, except that B had a right to take water from the pump, and to have ingress and egress to and from the yard for that purpose; and further, that the pump should thereafter be considered as belonging to A and B jointly, and to be repaired at their joint expense; and that B had not removed the hedge and ditch into A's land, but that thereafter the hedge should be kept in repair by B, who for that purpose should be at liberty to take mud from the ditch, but that, subject to such privilege, the ditch thereafter should be considered as the exclusive property of A:—Held, that the direction as to the future enjoyment, &c. was not inconsistent with the other part of the award; and held, that the arbitrator had not exceeded his authority by such direction. *Boodle v. Davies*, 4 N. & M. 788.

No precise form of words is necessary to constitute an award; it is sufficient if the arbitrator express by it a decision upon the matter submitted to him. But where the arbitrator, to whom a dispute between an architect and his clerk, respecting a claim by the latter to wages, was referred, stated in a letter that he had examined drawings made by the clerk, with an account of his time, which did not shew experience or ability to the extent to justify a demand for remuneration under the circumstances; but in consideration of the clerk's services out of the office on some occasions, and to meet the case in a liberal manner, he proposed that the architect should pay the clerk 10*l.*: Held, that the latter part of the letter was a mere suggestion of the arbitrator, and not a decided opinion that the clerk was or was not entitled to recover 10*l.*, and, therefore, not a good award. *Lock v. Pulliamy*, 5 B. & Ad. 600, s. c. 2 N. & M. 336.

If it clearly appear from reading an award, that the arbitrator intended to leave a particular question of law open, the Court will consider it, although in terms the arbitrator may in one part of his award have determined it. *Sherry v. Oke*, 3 Dowl. P.C. 349.

Upon a reference of partnership disputes, a direction in the award that some of the parties to the reference pay a sum of money (which is one of the matters included in the submission) to the arbitrator, and that he apply the same to the payment of certain specified demands (also part of the matters submitted,) is bad, and vitiates the award, although the payments appear by the tenor of the award to be for the benefit of the parties submitting, and not of the arbitrator. *In the matter of Mackey*, 2 Ad. & E. 356.

An arbitrator, who had authority to decide on what terms a partnership agreement should be cancelled, directed among other things that the agree-

ment should be cancelled, that one of the partners should have all the debts due to the firm, and should, if necessary, sue for them in the name of his late partner:—Held, that in authorizing one of the parties to sue in the name of the other, the arbitrator had not exceeded his authority. *Burton v. Wigley*, 1 Bing. N.C. 665, s. c. 1 Sc. 610.

A submission to refer a cause, and the subject matter thereof, and the issue therein, to the award of a barrister, does not authorize him to order a verdict to be entered up. *Hutchinson v. Blackwell*, 1 Law J. (N.S.) C.P. 98, s. c. 8 Bing. 331; 1 Mo. & Sc. 513; 1 Dowl. P.C. 267.

In an award, the direction to enter a verdict in favour of a plaintiff for a certain sum, is equivalent to an order to pay that sum. *Cartwright v. Blackworth*, 1 Dowl. P.C. 489.

A cause, and all matters in difference, were referred by rule of court to an arbitrator, who awarded that a particular balance was due from the plaintiff to the defendant, but did not order the money to be paid by the plaintiff. He also awarded that the plaintiff should pay costs, without directing to whom:—Held, that if an action would lie on this award, no attachment could be granted on it, as for disobedience of the rule of court. *Scott v. Williams*, 5 Tyr. 506, s. c. 3 Dowl. P.C. 508.

A cause had been referred by a Judge's order before trial. The arbitrator awarded a verdict to be entered for the plaintiff, with 55*l.* damages:—Held, that this was not tantamount to awarding the sum of 55*l.* to be paid by the defendant to the plaintiff; and that as no sum was ordered to be paid, no attachment could issue for the non-payment. *Donlan v. Brett*, 4 Law J. (N.S.) K.B. 55, s. c. 2 Ad. & E. 844; 4 N. & M. 854.

Where an award found that there was a balance of 26*l.* due from the defendant to the plaintiff, but contained no order for the payment of that sum, the Court refused to grant an attachment for non-payment thereof. *Hopkins v. Davies*, 4 Law J. (N.S.) Exch. 113, s. c. 1 C. M. & R. 846.

Trespass; plea, general issue, and justification; replication *de injuria*, and new assignment, upon which, judgment by default. Arbitrator awards a verdict for defendant, without giving damages upon the new assignment—Objection, that the award was not final and conclusive, by reason of no damages being awarded to the plaintiff on the new assignment:—Held, fatal. *Wykes v. Skipton*, 3 Law J. (N.S.) K.B. 90, s. c. 3 N. & M. 240.

Upon reference of a cause, (wherein the defendant had paid money into court,) and of all matters in difference between the parties, the costs to abide the event, the award only stated that the defendant had overpaid the plaintiff a certain sum. The Court refused to grant an attachment, to enforce this award. *Thornton v. Hornby*, 1 Law J. (N.S.) C.P. 6, s. c. 8 Bing. 13; 1 Mo. & Sc. 48.

A misrecital, in an award by an umpire, of the Christian name of one of the original arbitrators, by whom he has been duly appointed, does not vitiate the award.

Neither is the award vitiated by the substitution of the right name after publication. *Trew v. Burton*, 2 Law J. (N.S.) Exch. 236, s. c. 1 C. & M. 533; 3 Tyr. 559.

It is a general rule, that, wherever a matter in dispute has once been submitted to arbitration and

decided, the decision is conclusive. Therefore, where, by order at Nisi Prius, by consent of parties, it was referred to arbitrators, whether the plaintiff was entitled to recover from the defendant the sum of 246*l.* 3*s.*, and whether, against such sum, the defendant was entitled to set off the sum of 246*l.* 3*s.* for a bale of silk, and the arbitrators found the affirmative of the first, and the negative of the second proposition, following the words of the submission; in an action upon the award, the defendant was not allowed to set off a smaller sum, as the price due to him for the bale of silk; and the plaintiff obtained a verdict for the whole sum awarded. On an application to set aside that verdict, on the ground that the arbitrators felt themselves bound, by the terms of the submission, to confine their attention to the particular sum mentioned in it, without taking into their consideration whether the smaller sum was due; it appearing also upon the affidavits to have been possible that the arbitrators might have decided the matter upon a question of credit, in which case the question, as regarded both the larger and smaller sum, would be the same:—The Court refused to interfere. *Johnson v. Durant*, 1 Law J. (N.S.) K.B. 47, s. c. 2 B. & A. 925.

A, having agreed with certain trustees to build a bridge, according to plans and specifications, it being stipulated that he should be paid for extra work directed by the engineer of the trustees, employed B to execute the masonry and piling, and B also entered into an agreement with C for executing the piling. A was present twice during the progress of the work; on the first occasion, he only looked on, but on the second he inquired of C why the work was suspended, and C told him that he wanted money to go on with the extra work directed by the engineer; A said he should have money, and accordingly gave a bill of exchange to B, from whom he took a receipt, and B passed it to C, also taking a receipt.

In an action by B against A, the latter paid B for a part of the extra piling, and he subsequently recovered for the whole of the extra work, including the extra piling, against the trustees. On a reference of an action by C against A, to recover for the extra piling, the arbitrator awarded that a verdict should be entered for C, for his claim, deducting for that portion which had been paid to B:—Held, that there was sufficient evidence, in point of law, to support the award. *Pearson v. Graham*, 3 Law J. (N.S.) Exch. 175.

#### (c) Effect of.

The Court or a Judge may enlarge the time for making an award when the submission is by rule of court, or order of a Judge or of Nisi Prius, or with agreement that such submission may be made a rule of court. 3 & 4 Will. 4, c. 42, s. 39; 11 Law J. Stat. 98.

An action between the owner of land and a party holding by his permission, but claiming to hold as bailiff, and not as tenant, was referred to an arbitrator, who was to say what was to be done by the parties with respect to the land. He awarded, that the holding was as tenant; that the tenancy should cease on the delivery of the award, and that possession of the land should be delivered up to the owner in one month after.

On an issue, between the landlord and an execution creditor of the tenant, whether the crops on the

land at a certain time were the property of the party so found to have been tenant, the award was held to be admissible in evidence on the part of the landlord.

Held also, that the award did not of itself change the property.

Held further, that, if it had determined the tenancy, the tenant would not have been entitled to way-going crops, although there was a custom of the country that the tenant, at the regular expiration of Lady-day tenancy, should have them, and although this tenant commenced holding on Lady-day. *Thorpe v. Eyre*, 1 Ad. & E. 926, s. c. 3 N. & M. 214.

The decision of an arbitrator (though not a barrister) is final, though it can be shewn that his award is founded on a misapprehension of law. *Ashton v. Poynton*, 4 Law J. (N.S.) Exch. 71, s. c. 1 C. M. & R. 738; 3 Dowl. P.C. 281.

Where a cause was referred to an arbitrator, who, at a meeting, at which the plaintiff and defendant were present, appointed a future day for another meeting, but which day was beyond the time allowed for making the award, and the arbitrator by accident omitted to enlarge the time for that purpose, the Court refused to interfere by making a rule to extend the time for making the award to the day named. *Burley v. Stevens*, 4 Dowl. P.C. 255.

Where, in an action of trespass, the time for making an award pursuant to an order of Nisi Prius expires before the award is made, and the arbitrator has not enlarged the time, as empowered by the order, the Court will, under certain circumstances, direct judgment to be signed, and execution issued for the sum for which the jury find, subject to the reference, unless the enlargement is consented to. *Wilkinson v. Time*, 4 Dowl. P.C. 37.

The plaintiff and defendant by bond referred to arbitration the damages to be occasioned to the plaintiff by the defendant's working a mine, which damages were to be assessed, and an award made every two months. The first award was regularly made; but the second was postponed for about six weeks beyond the following two months, when the arbitrator and parties attended to assess the damages; and on the bond was indorsed a memorandum, unstamped, that all parties had then met by consent on the award:—Held, first, that the terms of such bond were imperative, and not merely directory, as to the periods of arbitration; and, secondly, that the memorandum indorsed on the bond, being unstamped, could not be given in evidence as an agreement. *Stephens v. Lowe*, 1 Law J. (N.S.) C.P. 150, s. c. 9 Bing. 32; 2 Mo. & Sc. 44.

A verdict was taken for the plaintiff, with damages, subject to the award of an arbitrator, within a specified time; the arbitrator allowed the time to elapse without enlarging it; and, the defendant refusing to proceed with the arbitration, the Court considered the case as opened, and sent it down to a new trial. *Hall v. Phillips*, 1 Law J. (N.S.) C.P. 169, s. c. 9 Bing. 89; 1 Mo. & Sc. 167.

#### (d) Setting aside.

A clause in a deed of submission to arbitration, "that no action or suit at law or in equity shall be commenced or prosecuted against the arbitrators concerning their award when made, nor to impeach the said award, unless some collusion or other fraud be discovered or appear therein," does not prevent a party to the deed from moving to set the award

aside (for illegality upon the face of it), though no fraud or collusion appear. *In the matter of Mackay*, 2 Ad. & E. 356.

A rule for setting aside an award must appear on the face of it to be drawn up on reading the award itself or a copy of it, and the Court will not allow it to be amended. Where a rule for setting aside an award was drawn up on imperfect materials, and was therefore discharged, the Court, under special circumstances allowed a new rule. *Sherry v. Oke*, 3 Dowl. P.C. 249.

A defendant may move to set aside a judgment entered up on an irregular award, though the time for setting aside the award itself has elapsed, if the defect insisted on be apparent on the face of it: an objection grounded on such defect need not be stated in the rule nisi. *Manser v. Heaver*, 3 B. & Ad. 295.

An application to set aside an award, under a reference by order of Nisi Prius, will not be entertained after the first four days of the term ensuing that in which the award was made, although the objections appear upon the face of the award. *Sell v. Carter*, 3 Law J. (N.s.) Exch. 65, s. c. 2 Dowl. P.C. 245.

On a reference of a cause, and all matters in difference by a Judge's order, one of the parties moved after the proper time to set the award aside:—Held, no excuse for the delay, that the arbitrator made an exorbitant charge for the award, in consequence of which the party applying did not take it up. *McArthur v. Campbell*, 4 Law J. (N.s.) K.B. 25, s. c. 5 B. & Ad. 518; 2 N. & M. 444.

A motion to set aside an award made under an order of a Judge, must be made promptly after the party knows of the award being made. Where such a motion was made after two terms had elapsed, the Court discharged it with costs, though it was alleged by the party moving, that he did not believe that the other party intended to proceed upon the award, as there had been a previous revocation. *Worrell v. Deane*, 2 Dowl. P.C. 261.

Arbitrations entered into under the authority of rules of court, though not within the statute 9 & 10 Will. 3, c. 15, s. 2, are, by the discretion of the Courts, governed by the statute rule as to time. Therefore, a party complaining of such arbitration must move to set it aside before the last day of the next term after the award in such arbitration made and published to the parties. *Musselbrook v. Dunkin*, 2 Law J. (N.s.) C.P. 71, s. c. 9 Bing. 605; 2 Mo. & Sc. 740.

Upon reference to, and decision by an arbitrator (a barrister), the Court will not, upon the complaint of a dissatisfied party, set aside the award, although the affidavits have a tendency to shew that the arbitrator entered upon the investigation with an incorrect view of his authority, there being no corrupt or improper motive attributed to the arbitrator, in the discharge of the duty, the performance of which, at the desire and by the selection of the parties, he undertook. *Wilson v. Martin*, 3 Law J. (N.s.) C.P. 180.

A motion to set aside an award, by reason of a revocation of the arbitrator's authority, must be made promptly after the party is aware the award has been made.

Thus, where an award was made before Easter

term, on which a rule for an attachment was obtained, and discharged in Trinity term,—it was held, that a motion in Michaelmas term to set the award aside, on the ground that the arbitrator's authority was revoked before it was made, was too late. *Socket v. Foster*, 3 Law J. (N.s.) Exch. 37.

Where an award is bad by reason of extrinsic matter, and not for defects upon the face of it, a party disputing the award must move to set it aside within the next term after it is published; and if he fails to do so, he cannot set up such extrinsic matter in answer to a rule for an attachment for non-performance of the award. *McArthur v. Campbell*, 4 Law J. (N.s.) K.B. 25, s. c. 5 B. & Ad. 518; 2 Ad. & E. 52; 4 N. & M. 208.

If parties agree to refer, there being an action pending, without a Judge's order, the reference is within the 9 & 10 Will. 3, c. 15, and an application to set aside the award must be made before the end of the term next after its publication. *Rushworth v. Barron*, 3 Dowl. P.C. 317.

An award made in pursuance of an order of Nisi Prius, referring a cause and other matters in difference, may be objected to at any time before the end of the term next after publication. In stating the grounds on which it is sought to set aside an award, it is not sufficient to state a general head of objection, as "misapprehension of the terms of the reference." *Allenby v. Proudlock*, 4 Dowl. P.C. 54.

A rule nisi to set aside an award ought to state specifically the particular grounds of objection. It is not sufficient to state that the arbitrator has exceeded his authority, or that the award is uncertain, and not final. *Boodle v. Davies*, 4 N. & M. 788.

Where, from the misconduct of one of the parties to an award, the submission cannot be made a rule of court, so as to enable the opposite party to make it a rule of court before the last day but one of the first term after the award, the time for a motion to set it aside will be enlarged until the following term. *In re Perring and Keymer*, 3 Dowl. P.C. 98.

The refusal of an arbitrator to examine witnesses is sufficient misconduct on his part to induce the Court to set aside his award, though he may think he has sufficient evidence without them. *Phipps v. Ingram*, 3 Dowl. P.C. 669.

The imputing of improper expressions, by affidavit, to a witness examined before the arbitrator as to the subject-matter of his testimony, and the non-examination of the party himself by the arbitrator (such examination being allowed by the terms of the arbitration,) are not such circumstances as will induce the Court to set aside the award. *Scales v. Petham*, 4 Law J. (N.s.) C.P. 195.

A reference was made to a barrister, who examined the parties by consent. Subsequently to the award it was discovered that the defendant was a felon convict; but, it appearing, that the judgment of the arbitrator was formed independently of the defendant's testimony, the Court refused to disturb the award. *Smith v. Sainsbury*, 1 Law J. (N.s.) C.P. 150, s. c. 9 Bing. 31; 2 Mo. & Sc. 53.

The Court will not set aside an award, merely on the ground that the arbitrator, at the time of the reference and award, was indebted to one of the parties, and did not communicate that fact to the other. *Morgan v. Morgan*, 2 Law J. (N.s.) Exch. 56.

The Court will not set aside an award, upon the ground that the arbitrator, a barrister, has improperly admitted evidence, or is mistaken in point of law, although the point in which the arbitrator is said to have decided erroneously arose incidentally, and was not expressly referred by the parties. *Perrymans v. Steggall*, 2 Law J. (N.S.) C.P. 150, a.c. 9 Bing. 679; 3 Mo. & Sc. 93; 2 Dowl. P.C. 726.

An award made by a barrister cannot be impeached, on the ground of his having decided contrary to law. *Wade v. Malpas*, 2 Dowl. P.C. 638.

The Court will not set aside an award, on the ground that the arbitrator has come to a wrong conclusion on the facts, if there be any evidence to support his finding, though they may not think the arbitrator right in his conclusion from such evidence. *Berrett v. Wilson*, 1 C. M. & R. 586, a.c. 5 Tyr. 218.

A cause was referred to an arbitrator, with liberty to him to state upon his award any point of law raised by either party in reference to the matters thereby referred. Certain points of law were accordingly submitted to the arbitrator, which he set out upon his award, (but without reference to any particular state of facts,) and certified, that he had overruled them. The arbitrator's decision upon these points as abstract propositions being correct, the Court refused either to refer it back to him to amend his award by setting forth the facts, upon which the questions of law arose, or to set aside the award. *Jay v. Byles*, 3 Mo. & Sc. 86.

Where an action was brought by an attorney on a bill not taxable, and a verdict was taken, subject to a reference as to the amount of the charges, and the arbitrator awarded a certain sum:—Held, that it was competent for the Court to examine, whether the arbitrator had adopted the right rule. *Broadhurst v. Darlington*, 2 Dowl. P.C. 38.

#### (e) Relief against.

In an agreement to refer matters in dispute to arbitration, it was agreed, that the submission might be made a rule of a court of law by either party. This had not been done:—Held, on demurrer, that the Court had jurisdiction to relieve against the award, overruling *Davis v. Gilly*.

The Court, having once exercised its jurisdiction over the award, will retain it, although on the coming in of the answer, it appear that the submission has been made a rule of a court of law, by the defendant before the demurrer was filed. *Nichols v. Roe*, 3 Law J. (N.S.) Chanc. 90, a.c. 5 Sim. 156: but see a.c. 3 M. & K. 431.

#### (H) CERTIFICATE.

The rule of Easter term, 2 Geo. 4, requiring the grounds of objection to an award to be stated upon a rule  *nisi* to set it aside, applies to the certificate of an arbitrator empowered to ascertain the amount due from the defendant to the plaintiff, and to certify the same to the associate, by whom a verdict is to be entered accordingly. *Carmichael v. Houschen*, 3 N. & M. 203.

On a reference to a barrister with power to certify, it is no objection to the certificate, that he has mistaken the law. *Wilson v. King*, 3 Law J. (N.S.) Exch. 212, a.c. 2 C. & M. 689.

A rule to set aside the certificate of an arbitrator

should specify the grounds of objection. *Whalley v. Morland*, 3 Law J. (N.S.) Exch. 58, a.c. 2 C. & M. 347; 4 Tyr. 255.

#### (I) REMEDIES.

An agreement was made between parties for the sale and purchase of property at a sum to be determined by two arbitrators. The arbitrators made their valuation, and the amount was demanded by the seller from the purchaser. The agreement was made a rule of court:—Held, that this was not a reference to arbitration within the statute 9 & 10 W. 3, and the Court would not enforce the payment of the sum awarded by attachment. *Lee v. Hemingway*, 3 Law J. (N.S.) K.B. 124, a.c. 3 N. & M. 860.

A stipulation in an agreement to refer, that the submission shall be made a rule of the Court of King's Bench or Exchequer, does not extend to both courts, and, therefore, after a submission with such a stipulation had been made a rule of the Court of King's Bench, an application to make the same a rule of the Court of Exchequer, refused. *Wispenny v. Bates*, 1 Law J. (N.S.) Exch. 152, a.c. 2 C. & J. 379; 2 Tyr. 466.

The demand, on which to found an attachment for non-payment of money pursuant to an award, and of costs pursuant to the Master's allocatur, must be made after the order of reference has been made a rule of court. *Chilton v. Ellis*, 2 C. & M. 459, a.c. 4 Tyr. 369; 2 Dowl. P.C. 338.

Personal service must be effected before an attachment can be obtained for non-performance of an award on which an action will lie. *Richmond v. Parkinson*, 3 Dowl. P.C. 703.

Where the time for making an award is enlarged by agreement, there being no authority for such an enlargement in the original submission, the new agreement must be made a rule of court before an attachment can issue for non-performance of an award made during the enlarged period. *M'Arthur v. Campbell*, 2 N. & M. 446.

The death of the defendant, after the making of an award in pursuance of a rule of court, where no verdict or judgment has been entered up, abates the suit, and the Court will not enforce performance of the award by attachment. *Maffey v. Godwyn*, 1 N. & M. 101.

It is not necessary that an affidavit for an attachment for not performing an award should state that it was made before the authority of the umpire expired, if the affidavit of execution appears from the jurat to have been sworn before that time. *Trew v. Burton*, 2 Law J. (N.S.) Exch. 236, a.c. 1 C. & M. 533; 3 Tyr. 559.

Where, after a demand and refusal to perform an award, an action has been brought on the award, the Court will grant an attachment for non-performance of the award, although the action has not been discontinued, on the terms of discontinuing the action and paying the costs thereon. *Paul v. Paul*, 3 Law J. (N.S.) Exch. 11, a.c. 2 C. & M. 235; 4 Tyr. 72.

Where a party was in custody on an attachment for non-compliance with an award, and the plaintiff commenced an action against him on the award, the Court ordered him to be discharged out of custody, upon his executing a bond to the plaintiff in the nature of bail, to the satisfaction of the Master.

*Earl of Lonsdale v. Whinnay*, 4 Law J. (N.S.) Exch. 7, s. c. 1 C. M. & R. 591; 5 Tyr. 205.

The Court cannot act on an award so as to pay money under it, until it is made a rule of court—semble. *Salmon v. Osborne*, 3 Law J. (N.S.) Chanc. 287, s. c. 3 M. & K. 429.

#### (K) PLEADING AND EVIDENCE.

An agreement of submission recited that a rate had been made and allowed for the relief of the poor of the parish of H; and that the plaintiff, a parishioner, was rated for several messuages, in aid of such rate, and that the plaintiff, conceiving himself to be overrated, had given notice to the defendants, the churchwardens and overseers of the parish, of his intention to appeal against the rate at the next General Sessions of the Peace for the county; and that the defendants did intend to defend the same; but that, in consequence of the parties thereto agreeing to leave the examination of the rate and all matters in dispute between them, as stated in the said notices, to arbitration, no appeal was entered against the rate as by law required; and that the parties, in order to put an end to all further expense, and to prevent litigation respecting such poor rate, and in order to settle and ascertain the subject of the said poor rate, and the equality or inequality thereof so far as related to the charges therein made on the plaintiff, as compared with the rate made on the other persons mentioned in the notice of appeal, had agreed to leave the same matters in difference between the parties thereto to arbitration. The agreement then witnessed that the defendants (as far as they lawfully might or could as such churchwardens and overseers), and the plaintiff did thereby severally and respectively mutually promise and agree to abide by the award of W. A., R. D., and P. B., or any two of them, to award and determine of and concerning the above-mentioned matters in difference, and of and concerning all and every the costs, charges, and expenses of the said agreement, and the counterpart thereof, and of the said notices of appeal, and of the said churchwardens and overseers, in consequence of such notices of appeal, and of their preparation to resist such appeal, and to support the rate, and all matters relating thereto respectively, so that they or any two of them made their award before the 5th of May then next; the costs of the arbitration and the award to be in the discretion of the arbitrators: and it was thereby further agreed, that that agreement and submission should be made a rule of the Court of King's Bench. The arbitrators took upon themselves the burthen of the award, and the time for making the award was by agreement enlarged to the 5th of June, before which day they published their award of and concerning the premises and matters to them referred, whereby they awarded that the defendants should, on delivery of that award, pay unto J. E. F., attorney for the plaintiff, 16*l.* 12*s.*—his bill already delivered, and the amount of the costs of the said J. E. F. attending that arbitration, and of the procuring the signatures of his client and the other parties to the said enlargement of time; and they further directed, that the defendants should deduct from the amount charged upon the plaintiff in all future rates the sum of 10*s.*, and return to the plaintiff the sum of 10*s.* for every rate granted and paid

by him since the then scheme had come into operation. The award further directed, that, as a dispute was made with regard to the quantity of the lake occupied by the plaintiff, the quantity should be ascertained by the parish, and the rate altered accordingly, agreeable to the price per acre as set against the said lake by the arbitrators in a schedule to the award. To a declaration on the above award, the defendants, after setting out the submission and award at full length, pleaded as follows:—"And the defendants, in fact, say, that the award is bad and void in law; and this they are ready to verify."

On demurrer to this plea, held that it was good in point of form and substance.

Held, also (Parke, B. *dissentiente*), that the submission and award were bad, inasmuch as the main object of the reference, namely, the rate, was not by law capable of being referred to the decision of an arbitrator; that the costs incurred were merely incidental to the determination of the former question; and that the consideration for the submission, therefore, wholly failed.

Held, also, by Lord Abinger, C.B., that the award was bad, in directing the churchwardens and overseers to return and refund to the plaintiff 10*s.* on each rate made since the new scheme had come into operation, as that was not binding upon them, inasmuch as they could not by law do so, and there was no power to make them obey the award in this respect. That the direction that the quantity of the lake occupied by the plaintiff should be ascertained by the parish, was also too vague and uncertain, and left it in doubt by whom it was to be done.

Held, by Parke, B., that, notwithstanding the reference of the rate was not binding on the churchwardens and overseers, the submission and award were still valid as to the other matters in difference referred to the arbitrators; and that the ascertaining the quantity of the lake was a mere ministerial act, which might be delegated to another, and the award was not invalid in this respect. *Thorp v. Cole*, 5 Law J. Exch. 24, 281, s. c. 2 C. M. & R. 367.

In *indebitatus assumpsit* for a debt, a plea of arbitrament of the plaintiff's claim, and an award that the defendant shall pay a sum of money, without an averment of the payment thereof, is no good plea in bar.

Thus—where, to an *indebitatus* count for 50*l.* for turnpike tolls, defendant pleaded, that differences had arisen between him and the plaintiff touching the plaintiff's claim; that the matter in difference was referred to arbitration; that each party mutually promised to abide by the award; and that an award was made, whereby the defendant was directed to pay to the plaintiff the sum of 13*l.*: the plea was held bad on special demurrer, because the award merely ascertained the existence and amount of the original debt, but did not change its character, or destroy its quality, and that the money payable under the award was nothing but the original debt so ascertained. *Allen v. Milner*, 1 Law J. (N.S.) Exch. 7, s. c. 2 C. & J. 47; 2 Tyr. 113.

If the agreement be not under seal, in an action on the award, the defendant may give in evidence, deficiency of assets under the general issue. *Crump v. Adney*, 2 Law J. (N.S.) Exch. 150, s. c. 1 C. & M. 355; 3 Tyr. 270.

## (L) COSTS.

[See *ante*, Form and Construction of Award, and Costs, Right of Defendant to.]

A plaintiff, who submits to arbitration, with a clause, that, if either party, by affected delay, or otherwise, prevents the arbitrator making an award, is liable to costs where the arbitrator is prevented from making his award in consequence of the plaintiff not being prepared with proper evidence, though he is ready to be examined in support of his own case. *Morgan v. Williams*, 2 Dowl. P.C. 123.

If an arbitrator, to whom a cause is referred by order of Nisi Prius, takes no notice in his award of a power, given him by the order, to give the defendant his costs, on the ground of an excessive arrest, but does dispose of the general costs of the cause, the Court will not interfere to give defendant his costs. *Greenwood v. Johnson*, 3 Dowl. P.C. 606.

The costs of shewing cause against a rule for setting aside an award, are costs in the cause, and the party, who alternately has the verdict in his favour, is entitled to have them taxed to him, notwithstanding the other party succeeds in part of his application. *Goodall v. Ray*, 4 Dowl. P.C. 1.

Where, by an agreement of reference, after reciting various disputes and claims by A and B, the parties to the agreement, and that an action of trespass has been commenced by A against B, "the aforesaid matters" are referred to C; and it is agreed that all the costs shall abide the event of the award, C cannot make any award as to the costs; and, unless C decides all the matters referred to him in favour of one party, the plaintiff and defendant must pay their own respective costs,—even though the arbitrator decides that the defendant has committed a trespass on the plaintiff's land. *Boodle v. Davies*, 4 N. & M. 788.

Parties in a cause referred all matters in difference to an arbitrator, with power to him to direct a verdict or nonsuit, and to order the defendant, although there should be a nonsuit, or a verdict for him, to pay any money, or do any other act which should be just and equitable, the costs of the suit and the costs of the reference to abide and follow the event of the award. The arbitrator directed a nonsuit, but awarded that the defendant ought to pay the plaintiff 25*l.*, and ordered him to do so:—Held, that the defendant was entitled to his costs of the suit, and the plaintiff to those of the reference. *Chittenden v. Walker*, 3 Ad. & E. 691.

A cause, in which money had been paid into court, was referred, with all matters in difference, the costs to abide the event. The arbitrators found that the plaintiff had no cause of action, but that there was a sum of 10*l.* due from the defendant for money lent to his wife, which was paid into court:—Held, that the plaintiff was liable to pay the costs. *Dawson v. Garrett*, 2 Dowl. P.C. 624.

A replevin suit and all matters in difference touching the distress, were referred to arbitration; the costs of the suit to abide the event. The arbitrator awarded, that the rent was 14*l.*, and that 6*l.* were due for rent at the time of the distress; that the plaintiff in replevin should pay the defendant 6*l.*, and that the action should be no further prosecuted. It did not appear for what rent the defendant had avowed.

Held, that the award did not shew who ought to pay the costs, which were to abide the event of the suit, and, consequently, it was not final. *In re Leeming v. Fearnly*, 5 B. & Ad. 403, a. c. 2 N. & M. 232.

The submission was of a cause and all matters in difference between the parties; the costs of the action, of the reference, and award, to abide the event. The arbitrators awarded that the action should cease and be no further prosecuted, and that, on the balance of accounts, a sum of money was due from the plaintiff to the defendant, which the former was directed to pay:—Held, that the award was sufficiently final. *Bardley v. Steer*, 4 Law J. (N.s.) Exch. 293, a. c. 2 C. M. & R. 327.

Plaintiff and defendant agreed, under a rule of court, to leave the cause of action and all matters in dispute to arbitrators, whose decision was to be final, and costs were to abide the event. The arbitrators award that the plaintiff had just cause of action upon some counts of his declaration, and are silent as to the others. They also find, that plaintiff is entitled to 5*l.* damages and his costs, and that both parties should give mutual releases of all causes of action:—Held, that such award was bad, inasmuch as the arbitrators withdrew themselves from the consideration of some of the counts, and thereby prevented the occurrence of that event which was to determine the costs, and which they were to abide. *Norris v. Daniel*, 3 Law J. (N.s.) C.P. 160, a. c. 10 Bing. 507; 4 Me. & Sc. 333.

Held, that the award of an arbitrator in a cause that had not arrived at issue, that the plaintiff had no cause of action, entitled the defendants to the costs of all the pleas. *Dibben v. the Marquis of Anglesea*, 4 Law J. (N.s.) Exch. 278, a. c. 2 C. & M. 722; 4 Tyr. 926.

Where two causes and all matters in difference were referred to arbitration, the costs of the cause and those of the reference to abide the event, an award of a sum of money to the plaintiffs in the first, in satisfaction of all matters in difference between them up to the time of the reference; and also to the plaintiff in the second, in satisfaction of all damage which he had sustained,—was held to be final, though the arbitrator made no adjudication as to the costs. *Jupp v. Grayson*, 4 Law J. (N.s.) Exch. 8, a. c. 5 Tyr. 150; 1 C. M. & R. 523.

An indictment for a nuisance was referred by order of Nisi Prius, with power to the arbitrator, in case he should find the defendant guilty of a nuisance, to direct what should be done; and in case he should be of opinion that, in point of law, the prosecutors were entitled to costs, the defendant undertook to pay them.

The arbitrator found the defendant guilty; and stated his opinion, that, in point of law, the prosecutors were entitled to costs:—Held, that this finding did not, according to the order, entitle the prosecutors to the costs of the reference or award; as they should have been specially provided for; nor the costs of a special jury, as they should have been applied for in court according to the 24 Geo. 2, c. 18, or made the subject of a special consent in the order of reference. *Rex v. Meale*, 1 Law J. (N.s.) K.B. 78, a. c. 3 B. & Ad. 237.

A party attending before an arbitrator by counsel must give express notice of his intention, and if he omit so to do, and the opposite side apply for an adjournment in order also to obtain the assistance of counsel, he will not be entitled to the costs of the day. *Whitley v. Merland*, 3 Law J. (N.s.) Exch. 58, s.c. 2 C. & M. 347; 4 Tyr. 255.

The plaintiff and defendant referred the matter in dispute to arbitration under an order of the Judge at Nisi Prius. By the terms of the arbitration, the death of either litigating party was not to operate as a revocation. Each party was at liberty to examine his adversary, and the rights of both were to be saved at equity. Pending the arbitration, and without being examined, the plaintiff died. The defendant continued to receive admissions for some weeks after the death, and then revoked his submission, upon the ground that the condition of the arbitration could not be complied with, as he, the defendant, was deprived of the benefit of the plaintiff's testimony. The matter being in consequence sent to trial:—Held, that the defendant should pay the costs of carrying the cause to trial, as, upon an examination of his motives, it did not appear to be his *bona fide* intention to examine the plaintiff, whose death he made the pretext for revocation. *Smith v. Fielder*, 3 Law J. (N.s.) C.P. 62, s.c. 10 Bing. 306; 3 Mo. & Sc. 858.

Where costs are directed to abide the event of an award, the Master's allocatur is insufficient to satisfy the Court that a party is entitled to the costs, but he must shew that an award has been made, and the event of it. *Spioey v. Webster*, 2 Law J. (N.s.) Exch. 58, s.c. 2 Dowl. P.C. 46.

An arbitrator awarded, that the plaintiff had no cause of action, and that a verdict should be entered for the defendant, and then, by mistake, directed, that the costs of the reference and award should be paid by the defendant, meaning the plaintiff:—Held, that the arbitrator, having executed his award in this form, could not rectify it. The plaintiff moved the Court for taxation of his costs as adjudged, or that the award which had been executed in duplicate, and one copy afterwards corrected by the arbitrator, might be set aside. The defendant not agreeing to this latter proposal, the Court ordered a taxation. *Ward v. Dean*, 3 B. & Ad. 234.

## ARMS AND GUNPOWDER.

Continuation of Acts relating to, in Ireland; 2 & 3 Will. 4, c. 70; 10 Law J. Stat. 196.

## ARMY.

Consolidation and amendment of laws relating to the Army prize-money, 2 Will. 4, c. 53; 10 Law J. Stat. 108.

Officers, their widows, representatives, &c., and persons on the Compassionate list, and civil officers on allowances payable by the Paymaster General, enabled to draw for payment of half-pay and allowances, 2 & 3 Will. 4, c. 106; 10 Law J. Stat. 259.

## ARREST.

[See BANKRUPT—EXECUTION—FOREIGN LAW—MALICIOUS ARREST.]

- (A) IN WHAT CASES ALLOWED.
- (B) AT WHAT TIMES AND PLACES ALLOWED.
- (C) PRIVILEGE FROM.
- (D) IRREGULARITIES.
- (E) WHAT CONSTITUTES AN ARREST.
- (F) PROOF OF.
- (G) RE-ARREST WHEN ALLOWED.
- (H) IN CRIMINAL CASES.

### (A) IN WHAT CASES ALLOWED.

A plaintiff may arrest a defendant after suing out three serviceable writs, the actions commenced by which he has not discontinued. *Chapman v. Vandevelde*, 3 Dowl. P.C. 313.

A plaintiff may, without distraining, arrest a defendant for a cause of action, although he has proceeded in an action commenced by serviceable process for the same cause, so far as to put it down for trial. *Brickline v. Smallwood*, 3 Dowl. P.C. 569.

The Court will not make an order to hold a tenant to bail under 11 Geo. 2, c. 19, s. 3, for double the amount of goods clandestinely and fraudulently removed from premises on which arrears of rent have accrued. *Sutton v. Onward*, 1 Dowl. P.C. 348.

A party cannot be held to bail for arrears of a fee-farm rent issuing out of premises situate in Scotland. *M'Kenzie v. Johnson*, 1 Sc. 594.

Where a plaintiff sued out serviceable process, and an order for particulars was made, and, two terms after suing out the serviceable process, he arrested the defendant:—Held, that the arrest was regular, although the order for particulars operated as a stay of proceedings in the first action. *Anonymous*, 1 Dowl. P.C. 59.

The obligor of an indemnity bond for payment of an annuity, may be arrested for the amount of arrears, which the plaintiff has been compelled to pay. *Anderdon v. Bell*, 1 Law J. (N.s.) Exch. 246, s.c. 2 C. & J. 630; 2 Tyr. 732.

### (B) AT WHAT TIMES AND PLACES ALLOWED.

A man arrested within the verge of the court is not entitled to be discharged, an arrest in a franchise being only the breach of the privilege of the lord of the franchise. *Kirkpatrick v. Kelly*, 3 Doug. 30.

To set aside an arrest in a wrong county, there must be an affidavit that it did not take place on the borders of the county, and that there is no dispute as to boundaries. *Webber v. Manning*, 1 Dowl. P.C. 24.

A defendant who has been wrongfully arrested upon a Sunday on a charge of forgery, without any warrant, may be lawfully arrested upon civil process as he is leaving the police office, after he has been ordered by the magistrate to be discharged. *Jacobs v. Jacobs*, 3 Dowl. P.C. 675.

The sheriff is not liable to an action for not arresting a party who is within a liberty (the writ directed to the sheriff having no *non omittas* clause); although, if under such a writ he do arrest, he will be liable to an action if he afterwards permit an escape. *Adams v. Osbaldeston*, 1 Law J. (N.s.) K.B. 162, s.c. 3 B. & Ad. 489.

## (C) PRIVILEGE FROM.

[See ACTION, Where maintainable—BANKRUPT, Rights and Privileges of.]

The king's chaplains, who have a yearly salary, are privileged from arrest. *Byrn v. Dibdin*, 4 Law J. (N.S.) Exch. 128, s. c. 1 C. M. & R. 821; 5 Tyr. 357.

The Court refused to discharge out of custody the Somerset herald, but put him to sue out his writ of privilege. *Leslie v. Disney*, 4 Law J. (N.S.) Exch. 15, s. c. 5 Tyr. 181; 1 C. M. & R. 578.

A lord of the bed-chamber is privileged from arrest. *Aldridge v. Barry*, 3 Dowl. P.C. 450.

A practising barrister, on his return from the Court of Quarter Sessions, where he has been actually engaged in business, is privileged from arrest, and his privilege is not lost by going into a shop, unless he remain there an unreasonable time. *Luntley v. —*, 2 Law J. (N.S.) Exch. 184, s. c. 1 C. & M. 579; 2 Dowl. P.C. 51.

A practising barrister attending the Court as a party, and not as counsel in a cause, is entitled to privilege from arrest, in returning home, and the officer will be ordered to pay costs. *Anonymous*, 4 Law J. (N.S.) Exch. Eq. 46, s. c. 1 Y. & C. 331.

The privilege of freedom from arrest of an ambassador's servant is the privilege of the ambassador, and not of the servant.

Where a person alleged to be a domestic servant of an ambassador is arrested, and neither the ambassador nor any one on his behalf interferes, the Court will not discharge the defendant out of custody, unless he shews a clear case of *bond fide* service as a domestic servant of the ambassador. *Fisher v. Begrez*, 2 C. & M. 240.

The mere fact, that the defendant's name is in the list of persons privileged as domestic servants of a foreign minister, transmitted by the secretary of state to the office of the sheriff of Middlesex, in pursuance of stat. 7 Ann. c. 12. s. 5, is not sufficient to induce the Court to excuse the sheriff from returning a writ of *feri facias*; but an actual and *bond fide* service, at the time of the delivery of the writ to the sheriff, and of the application to the Court, must be clearly deposed to by the affidavits.

*Semble*—That a chorister in a Catholic chapel, actually belonging to an ambassador, who is in that character *bond fide* attached to the embassy, and whose assistance is requisite in the performance of religious service for the ambassador and his suite, is within the protection of the statute as a domestic servant. *Fisher v. Begrez*, 2 Law J. (N.S.) Exch. 13, s. c. 1 C. & M. 117; 3 Tyr. 184; 2 Dowl. P.C. 279.

A petitioning creditor is protected from arrest in returning from the second meeting under the commission. The Court, by whose process he is arrested, is the proper Court to give relief. The Court do not view very strictly the party's direct return home. *Selby v. Hills*, 1 Law J. (N.S.) C.P. 55, s. c. 8 Bing. 166; 1 Mo. & Sc. 253.

A bankrupt attending the commissioners, and taken on a *copias utlagatum* in an action for debt, is entitled to his discharge. *In re Helsby*, 1 Law J. (N.S.) Bankr. 5, s. c. Mont. 355; 1 D. & C. 16; 1 M. & B. 79.

A witness attending at the request of a party, an arbitrator under a submission to be made a rule of court, is privileged from arrest. *Rishton v. Nisbett*, 1 M. & Ro. 347. [Alderson]

A defendant, who has been in custody on a charge of felony, and is acquitted and discharged, is not privileged from arrest on his return home; and the Court will not relieve him from such arrest, if it does not appear that his apprehension on the criminal charge was a contrivance to get him into custody on the civil suit. *Goodwin v. Lordon*, 1 Ad. & E. 378, s. c. 3 N. & M. 879; and see *Jacobs v. Jacobs*, 3 Dowl. P.C. 675.

A defendant, when discharged from legal custody, has no privilege from arrest in returning home. *Anonymous*, 1 Dowl. P.C. 157.

A person having made a motion in a cause to which he was party, left the court, and, in his way home, called at an office where he kept his papers, but did not reside, to refresh himself and sort his papers: he remained there between one and two hours, and then left the office and went into a tailor's shop in the same street, intending, however, to proceed home immediately, and being on his way thither when he so deviated. As soon as he entered the shop, he was arrested by a sheriff's officer, who had watched him from the court:—Held, that the privilege of the party, *redeundo* from the court, had not ceased when he was arrested, and that he was entitled to be discharged. *Pitt v. Coombes*, 5 B. & Ad. 1079, s. c. 3 N. & M. 212.

The defendant having been arrested on a writ *de contumace capiendo*, was brought up by *habeas corpus* before a Judge, and obtained his discharge; within two minutes afterwards he was again arrested on a writ *de contumace capiendo*, issued into Middlesex for the same cause:—Held, that he was privileged from arrest *redeundo* from his attendance before the Judge; and the Court discharged him out of the sheriff's custody. *The King v. Blake*, 2 Law J. (N.S.) K.B. 29, s. c. 2 N. & M. 312; 4 B. & Ad. 355.

Where the party pays the sum for which he is arrested, in order to free himself from an arrest, which turns out to be illegal, on account of his being at the time privileged from arrest, this Court will order the sum so paid to be restored, considering it to have been obtained by duress. *Pitt v. Coombes*, 4 Law J. (N.S.) K.B. 83, s. c. 2 Ad. & E. 459; 4 N. & M. 535.

The Court, in banc, has no power to discharge a suitor arrested on process out of another court, whilst attending the trial of his cause at Nisi Prius; but he must apply either to the Judge at Nisi Prius, or to the Court out of which the process issued.

An application in two actions, on the same ground; may be made on one affidavit, entitled in both actions. *Pitt v. Evans*, 3 Law J. (N.S.) Exch. 64, s. c. 2 Dowl. P.C. 223.

## (D) IRREGULARITIES.

[See BAIL, Bail-bond — MISNOMER — PRACTICE, Process.]

The Court will interfere to discharge a party from arrest, or set aside the bail-bond, where it appears plainly, on the face of the matter, that the arrest was groundless, but not where it would become necessary to try the merits of the case on detailed and contradictory statements in several affidavits.



It is not sufficient ground for such interference that the defendant, denying that he is indebted and advancing a number of facts in support of such denial, alleges his belief that the action is brought for the purpose of obtaining from him, by intimidation, a release of certain covenants, and states, that the plaintiff, or his attorney in his presence, on being refused such release a week before the arrest, declared that some strong measure must be adopted against the defendant. *Barton v. Haworth*, 4 B. & Ad. 462, s. c. 1 N. & M. 818.

A party irregularly arrested was discharged, on paying into court the sum claimed, and another sum as security for the expenses of the arrest. The Court, on motion made a year and a half after the arrest, ordered the money to be repaid to him, his application appearing not to have been unnecessarily delayed. *Pitt v. Coombes*, 4 Law J. (n.s.) K.B. 38, s. c. 2 Ad. & E. 459; 4 N. & M. 635.

The defendant was arrested on the 12th of May, carried to gaol on the 15th, and a declaration delivered on the 28th:—Held, that an application on the 4th of June to discharge him out of custody, on the ground that he had been carried out of the county, and there detained two days before he was taken to the county gaol, was too late.

*Quere*—Whether this would be any ground for discharging the defendant, even had the application been made in time. *Fowkes v. Stokes*, 2 Sc. 205.

To induce the Court to discharge a defendant from an arrest, on the ground of no debt being due, the circumstances must be exceedingly strong to shew that the arrest is an abuse of the process of the Court. *Tucker v. Tucker*, 1 Sc. 463.

Where the defendant, a foreign merchant, was arrested for several thousand pounds, it was held, that due diligence was used to ascertain his christian names, pursuant to rule 32, Hilary term, 2 Will. 4, though no inquiry had been made of the defendant or his immediate friends, or at his house or place of business; it appearing from the affidavits, that there was reason to fear that he might quit the country if he were informed that the plaintiff was about to commence proceedings. *Hicks v. Marreco*, 2 Law J. (n.s.) Exch. 17, s. c. 1 C. & M. 84; 3 Tyr. 216.

The Court will not order a bail-bond to be delivered up to be cancelled, on the objection that the defendant is misnamed in the affidavit of debt and process, if he is similarly named in the bail-bond. *Sengrover v. L'Amey*, 2 Law J. (n.s.) Exch. 47.

The sheriff's warrant on a writ of *capias* need not specify the court out of which the writ issued. *Astley v. Goodyear*, 3 Law J. (n.s.) Exch. 210, s. c. 2 C. & M. 682.

Rule to discharge a defendant out of custody, under an arrest as William Henry Maxwell, on the ground, that his real name was William Hamilton Maxwell,—discharged by the Court with costs, on an affidavit by the plaintiff, that the defendant had been known to him for five years by the name of William Henry; and on one occasion had told him that was his name; and had signed an agreement with other parties, wherein he was described as William Henry Maxwell, with the initials W. H. *Weston v. Maxwell*, 1 Law J. (n.s.) Exch. 78, s. c. 2 Tyr. 278.

A defendant who has been arrested on an affidavit of debt, wherein part of the cause of action is

stated defectively, is entitled to be discharged out of custody on filing common bail.

The Court will presume that he has been arrested for the whole sum sworn to in the affidavit of debt.

Thus, where an affidavit of debt by the payee against the maker of three promissory notes omitted to state when two of the notes were payable, or that they were overdue and unpaid, the Court discharged the defendant out of custody on filing common bail. *Kirk v. Almond*, 1 Law J. (n.s.) Exch. 112, s. c. 2 C. & J. 354; 2 Tyr. 316; 1 Dowl. P.C. 818.

If commissioners of bankrupt issue a warrant to apprehend a bankrupt, and direct the warrant—"To J A and W S, our messengers, and their assistants," &c., this warrant does not justify the apprehension of the bankrupt by any who is not in the presence, actual or constructive, of J A or W S; and, therefore, B, who was the assistant of W S in his business of sheriff's officer, is not justified in apprehending the bankrupt in the absence of W S and J A, although B has the warrant in his possession. Held also, that if B, in attempting to take the bankrupt, be struck down by the bankrupt with a stone, and, in a struggle which ensued, have a part of his nose bitten off by the bankrupt, this, in case death had ensued to B, would have been a case of manslaughter only. *The King v. Whalley*, 7 C. & P. 245. [Williams]

Where a defendant has been arrested for goods sold and delivered, and money lent and advanced, though the declaration contains no count for goods sold and delivered, the Court will not enter an exoneretur on the bail-piece. *Gray v. Harvey*, 1 Dowl. P.C. 114.

If a defendant on being arrested, does not name any safe and convenient dwelling-house within the county in which he is arrested, he may be taken immediately to gaol, notwithstanding the 32 Geo. 2, c. 28, s. 2. *Pitt v. Sheriff of Middlesex*, 1 Dowl. P.C. 201.

If a person employed by a sheriff's officer, after making the arrest, transfers the custody of the party arrested to an assistant of the officer, the officer is liable to the penalties of statute 32 Geo. 2, c. 28, notwithstanding the assistant's name is also in the warrant.

Beginning to carry, i. e. placing a party arrested on a coach, for the purpose of being conveyed to prison, within twenty-four hours after the arrest, is a carrying to prison within the meaning of the statute. A positive and express consent of the party arrested, is necessary to satisfy the words "voluntary consent," and, therefore, a mere acquiescence in the proposal of the officer to take him to a tavern, is insufficient.

The mere neglect of the party to nominate some "safe and convenient dwelling-house," does not justify the officer in conveying him to prison within twenty-four hours, but it is the duty of the officer previously to require him to nominate. *Deuhurst v. Pearson*, 2 Law J. (n.s.) Exch. 143, s. c. 1 C. & M. 365; 3 Tyr. 242; 1 Dowl. P.C. 664.

Under the 32 Geo. 2, c. 28, it is the duty of a sheriff's officer, who makes an arrest upon mesne process, to call upon the party arrested to nominate a private house of custody.

Nor is he relieved from such duty by the circum-

stance of the party making a resistance against being arrested at all. *Simpson v. Renton*, 2 Law J. (N.S.) K.B. 157, s. c. 2 N. & M. 52; 5 B. & Ad. 38.

The Court will not discharge a defendant out of custody, and cancel the bail-bond, on the ground, that the arrest was made contrary to good faith. *Udall v. Nelson*, 4 Law J. (N.S.) K.B. 160, s. c. 4 N. & M. 637.

#### (E) WHAT CONSTITUTES AN ARREST.

*Seem*, that in order to constitute an arrest, the warrant must be produced, but the closest watching of the defendant is not sufficient. *Robins v. Hender*, 3 Dowl. P.C. 543.

#### (F) PROOF OF.

The return of a sheriff's officer of the arrest of a party, and of the place where the arrest took place, annexed to the writ, according to the practice of the sheriff's office, signed by the officer, and sent by him to the sheriff's office, where it has been filed according to the course of the office,—is no evidence after the death of the officer, in an action between third parties, to prove the place where the arrest was made. *Chambers v. Bernasconi*, 3 Law J. (N.S.) Exch. 373, s. c. 2 C. M. & R. 347; 4 Tyr. 531.

#### (G) RE-ARREST, WHEN ALLOWED.

A party may be arrested a second time on the same affidavit, where the first action has been discontinued, and the second proceeding is with the same filacer. *Richards v. Stuart*, 10 Bing. 322.

After an arrest in a foreign country upon a judgment obtained there, the defendant, having escaped, may be again arrested here in an action on that judgment. *Allen v. Furnival*, 2 Law J. (N.S.) Exch. 88, s. c. 1 Dowl. P.C. 614.

A defendant who has been discharged out of custody, on a representation that he can and will obtain an acceptance for debt and costs forthwith, if he fail to do so, may be arrested a second time, without a Judge's order, on the same affidavit of debt. *Cantelow v. Freeman*, 2 Law J. (N.S.) Exch. 240, s. c. 1 C. & M. 586; 3 Tyr. 579; 2 Dowl. P.C. 2.

Where a party was arrested, and his attorney having pointed out an irregularity in the process, the plaintiff discontinued the action, taxed the defendant's costs, and paid them; and then sued out a fresh writ, and arrested the defendant thereon:—Held, that it was not necessary to give the sheriff notice of the discontinuance, although he had taken an undertaking for a bail-bond on the first arrest, and claimed to detain the defendant thereon, the latter not having sustained any damage. *Price v. Day*, 4 Law J. (N.S.) Exch. 118, s. c. 1 C. M. & R. 937; 5 Tyr. 456.

A defendant who, after an arrest, and payment of debt and costs to the sheriff, is again arrested by the sheriff of another county, on a concurrent writ of *copias ad satisfaciendum*, cannot maintain an action on the case against the plaintiff and his attorney, for not giving notice to the latter sheriff, that the first writ had been executed, and the judgment satisfied, or for not directing him not to execute the second writ, unless they have acted maliciously.

The discharge by the sheriff of a defendant taken in execution, upon payment of debt and costs, with-

out the consent of the plaintiff, is, it seems, illegal. *Lewis v. Morris*, 4 Law J. (N.S.) Exch. 264, s. c. 1 C. & M. 712; 4 Tyr. 907.

A plaintiff having discharged a defendant from custody on an arrest, upon his giving securities, cannot arrest him again upon the same debt, although the securities are of no value, if the defendant has not been guilty of fraud. *Wilson v. Hamer*, 1 Law J. C.P. 41, s. c. 8 Bing. 14; 1 Mo. & Sc. 120.

A defendant, who has been arrested in Ireland, and there put in special bail, who have been discharged on entering a common appearance, is entitled to be discharged out of custody, if again arrested in this country, in an action on the judgment in the former action. *Gunn v. McChintock*, 3 Law J. (N.S.) Exch. 201, s. c. 2 Cr. & M. 668.

A defendant being arrested for 70*l.*, it was agreed that he should be discharged out of custody on his accepting a bill for 30*l.*, drawn by a third person, and indorsed to the plaintiff. This bill was dishonoured, and renewed:—Held, that the plaintiff might arrest him on the renewed bill, which was not paid when due. *Hamber v. Cooper*, 4 Law J. (N.S.) Exch. 157, s. c. 2 C. M. & R. 148.

#### (H) IN CRIMINAL CASES.

##### [See CONSTABLE.]

A man may be arrested without warrant under 3 Geo. 4, c. 40, s. 5, as a person found in a dwelling-house, &c. with intent to commit a felony, if he is seen in the dwelling-house, but gets out of it, and he is taken of a fresh pursuit. And it makes no difference that he was not seen getting out of the house, and was found concealing himself on other premises near, to avoid being apprehended.

To make such an arrest legal, it is not necessary that the person should have at the time he is arrested a continuing purpose to commit the felony; he may be arrested though that purpose is wholly ended.

Where the circumstances are such, that a man must know why a person is about to apprehend him, he need not be told, and the arrest will be legal, and the resistance illegal, as much as if he had been told. *Rea v. Howarth*, 1 R. & M. C.C. 207.

A private person cannot apprehend another on suspicion of felony, for the purpose of taking him to the place where the theft was committed, in order to ascertain whether he was the thief. *Hall v. Booth*, 3 N. & M. 316.

If a constable take a man without warrant, upon a charge which gives him no authority to do so, and the prisoner runs away and is pursued by J. S., who was with the constable all the time, and charged by him to assist, and the man kill J. S. to prevent his retaking him, it will not be murder, but manslaughter only; because the arrest was illegal, and J. S. ought to have known it was, and then his attempt to retake was illegal also; and that though the prisoner, whilst in custody of the constable, struck the man by whom the charge was given, because a blow, whilst he was under the influence of the provocation from the illegal arrest caused by such man, would not justify the constable in detaining him; at least, it will make no difference if the blow was not likely to be followed with

dangerous consequences, nor made a new and distinct ground of detainer. *Rex v. Curran*, 1 R. & M. C.C. 132.

## ARSON.

[See INDICTMENT.]

A stack, of which the lower part consists of coleseed straw, and the upper part of wheat stubble, is not a stack of straw; and the setting it on fire is, therefore, not a capital offence within the statute 7 & 8 Geo. 4, c. 29, s. 17. *Rex v. Tottenham*, 7 C. & P. 237. [Gaselee]

Upon a statute which makes it capital to set fire to a stack of pulse, it is sufficient to state that the prisoner set fire to a stack of beans. The Judges will take notice that beans are pulse. *Rex v. Woodward*, 1 M. C.C. 323.

Setting fire to a score of faggots, which were piled one upon another in a loft, which was made by means of a temporary floor put over an archway, roofed in between two houses, and under which carts could go, is not setting fire to a stack of wood within the statute 7 & 8 Geo. 4, c. 30, s. 17. *Rex v. Arie*, 6 C. & P. 348. [Park]

It is not within 7 & 8 Geo. 4, c. 30, s. 2, for a wife to set fire to her husband's house. *Rex v. March*, 1 R. & M. C.C. 182.

A cart hovel, consisting of a stable roof, supported by uprights in a field at a distance from other buildings, is not an outhouse within the meaning of the statute 7 & 8 Geo. 4, c. 30, s. 2. *Rex v. Parrott*, 6 C. & P. 402. [Vaughan]

An open building in a field at a distance from, and out of sight of the owner's house, though boarded round and covered in, is not an outhouse within 7 & 8 Geo. 4, c. 30, s. 2. *Rex v. Elkington*, 1 M. C.C. 336.

A building had been built for an oven to make bricks, but afterwards was roofed, and a door put to it: in this place the prosecutor kept a cow; adjoining to it, but not under the same roof, was a lean-to, in which another person kept a horse. Neither the prosecutor nor the person of whom he rented this building had any house or farm-yard near it, nor did any wall connect it with any dwelling-house, the nearest dwelling-house being one hundred yards off, and not belonging to the prosecutor or his landlord:—Held, that the building was neither a stable nor an outhouse; and that if a person set it on fire (the lean-to not being burnt), he was not indictable for arson. *Rex v. Houghton*, 5 C. & P. 555. [Taunton]

If a person set fire to a stack, the fire from which is likely to, and which does, communicate to a barn, which is thereby burnt, the person is indictable for burning the barn. *Rex v. Cooper*, 5 C. & P. 535. [Parke]

A house may be described as in the possession of the actual occupier, though this possession be wrongful. *Rex v. Wallis*, 1 M. C.C. 344.

## ASSAULT.

[See EVIDENCE, In general—CONSTABLE—FALSE IMPRISONMENT—MISDEMEANOR—TRESPASS.]

(A) WHAT CONSTITUTES AN ASSAULT.

(B) PLEADINGS AND EVIDENCE.

(C) ASSAULT WITH INTENT TO ROB.

(A) WHAT CONSTITUTES AN ASSAULT.

If A comes up to attack B, and B puts himself into a fighting attitude to defend himself, this is not an assault by B, and will not, in an action by B against A for an assault, support a plea of *son assault demesne*. *Moriarty v. Brooks*, 6 C. & P. 684. [Lyndhurst]

If one of two persons fighting, unintentionally strikes a third, he is answerable in an action for the assault; and the absence of intention can only be urged in mitigation of damages. *James v. Campbell*, 5 C. & P. 372. [Bossanquet]

One of the marshals of the city of London, whose duty it was, on the day of a public meeting in the Guildhall, to see that a passage was kept for the transit to their carriages of the members of the corporation and others, directed a person in the front of a crowd at the entrance to stand back, and, on being told by him that he could not for those behind him, struck him immediately on the face, saying that he would make him:—Held, that in so doing, the marshal exceeded his authority, and that he should have confined himself to the use of pressure, and should have waited a short time to afford an opportunity for removing the party in a more peaceable way. *Imason v. Cope*, 5 C. & P. 193. [Tindal]

(B) PLEADINGS AND EVIDENCE.

Where a plea justified two assaults (the declaration only charging one), and no evidence was given of the second assault mentioned in the plea, and the jury found a verdict for the defendant:—Held, that as it was unnecessary to have justified a second assault in the plea, it was unnecessary to prove it. *Atkinson v. Warne*, 3 Dowl. P.C. 483.

If a party be charged before two Magistrates with an assault, and they dismiss the complaint, giving him a certificate under the statute 9 Geo. 4, c. 31, s. 27, he cannot avail himself of this certificate as a defence to an action for the same assault, unless it be specially pleaded. *Harding v. King*, 6 C. & P. 427. [Gurney]

By a private act of parliament, the shire-hall of G was vested in the Justices of the Peace for the county, in trust, to allow courts of justice to sit there, &c., and to permit and suffer it to be used for such other public purposes as a major part of the Justices in Sessions should direct. The hall had always been used for the holding of the county musical festivals; but, there was no evidence that the Justices had, under that act, so directed it to be used:—Held, that the stewards of one of these musical festivals had such a possession of the hall, that they might justify the turning out of an intruder. If in answer to a plea of justification, stating that the plaintiff was intruding himself there, the plain-

tiff rely on his having a ticket, as giving him a right to be there, he must reply that specially. A replication *de injurid* in trespass, with a new assignment, that the defendant committed the trespasses with more violence, and in a greater degree than was necessary for the purposes in the plea mentioned, is demurrable. *Thomas v. Marsh*, 5 C. & P. 596. [Parke]

If in an action for an assault, the defendant plead, that he was possessed of a public-house in which the plaintiff was making a disturbance, and that the plaintiff refusing to depart, the defendant laid hands on him, and turned him out; this plea is proved if it be shewn that, in consequence of the plaintiff refusing to go, the defendant assaulted him with a view of turning him out of the house, though in fact, the defendant could not succeed in turning the plaintiff out of the house. *Moriarty v. Brooks*, 6 C. & P. 684. [Lyndhurst]

A party, who has witnessed an affray, is justified in giving one of the affrayers in charge to a constable on the very spot where it was committed, and whilst there is a reasonable apprehension of its continuance.

It is not material who was guilty of the first wrongful act which led to the affray.

*Quere*—whether a private individual, who has seen an affray committed, may give in charge to a constable, who has not, and such constable may thereupon take into his custody the affrayers, or either of them, to be carried before a Justice after the affray has entirely ceased, and after the offenders have quitted the place where it was committed, and there is no danger of its renewal. *Timothy v. Simpson*, 4 Law J. (N.s.) Exch. 81, s. c. 1 C. M. & R. 757; 5 Tyr. 244.

A declaration in trespass for assault and battery stated, that defendant assaulted plaintiff, and wrenched a stick from his hands, and with the said stick, and with his fists, gave the plaintiff many violent blows, &c. Plea, as to the assaulting of the plaintiff with the said stick and with his fists giving him blows, &c., *son assault demesne* :—Held, after verdict, that the plea sufficiently justified the battery with the stick, as well as the assault with it. *Blunt v. Beaumont*, 2 C. M. & R. 412.

#### (C) ASSAULT WITH INTENT TO ROB.

If a person, with menaces, demand a sum of money of another, and that other does not give it to him, because he has it not with him, this is a felony within the statute 7 & 8 Geo. 4, c. 29, s. 6; but, if the person demanding the money knows that the money is not then in the possession of the party, and only intends to obtain an order for the payment of it, it is otherwise. *Rex v. Edwards*, 6 C. & P. 515.

A was decoyed into a house, and chained down on a seat, and compelled to write an order for the payment of the money, and an order for the delivery of a deed. The paper on which he wrote remained in his hands half an hour, but he was chained all the time :—Held, that this was not an assault with intent to rob within the statute 7 & 8 Geo. 4, c. 29, s. 6. *Rex v. Edwards*, 6 C. & P. 521.

## ASSESSED TAXES.

[See REVENUE.]

Continuance of compositions for, 2 & 3 Will. 4, c. 113; 10 Law J. Stat. 279; 3 & 4 Will. 4, c. 34; 11 Law J. Stat. 85; 4 & 5 Will. 4, c. 54; 12 Law J. Stat. 101. Relief from, in certain cases, 4 & 5 Will. 4, c. 73; 13 Law J. Stat. 147. Reduction of duties on dwelling-houses, and repeal of other duties of assessed taxes, 3 & 4 Will. 4, c. 39; 11 Law J. Stat. 89.

A bond given to commissioners by a collector of assessed taxes, and his surety, to secure due payment of monies collected, need not be stamped, although not taken in the precise amount required by 43 Geo. 3, c. 99, s. 13.

Such a bond need not be taken to his Majesty and his successors.

The collector in default on such bond is a competent witness against his surety.

The sale of the collector's lands and goods is not a condition precedent to putting such bond in suit.

To pay money collected for a given year to the account of a different year, is a breach of the condition for due payment. *Collins v. Gwynne*, 2 Law J. (N.s.) C.P. 49; s. c. 9 Bing. 544; 2 Mo. & Sc. 640, 775.

Plea, by the sureties in a bond given for the performance of the duties of a collector of assessed taxes, shewing that the commissioners and receiver-general have not taken such steps as are directed by the acts relating to the assessed taxes, to examine the accounts, and to enforce payment from the collector, are bad, on general demurrer.

A plea, that the commissioners did not imprison the person, or seize the estate of the collector, is bad; as such a plea should set forth that there were lands or goods of the collector, that might have been seized, to satisfy the deficiency, for which the bond is put in suit. *Wilks v. Heesley*, 2 Law J. (N.s.) Exch. 51, s. c. 1 C. & M. 249; 3 Tyr. 91.

## ASSESSMENT.

[See RATE.]

## ASSETS.

[See EXECUTOR AND ADMINISTRATOR.]

## ASSIGNEE.

[See BANKRUPT—INSOLVENT DEBTOR—LANDLORD AND TENANT.]

## ASSIGNMENT.

[See COVENANT.]

- (A) OF GOODS, CHATTELS, AND PROPERTY.
- (B) EQUITABLE.
- (C) OF A DEBT.
- (D) FOR THE BENEFIT OF CREDITORS.

- (A) OF GOODS, CHATTELS, AND PROPERTY.

Trover by the assignees of a bankrupt for goods and chattels possessed by the bankrupt as his own property, and converted by the defendants. Plea,

that before the bankruptcy the bankrupt assigned and conveyed the said goods and chattels to the defendants by deed, and that before the bankruptcy they took possession thereof, and kept and retained possession thereof. Replication, that the defendants did not take possession of the said goods before the bankruptcy. Issue being joined, a trial was had, and a verdict found for the plaintiffs. The Court, on a motion to enter up judgment for the defendants *non obstante veredicto*, gave the parties leave to amend, on the ground that the issue was an immaterial one, inasmuch as the conveyance of the property was complete without possession; and if it were intended to be shewn that the bankrupt continued reputed owner, that should have been especially replied. *Carr v. Burdiss*, 4 Law J. (n.s.) Exch. 60, s. c. 1 C. M. & R. 443; 5 Tyr. 136.

The want of possession under a bill of sale, is a badge of fraud only, and does not make the deed void. Therefore, where the possession of the vendor was consistent with the terms of a bill of sale, a party, claiming under it, was held capable of maintaining an action of trespass against the sheriff and his officer, who seized the goods under an execution upon judgment on a warrant of attorney given before the bill of sale, the judgment not having been entered up until after the execution of the bill of sale. *Martindale v. Booth*, 1 Law J. (n.s.) K.B. 166, s. c. 3 B. & Ad. 498.

If A, being in custody on a charge of felony, convey all his property in trust for his wife for life, and then in trust for his son, and on the next day A be convicted of the felony, this conveyance will be void as against the Crown. *Morewood v. Wilkes*, 6 C. & P. 144.

#### (B) EQUITABLE.

A being indebted to B, and an unascertained balance being due from C to A, A by letter requested C to pay such balance to B; C, by letter, consented to do so, on the amount being ascertained, but before it was paid to B, A became a bankrupt: and held, that the above circumstances amounted to an equitable assignment to B, of the debt due from C to A; and that the assignees under the commission against A, standing in the same situation as the bankrupt himself, could not maintain an action against C for the amount. *Crowfoot v. Gurney*, 2 Law J. (n.s.) C.P. 21, s. c. 9 Bing. 372; 2 Mo. & Sc. 473.

Monies were made payable by A to B at stated periods; and B gave a written authority to A to pay parts of the money to C; and notice of the authority was given to A by C:—Held, that such authority was an equitable assignment, and A was bound to pay the money to C. *Leit v. Morris*, 1 Law J. (n.s.) Chanc. 17, s. c. 4 Sim. 607.

#### (C) OF A DEBT.

To assumpsit by two plaintiffs, for goods sold, &c., defendant pleaded the bankruptcy of one. Replication, that before the bankruptcy, the bankrupt plaintiff assigned to the other all his interest in the debt, and that the bankrupt now sued only as trustee for his co-plaintiff.

The Court was of opinion that the replication was bad, for not stating that the debtor had had notice of the supposed assignment, although the defendant had pleaded over without alleging

the want of notice. But the plaintiff had leave to amend. *Dean v. James*, 1 Ad. & E. 809.

#### (C) FOR THE BENEFIT OF CREDITORS.

A, expecting an execution, executed a deed assigning all his property to trustees, for the benefit of all his creditors, after paying expenses, with a power to the trustees to retain money to pay the costs of an action, which had been brought by J S against A. This deed was executed at 9 A.M., on the 25th of February. A writ of *fi. fa.* was delivered to a sheriff's officer on the 24th, and by him delivered to the under-sheriff at 10 A.M. on the 25th:—Held, that the deed was good, notwithstanding the proviso to retain, and that the goods could not be taken under the *fi. fa.* *Boven v. Bramidge*, 6 C. & P. 140. [Tindal]

A list of creditors made out by the direction of a trader, who has made an assignment for the benefit of creditors to a trustee, for the purpose of informing them of the assignment, is admissible evidence in an action against the assignee, after the death of the assignor, as executor *de son tort*, in order to prove the *bona fides* of the assignment.

Cattle on a farm of a person carrying on trade, and occupying the farm—held, to pass under an assignment of "effects, stock, books, and book debts." *Lewis v. Rogers*, 3 Law J. (n.s.) Exch. 326, s. c. 1 C. M. & R. 48; 4 Tyr. 872.

#### ASSISTANT OVERSEER.

[See RATE, Inspector of Poor-rate.]

#### ASSIZES.

Provisions for the appointment of convenient places for holding. 3 & 4 Will. 4, c. 71; 11 Law J. Stat. 122.

Provisions for appointment of places for holding of, in Ireland. 5 & 6 Will. 4, c. 26; 13 Law J. Stat. 54.

Assizes for Norfolk and Norwich, to be held twice a year at Norwich. 2 Will. 4, c. 47; 10 Law J. Stat. 105.

#### ASSOCIATIONS.

[See 3 Will. 4, c. 4. for the suppression of dangerous associations and local disturbances in Ireland; 11 Law J. Stat. 6. The same act is continued by 4 & 5 Will. 4, c. 38; 3 Law J. Stat. 67.]

#### ASSUMPSIT.

[See PARTNERS—CONTRACT.]

(A) WHEN IT LIES.

(B) CONSIDERATION.

(C) PLEDINGS AND EVIDENCE.

#### (A) WHEN IT LIES.

[See CHURCHWARDENS AND OVERSEERS.]

Where a private act gives the trustees of a river navigation power to sue for arrears of toll "by action of debt, or on the case," assumpsit will lie. *Corbett v. Carpmael*, 2 N. & M. 834.

*Assumpsit lies for stallage. Mayor of Newport v. Saunders*, 1 Law J. (N.S.) K.B. 147, s. c. 3 B. & Ad. 411.

A privileged person having been arrested on process, was discharged out of custody by a Judge's order, which directed that no action for the arrest should be brought, provided the costs, to be taxed by the Master, were paid by the officer who made the arrest. He attended the Master, and paid the costs then allowed. These not being deemed sufficient, a fresh order was obtained for the Master to review his taxation, which he did, and allowed an additional sum. The officer refused to pay this, and an action of assumpsit was brought, in which the plaintiff alleged an agreement by the defendant, to pay the costs in consideration of his relinquishing his action for the false imprisonment:—Held, that the facts of the case did not support the allegation of the special agreement to pay the costs, without which, no action was maintainable. *King v. Taylor*, 4 Law J. (N.S.) Exch. 190, s. c. 2 C. M. & R. 235.

#### (B) CONSIDERATION.

The payment of the sum claimed, in an action for unliquidated damages, is a good consideration for a promise by the plaintiff to discharge the costs; and, per Littledale J., immediate payment of a specific ascertained debt, due from the defendant to the plaintiff, is a sufficient consideration for a promise by the plaintiff to discharge the costs already incurred.—The benefit which accrues to him by immediate payment, is sufficient consideration for a promise to forego costs, which he could not obtain until final judgment. *Wilkinson v. Byers*, 3 Law J. (N.S.) K.B. 144, s. c. 1 Ad. & E. 106; 3 N. & M. 853.

Declaration in assumpsit stated the delivery of goods to the defendant, and a promise by her to pay for them; and it appeared that, at the time of the delivery of the goods to the defendant, she kept a school; that her husband was alive, but for some cause was abroad; and that after the death of her husband she promised to pay for them:—It was held, that the averment in the declaration must be taken to be an averment of delivery of the goods to the defendant herself, which was not supported by the evidence.

In an action of assumpsit founded on a moral consideration, the consideration should appear on the declaration, to entitle the plaintiff to recover.

*Semble*, that a moral obligation is not always a sufficient consideration for a promise. *Littlefield v. Shee*, 1 Law J. (N.S.) K.B. 12, s. c. 2 B. & Ad. 811.

The declaration stated, that in consideration plaintiff at the request of defendant, had given defendant a letter, written by O, since deceased, by means of which letter defendant was enabled to and did determine controversies, and obtain a large portion of O's effects, defendant promised to give plaintiff 1,000*l*.:—Held, that a sufficient consideration was disclosed to sustain an action on the promise. *Wilkinson v. Olisatra*, 1 Bing. N.C. 490, s. c. 1 Sc. 441.

The declaration alleged, that one S, who had died intestate, was indebted at his decease to the plaintiff for arrears of rent, and had deposited, as a sol-

lateral security, a bill of exchange drawn by him upon one J F, accepted by him and indorsed by the drawer to the plaintiff; that, after his death, his widow continued to occupy the premises, and was in possession of goods on them; that the plaintiff intended to distrain, and she was desirous of giving up the possession at the ensuing quarter day, and of preserving her goods from the distress: whereupon, in consideration that the plaintiff would suffer her to quit the premises on that day, and would forbear to distrain, the defendant promised to pay part of the rent down, and the residue at the expiration of a year, the plaintiff giving up the bill of exchange. It was then averred, that the plaintiff did permit the widow to quit without being distrained upon; and the breach alleged was, that, though the plaintiff had offered to give up the bill of exchange, the defendant had refused to pay the rent:—Held, that the declaration was good, though it did not allege that the bill had been duly presented to the acceptor for payment and dishonoured, and that a sufficient consideration appeared on the declaration for the defendant's promise. *King v. Sears*, 4 Law J. (N.S.) Exch. 181, s. c. 2 C. M. & R. 48; 5 Tyr. 587.

Declaration stated, that one W P was indebted to the plaintiff in a certain sum, and that, in consideration the said W P, at the request of the defendant, had agreed to work for him at certain wages, and of his leaving the amount which might be earned of him by W P in defendant's hands, the defendant promised plaintiff to pay him the sum due to him from W P:—Held bad, in arrest of judgment, as no privity of consideration appeared to exist between plaintiff and defendant. *Price v. Easton*, 2 Law J. (N.S.) K.B. 51, s. c. 1 N. & M. 303; 4 B. & Ad. 433.

#### (C) PLEADINGS AND EVIDENCE.

[See ACCORD AND SATISFACTION—PLEADING, Replication—USE AND OCCUPATION. And see *Lysaght v. Walker*, 2 D. & C. A.C. 211, 2 Law J. Dig. 19, s. c. 5 Bl. n.s. 1.]

Since the new rules of Hil. term, 4 Will. 4, a defendant, under a plea of *non assumpsit* to a declaration on an account stated, cannot give in evidence another account stated subsequently to that specified in the particulars of demand; but he must plead payment or a set-off. *Fidgett v. Penny*, 3 Law J. (N.S.) Exch. 355, s. c. 1 C. M. & R. 108; 4 Tyr. 650.

A plea of payment in assumpsit, concluding to the country, is bad. *Ensall v. Smith*, 4 Law J. (N.S.) Exch. 5, s. c. 1 C. M. & R. 522.

In a declaration in assumpsit, on an agreement to pay on request a fixed sum for the costs and expenses of preparing a lease, alleging that the lease was prepared and accepted by the defendant, it is not necessary to state that costs and expenses were incurred, or the amount thereof, or that the defendant had notice of the same, and of the preparation of the lease. *Townsend v. Burns*, 2 Law J. (N.S.) Exch. 30, s. c. 1 C. & M. 177; 3 Tyr. 104; 1 Dowl. P.C. 629.

A count in *indebitatus assumpsit* by an administratrix, stated a debt and promise to pay in the lifetime of the intestate—"to wit, on the 2nd of January 1832," and a grant of letters of administration to the plaintiff after the death of the intestate

—"to wit, on the 11th day of January 1831," making profert of the grant, the date whereof is the day and year therein in that behalf mentioned—"to wit, the day and year last aforesaid:"—Held, on special demurrer, that the allegations of time were repugnant, and that neither could be rejected, as a material and traversable fact would be alleged without a day.

A count in assumpsit, stating a promise upon several considerations, one of which is bad, is good on special demurrer.

On general demurrer to a count in assumpsit, a statement of a promise under a *whereas* is sufficient.

Where the promise is to pay upon request, a request is unnecessary to be stated or proved. *Ring v. Roxborough*, 1 Law J. (N.S.) Exch. 168, s.c. 2 C. & J. 418; 2 Tyr. 468.

In assumpsit the defendant pleaded as to 14s. parcel, &c., that before the commencement of the suit he paid the same to the plaintiff, and as to the residue of the said monies, that he did not promise as in the declaration is alleged, and of this he puts himself upon the country. The plaintiff having specially demurred, alleging duplicity, and the want of a proper conclusion with a verification, the Court held the plea bad, and that judgment for the plaintiff must be upon the whole plea. *Ansell v. Smith*, 3 Dowl. P. C. 193.

Evidence of a special contract may be given under the general issue, to a declaration in the common form for goods bargained and sold. *Gardner v. Alexander*, 3 Dowl. P. C. 146.

To an action on a promissory note by the payee against the maker, the defendant pleaded that after the accruing of the cause of action to the plaintiff, he drew on the defendant a bill of exchange for a larger amount, for and on account of the said note, which the defendant accepted and delivered to the plaintiff, who took it on account of the said note:—Held, that this plea was bad, as well because it did not aver that the bill was accepted or delivered by the defendant, on account of the previous note, as also that it did not shew that it was given or received in satisfaction.

To the above plea the plaintiff replied, that the defendant neglected to pay the note, of his own wrong, and without the cause alleged in the plea; to which the defendant demurred, assigning for special cause, that it was multifarious and too general, and not proper in an action on promises. *Semble*, that this replication (if properly pleadable under any circumstances in such an action as the present,) was bad in this instance, as being inapplicable to the plea, and therefore not putting the matters of the plea in issue, for the plea did not shew any cause for not breaking the promise in the declaration, but merely stated a matter which had occurred subsequently, shewing that the plaintiff's right of action was suspended or transferred. *Cress v. Griffiths*, 3 Dowl. P. C. 753, s.c. 4 Law J. (N.S.) Exch. 199; 2 C. M. & R. 159.

In assumpsit, payments which do not amount to a bar to the action, but merely go to reduce the plaintiff's demand, need not be specially pleaded, but may be given in evidence in mitigation of damages under a plea of non assumpsit. *Ladiard v. Boucher*, 7 C. & P. 1. [Denman]. And see *Shirley v. Jacobs*, cited *ib.* p. 3.

Where there is a special contract for goods to be furnished, or work to be done, at a fixed price, and the declaration consists of the common counts in debt on simple contract, for goods sold and delivered, and for work and labour; to which the defendant pleads that he never was indebted, he may prove, as well since the new rules of pleading, Hil. 4 W. 4, Nos. 1 & 2, as before, that the goods delivered were not of the quality contracted for, or that the work was done in an improper manner. *Cousens v. Paddon*, 5 Law J. (N.S.) Exch. 49, s.c. 5 Tyr. 535.

To assumpsit for goods sold, &c. the defendant pleaded, as to 9l., part of the debt, that he at the plaintiff's request put his name as acceptor to a stamped bill of exchange for 20l. (there being no drawer's name to it,) partly for the debt and partly for his accommodation, and delivered the same to the plaintiff, who accepted it in payment of the debt, and that the bill had not become due at the time the action was commenced. The plaintiff replied that the bill then remained in his hands unnegotiated, and unpaid, and without any drawer's name put to it:—Held, that this replication was no answer to the plea, and that the plea was good. *Quare*, whether it would have been good if it had been demurred to. *Simon v. Lloyd*, 3 Dowl. P. C. 813.

To a declaration in assumpsit for non-performance of a contract to receive, and pay for, a copper made to order at a specified price per pound weight, the defendants pleaded, *inter alia*, payment into court of 15l., and that the plaintiff had not sustained damage to a greater amount:—Held, that they could not under this plea give in evidence, that they had countermanded the order when only a part of the work had been done. *Stevens v. Ufford*, 7 C. & P. 97. [Tindal]

## ATTACHMENT.

### 1. AT LAW.

[See LACHES.]

- (A) WHEN AND ON WHAT GROUNDS GRANTED.
- (B) FOR NON-PAYMENT OF MONEY AND COSTS.
- (C) FOR NOT OBEYING A SUBPENA—[See WITNESS, Attendance].
- (D) AGAINST SHERIFFS,
- (E) RULE FOR, AND WHEN AND HOW SERVED.

### 2. IN EQUITY.

#### 1. AT LAW.

- (A) WHEN AND ON WHAT GROUNDS GRANTED.

In order to obtain an attachment, it is not sufficient that all the necessary steps are taken partly at one time, and partly at another. *Rogers v. Twissel*, 3 Dowl. P. C. 572.

A defendant, who had been taken on an attachment for want of appearance, was discharged under 11 Geo. 4. & 1 W. 4, c. 36, before the plaintiff got an appearance entered for her:—Held, that, though a fresh subpoena might be issued against the defendant, no attachment could be taken out upon it. *Williams v. Townsend*, 6 Sim. 296.

In order to bring a party into contempt for non-delivery of a bond, pursuant to a rule of court, the demand of it must be made by one of the parties mentioned in the rule as entitled to receive it. *Ex parte Fortescue*, 2 Dowl. P.C. 448.

The alleged omission of certain items in an account delivered, is not a sufficient disobedience of a Judge's order to deliver an account, to sustain a motion for an attachment.

The non-delivery of an account, pursuant to a Judge's order, until the order has been made a rule of court, does not render the party so delaying the delivery liable to the costs of making the order a rule of court, for the purpose of obtaining an attachment thereon. *Lawrence v. Morgan*, 3 Law J. (N.S.) Exch. 60.

To obtain an attachment against an attorney for a contempt in not declaring the plaintiff's place of abode, pursuant to section 17 of 2 Will. 4, c. 39, it must appear on the affidavits that his name was indorsed on the writ.

An attorney may be guilty of a contempt within the act, by delivering a false description.

An attorney and his agent, who had delivered a false description, directed to pay the costs of inquiring as to plaintiff's address, and of a motion to the Court consequent thereon. *Neale v. Holden*, 3 Law J. (N.S.) Exch. 149.

Where a Judge ordered that on payment of a sum of money to the plaintiffs, or their attorney, certain title deeds should be given up to the defendant, and the money was tendered to the attorney, but the deeds were not given up; the Court refused an attachment against the plaintiffs, because notice had not been given to them of the tender, and the deeds had not been demanded of them personally. *Evans v. Millard*, 4 Law J. (N.S.) Exch. 156, s.c. 3 Dowl. P.C. 661.

#### (B) FOR NON-PAYMENT OF MONEY AND COSTS.

[See ATTORNEY, Summary Jurisdiction of the Court—Costs.]

If a rule of court requires a client to pay a certain sum of money, an attachment cannot be obtained against his attorney for its non-payment. *Poole v. Watkins*, 4 Dowl. P.C. 11.

Where an action was brought by an attorney for his bill of costs, and the defendant obtained an order to tax the bill, but which order did not contain any direction to the defendant to pay what was due, though he signed the usual consent in the Judge's book; and another order was afterwards made for reviewing the taxation, which also contained no direction to the defendant to pay what was due; and the Master found a sum of money to be due to the plaintiff, who made the latter order only a rule of court:—Held, that an attachment obtained thereon was irregular, as it did not contain any order on the defendant to pay. *Ryalls v. Emerson*, 2 Dowl. P.C. 357.

An attachment cannot be obtained for non-payment of costs, pursuant to the Master's *allocatur*, if there was no undertaking in the Judge's order for taxation to pay what should be found due. *Harrison v. Ward*, 3 Dowl. P.C. 541.

To obtain an attachment for non-payment of costs, a personal service and demand are absolutely necessary. *Stunell v. Tower*, 3 Law J. (N.S.) Exch. 353, s.c. 1 C. M. & R. 88; 4 Tyr. 862; 2 Dowl. P.C. 673.

In order to ground an attachment for non-payment of costs, pursuant to a rule of court, or the Prothonotary's *allocatur*, there must, in all cases, be a personal service; unless it appears that the rule or *allocatur* has been seen in the actual possession of the party. *Dicas v. Warne*, 1 Sc. 537.

The Court will not grant an attachment without personal service in any case where the party applying has another remedy. *In re Lowe*, 4 B. & Ad. 412.

A rule for an attachment for non-payment of costs, may, under certain circumstances, be obtained without personal service. *Allier v. Newton*, 2 Dowl. P.C. 582.

Personal service of an order for payment of costs by a plaintiff to a person not a party to the suit, will be dispensed with where the plaintiff cannot be found. *Hunter v. —*, 6 Sim. 429.

In order to obtain an attachment for non-payment of costs pursuant to the Master's *allocatur*, it is not indispensably necessary that a copy of the rule and *allocatur* should be left on the person of the defendant. *Rez v. Koops*, 3 Dowl. P.C. 566.

Personal service of the rule for payment of costs is necessary, in order to obtain an attachment, although the defendant is an attorney. *Albin v. Toormer*, 3 Dowl. P.C. 563.

Where it is clear that the copy of the rule and *allocatur* have come to the hands of the defendant, an attorney, the Court will grant a rule *nisi* for an attachment, although strict personal service has not been effected. *Phillips v. Hutchinson*, 3 Dowl. P.C. 583.

If facts are stated in support of an application for an attachment, from which it may be presumed that the person sought to be served has received notice of the contents of the rule and *allocatur*, and of the demand thereon; and on shewing cause against the rule such knowledge is not denied, the Court will direct the attachment to issue. *Bottomley v. Belchamber*, 4 Dowl. P.C. 26.

Where a person is in custody on an attachment for the non-payment of money, he will be discharged on an application to one of the Judges, where the process is not regular in respect to personal service. *Ex parte Malachy, re Bennet*, 3 Law J. (N.S.) Bankr. 86.

A personal service of the rule of court must be made, to ground an attachment for non-payment of money, pursuant to a Judge's order, which is afterwards made a rule of court; and service of the order and *allocatur* is not sufficient, nor is service of the rule on the London agents of the attorney sufficient; and for this defect an attachment issued at the end of January, and executed on the 12th of February, was set aside in Trinity term following. *Woolison v. Hodgson*, 3 Dowl. P.C. 178.

In order to bring a party into contempt by not paying money, according to an order, a demand of the money must be made after the order has been made a rule of court. *Chilton v. Ellis*, 2 Dowl. P.C. 338.

Where a demand is made of money, pursuant to the Master's *allocatur* by or under the authority of a power of attorney, a copy of the power must be left with the defendant, in order to bring him into contempt for non-payment. *King v. Packwood*, 2 Dowl. P.C. 570.

In order to obtain an attachment for non-payment



of costs, pursuant to the Master's *allocatur*, a demand is not necessary, if the party sought to be served, by his violence prevents the service from being made. *Wenham v. Downes*, 3 Dowl. P.C. 578.

An attachment for non-payment of costs may be obtained on the 22nd of April; although the affidavit does not shew that any demand was made since the 2nd of February. *Rex v. Rogers*, 3 Dowl. P.C. 605.

Eight o'clock in the evening is not an unreasonable hour to make a demand of costs, on a person upwards of eighty years of age.

After a demand and refusal of costs on Saturday evening, in the country, the attorney is not bound to give the party till Monday to pay the costs, but may send instructions to move for an attachment by the Sunday's post.

Accordingly, a demand and refusal of costs were made on a person upwards of eighty years of age, at eight o'clock on a Saturday evening, at a place one hundred and fourteen miles distant from London, and by the Sunday's post the London agent was instructed to move for an attachment. On the Monday, at twelve o'clock, the costs were paid to the country attorney, who, by the post of that day, wrote to countermand the motion, which countermand, however, arrived too late, as the attachment had been obtained on the Monday. The Court held the attachment regular, and discharged the rule to set it aside, with costs. *Phillips v. Phippard*, 1 Law J. (n.s.) Exch. 150.

In a cause, where W acted, with the knowledge of all parties, as the defendant's attorney in the country, and the name of T, agent of W, appeared as attorney upon the record:—Held, upon a rule requiring the plaintiff to pay costs, that a refusal to pay them to W, the attorney in the country, was a sufficient ground for the granting of an attachment. *Dennett v. Pass*, 4 Law J. (n.s.) C.P. 218, s.c. 1 Bing. N.C. 638; 1 Sc. 586.

Where, after a demand and refusal of costs, so as to bring a party into contempt, he is allowed to set off his own costs against the costs demanded, there must be a new demand of the amount due, after making this deduction, in order to obtain an attachment for non-payment. *Spivey v. Webster*, 2 Law J. (n.s.) Exch. 113, s.c. 1 Dowl. P.C. 696.

*Quære*—whether an action of *debt* can be maintained for an escape from custody, under an attachment for non-payment of costs, pursuant to a decree in equity—*semble*, that it cannot. *Blower v. Hollis*, 2 Law J. (n.s.) Exch. 176, s.c. 1 C. & M. 393; 3 Tyr. 357.

In order to obtain an attachment for non-payment of costs, pursuant to the Master's *allocatur*, it must appear by affidavit, that the persons denying the payment are those mentioned in the *allocatur*. *France v. Wright*, 3 Dowl. P.C. 325.

The plaintiff, an attorney, brought an action for his bill of costs. The defendant obtained an order to tax the bill, which order did not contain a submission or undertaking to pay the amount taxed. The usual submission was, however, entered in the Judge's book. The Master proceeded in the taxation, and made his *allocatur* for 6*d.* in favour of the defendant. The plaintiff applied on affidavits, and obtained another Baron's order for the Master to review his taxation. On the review, the Master made his *allocatur* for 1*l.* in the plaintiff's favour.

The plaintiff made the second order a rule of court, made a demand thereon, and moved for an attachment. Neither the first order, nor the submission in the Judge's book, was made a rule of court. The Court held, that the attachment was irregular, and set it aside. The plaintiff afterwards made the first order, and the submission in the Judge's book, a rule of court, served the two rules, the *allocatur*, &c., and made a fresh demand, and then obtained an attachment:—Held, that the second attachment was regular. *Ryalls v. Emerson*, 2 C. & M. 464, s.c. 2 Dowl. P.C. 357.

An attachment for non-payment of costs pursuant to the Master's *allocatur*, set aside, where, in the copy of the rule served on the defendant, the defendant's name was spelled Calver instead of Calvert, and the Master's name Day instead of Dax, although in the original rule the names were spelled correctly. *Rex v. Calvert*, 3 Law J. (n.s.) Exch. 16, s.c. 2 C. & M. 189; 4 Tyr. 77; 2 Dowl. P.C. 276.

Where a party is allowed to amend, on condition of paying costs; but he amends and proceeds without such payment, he is still not liable to an attachment. *Turner v. Gill*, 3 Dowl. P.C. 30.

An attachment for costs is now grantable without first issuing a *subpoena solwas*. *Doe d. — v. Barker*, 2 Dowl. P.C. 217; s. r. *Doe d. Fry v. Fry*, 3 Law J. Exch. 21, s.c. 2 C. & M. 234.

Attachment will be issued for not paying costs in ejectment on the Master's *allocatur* after judgment as in case of nonsuit, though no *subpoena solwas* has issued against the nominal plaintiff. *Doe d. Floyd v. Roe*, 4 Tyr. 85.

A conditional order for payment of costs cannot be enforced by attachment, although the step to be allowed on payment of costs has been taken without such payment. *Rese v. Fenn*, 2 Dowl. P.C. 182.

#### (D) AGAINST SHERIFFS.

[See SHERIFF.]

The defendants accepted a bill of exchange under the name and description of William Harris & Son. The plaintiff, as holder, arrested them for non-payment. The writ followed the description of the parties in the acceptance, and styled them "William Harris & Son." No bail having been put in, a rule which expired in the vacation was served on the sheriff to bring in the bodies. Upon rule for an attachment, and cause shewn,—Held, that the writ following the description of the parties as acceptors of the bill was defective, and that the sheriff was not liable to an attachment. *Rex v. the Sheriff of Worcestershire*, 3 Law J. (n.s.) C.P. 201.

An attachment against the sheriff for not bringing in the body is irregular, where the rule for allowance of bail has not been drawn up by reason of the misconduct of the plaintiff's attorney.

Therefore, where the Court permitted bail to justify after the usual time, on condition that the rule for allowance should not be drawn up until an acknowledgment of the plaintiff's attorney, that he had not instructed counsel to oppose, was produced, and the plaintiff's attorney admitted that he had not instructed counsel, but refused to give such acknowledgment,—an attachment against the sheriff afterwards obtained, was set aside for irregularity. *Anonymous*, 2 Law J. (n.s.) Exch. 46.

If an attachment issue against the sheriff for a

contempt, in not obeying the rule to bring in the body, upon motion to stay all proceedings upon such attachment, founded on the affidavit of the agent for the defendant in the original action, the Court will order the attachment to stand as a security to the plaintiff in such action.

*Smale*—That in the affidavit of merits made by such agent, he should use the words *is advised and believes*, and should not confine himself to a bare assertion of his belief. *Rees v. Sheriff of Lancashire*, 2 Law J. (N.S.) C.P. 67.

#### (E) RULE FOR, AND WHEN AND HOW SERVED.

A rule for an attachment for non-performance of the terms of the consent rule is properly entitled as in an action against the casual ejector, although obtained upon affidavits entitled as in an action against the tenant. *Key v. Bryant*, 2 N. & M. 666.

A rule to shew cause, granted on 42 Geo. 3, c. 99, s. 2, calling on an executor to account to the Commissioners of Stamps for the testator's personalty. That rule was served on the executor; but after repeated attempts to serve him with the rule absolute, the service could not be effected. The Court, on a very strong affidavit of the facts, granted a rule nisi for an attachment, unless cause was shewn in eight days, directing that rule to be served personally. *In re Barwick*, 5 Tyr. 431, s.c. 3 Dowl. P.C. 703.

The rule for an attachment for non-payment of costs, on the Master's *allocatur*, where accounts are referred to the Master, is, as in the other courts, a rule nisi only. *Anon.* 3 Law J. (N.S.) K.B. 41; s.c. as *Rees v. Spragg*, 2 N. & M. 678.

The rule for an attachment for non-payment of costs between attorney and client is nisi in the first instance. *Boomer v. Mellar*, 2 Dowl. P.C. 533. And see *Bray v. Yates*, 1 Dowl. P.C. 459, (*infra*) ATTORNEY AND SOLICITOR, Remedy for Costs; and s. F. *Green v. Light*, 3 Dowl. P.C. 578.

Where a rule nisi issues to shew cause why an attachment should not issue for not obeying a Judge's order, which has been made a rule of court, and the rule nisi is not personally served, but the party appears upon it, and objects to the want of personal service, such appearance waives the necessity of personal service. *Levi v. Duncombe*, 1 C. M. & R. 737, s.c. 5 Tyr. 490.

#### 2. IN EQUITY.

Attachment from the Court of Chancery, for non-payment of the costs of dismissing a bill, is not in the nature of a *ca. sa.* at law; and therefore, it seems sufficient if the sheriff has the body of the party, against whom it has issued, at the return; although he had before the return taken the defendant, and suffered him to go at large, but afterwards retaken him before the return. *Collard v. Hare*, 1 Law J. (N.S.) Chanc. 180, s.c. 5 Sim. 10.

A motion to discharge an attachment for costs, for irregularity, because two sets of subpoenas (*vide* the circumstances,) had been taken out, refused. *Chute v. Ross*, 4 Law J. (N.S.) Chanc. 67.

Attachment issued on the morning of the eighth day after appearance entered, has precedence of a demurrer filed the same morning. Motion to discharge a writ of attachment so issued on the ground of irregularity, dismissed with costs. *Taylor v. Sheppard*, 4 Law J. (N.S.) Exch. Eq. 7, s.c. 1 Y. & C. 94.

#### ATTAINER.

Lease for the lives of E G, H E, and E E, and the survivors and survivor of them, with a clause of re-entry "in case the said E G, his heirs, or assigns, should become insolvent, and unable in circumstances to go on with the said farm," &c. H E became entitled to the premises as special occupant, and afterwards committed felony, was convicted and attainted, but no office found; the reserved rent was afterwards paid, by the mother of H E and his sister, to the persons entitled to the reversion. On the death of the third life (E E), the reversioner let the premises to one I E, and then brought ejectment and recovered possession; and against the defendants, tenants in possession under a subsequent letting by him, this ejectment was brought, on the ground that the lease was still subsisting, with freehold in H E:—

Held, 1st, That admitting the conviction of H E to have created insolvency within the terms of the proviso, the acceptance of the reserved rent by the reversioner, even from those who had no title, was a waiver.

2ndly, That the bringing of an ejectment against I E, would have been a sufficient entry, although not done with the intent to avoid the lease for lives under the proviso for re-entry.

3rdly, That the attainted convict, before office found, could make a valid demise.

*Quere*—Whether such conviction did amount to insolvency within the terms of the proviso. *See d. Griffith v. Pritchard*, 3 Law J. (N.S.) K.B. 11, s.c. 5 B. & Ad. 765; 2 N. & M. 482.

#### ATTESTING WITNESS.

[See EVIDENCE, Private Writings—WARRANT OF ATTORNEY, Judgment.]

A joint and several promissory note was signed by S, and afterwards by defendant as surety for S. There was a subscribing witness to S's signature. Defendant being sued, alone, on the note, pleaded the Statute of Limitations; and at the trial it was proved, to take the case out of the statute, that a person named S had made payments on the note. Evidence, but not that of the subscribing witness, was offered to shew that the name S on the note was the handwriting of the party who made the payments:—Held, that this could not be proved without calling the subscribing witness; and that without such proof there was no *prima facie* case in answer to the plea. *Wylde v. Porter*, 1 Ad. & E. 742, s.c. 3 N. & M. 586.

#### ATTORNEY GENERAL.

[See CHARITY.]

It is irregular to obtain the fiat of the Attorney General to an information, original or amended, after it has been filed. *The Attorney General v. the Ironmongers' Company*, 4 Law J. (N.S.) Chanc. 5.

## ATTORNEY AND SOLICITOR.

[See DISCOVERY—EVIDENCE, Confidential Communications—PRACTICE, Proceedings, wherestayed—POWER OF ATTORNEY—PRISON—VENUE—WILL—EJECTMENT, Declaration and Service—PARTNERSHIP, Illegal.]

- (A) QUALIFICATION, ADMISSION, AND INROLMENT.
- (B) CERTIFICATE.
- (C) RETAINER.
- (D) DUTIES AND LIABILITIES.
- (E) PRIVILEGES AND DISABILITIES.
- (F) CONNEXION BETWEEN ATTORNEY AND CLIENT.
- (G) SUMMARY JURISDICTION OF THE COURT OVER.
- (H) CHANGING ATTORNEY.
- (I) UNAUTHORISED USE OF ATTORNEY'S NAME.
- (K) LIEN.
- (L) COSTS.
  - (a) *In general.*
  - (b) *Bill.*
  - (c) *Remedy for.*
- (M) STRIKING OFF THE ROLL.
- (N) RE-ADMISSION.
- (O) ACTION BY, AND EVIDENCE.
- (P) AGENT.
- (Q) ATTORNEY'S CLERK.

## (A) QUALIFICATIONS, ADMISSION, AND INROLMENT.

An attorney of the superior courts at Westminster is not entitled, as a matter of right, to be admitted an attorney of a local court, in which the number of attorneys has been, by a by-law, though not by immemorial usage, limited. *Rez v. the Sheriffs of the City of York*, 1 Law J. (N.S.) K.B. 211, s.c. 3 B. & Ad. 770.

Where an attorney had been admitted and had practised in the Court of Great Session in Wales, before the 11 Geo. 4. & 1 Will. 4, c. 70, but had ceased to practise, and was not "practising" at the passing of the act:—Held, that he was not entitled to have his name inrolled in the superior courts under the act. *Ex parte Garratt*, 2 C. & M. 410, s.c. 4 Tyr. 282; and see s. p. *Ex parte Roach*, 3 Law J. (N.S.) Exch. 92.

Where a clerk has been articulated to a second master, pursuant to the 22 Geo. 2, c. 46, s. 9, and the affidavit of such articles has not been filed within three months after execution in accordance with section 3 of that statute, he cannot be admitted; nor can such affidavit be filed *nunc pro tunc*. *Ex parte Joy*, 3 Dowl. P.C. 342.

Where a clerk has been unavoidably absent from his master's service for several months during the five years, but has served a similar period at the expiration of his articles, he may be admitted. *Ex parte Frost*, 3 Dowl. P.C. 322.

If, during the five years, an articulated clerk has been absent two months, by consent of his master, at his father's house, and at the end of the five years has served two additional months, he will be entitled to admission. *Ex parte Hubbard*, 1 Dowl. P.C. 438.

Digest, 1831—35.

If, during the five years, a clerk is assigned for a certain period, and at its conclusion re-assigned to his original master, the name of the assignee must be stated in; the notice of the clerk's intention to apply for admission. *Ex parte Jones*, 1 Dowl. P.C. 439.

An attorney, unable, from bodily infirmity, to attend to be sworn in, in the Court of Bankruptcy, was allowed to be admitted, on an affidavit sworn before a Master in Chancery. *Ex parte Swain*, 1 D. & Ch. 15.

A party, under special circumstances, admitted an attorney in the Court of Bankruptcy *nunc pro tunc*. *Ex parte Tanner*, 3 D. & Ch. 10.

Admission of attorney without a term's notice, under particular circumstances, for the purpose of practising in New South Wales. *Ex parte Hulme*, 4 Dowl. P.C. 88.

Severe illness, under certain circumstances, will be considered as an excuse for not complying with the rule of court, in putting up notices in the King's Bench office and outside of the Court of King's Bench, a term before applying for admission as an attorney. *Ex parte Herbert*, 2 Dowl. P.C. 172.

Where a mistake has been made in the notice of application to be admitted as an attorney, the Court will, on application, (made to them in the term next previous to the term when the application to be admitted is intended to be made,) allow the notice to be amended, and the party admitted on the last day of the subsequent term.

Thus, where, in a notice given at the commencement of Easter term, of the intention of A to apply to be admitted an attorney of King's Bench, the name of another individual was inserted, by mistake, in lieu of the name of the person with whom A had served his articles, the Court, upon an application in Easter term, allowed the notice to be amended, in order that A might be admitted on the last day of Trinity term. *Anonymous*, 4 Law J. (N.S.) K.B. 155, s.c. *In re Clarke*, 4 N. & M. 709.

Where a notice had been given in Hilary term of an intention to apply for admission in Michaelmas; and, subsequently, a notice had been given on the second or third day of Trinity term, to apply for admission at the end of that term:—Held, not a sufficient compliance with the rule of court, requiring a term's previous notice. *Ex parte Parsons*, 4 Law J. (N.S.) K.B. 205, s.c. 5 N. & M. 241.

Where a party was articulated in the name of G C, with a person in the name of E S, and the notice of application to be admitted was in the name of G A C, and stated the service to have been with E W S, the Court, on affidavit of identity, and that the notice contained the true names, allowed him to be admitted. *Ex parte George Anderson Crofts*, 4 Law J. (N.S.) K.B. 204, s.c. 5 N. & M. 58.

If the original indenture of clerkship is lost, a copy may be inrolled. *Ex parte Chapman*, 3 Dowl. P.C. 562.

Two persons in partnership as attorneys cannot recover in a joint action for business done in the Palace Court, if it appear that one of them only was a person authorized to practise in that court. *Arden v. Tucker*, 5 Car. & Pay. 246, s.c. 1 M. & Ro. 191;

G .

[Tenterden]; and see *Macgillan v. Henderson*, 2 C. & F. 1.

A solicitor of the Court of Chancery may carry on a suit in the Court of Equity in the Exchequer Chamber, in the name of a clerk in court of the King's Remembrancer, without being admitted and inrolled a solicitor in that court, and is entitled to his fees in respect thereof. *The Attorney General v. Malin*, 1 Law J. (n.s.) Exch. 184, s. c. 2 C. & J. 500; 2 Tyr. 512; 1 Dowl. P.C. 576; 1 You. 567.

A solicitor may practise as an attorney in the courts of law, in the name of an attorney, and by his consent; but an attorney may not practise as a solicitor in the courts of equity. An attorney who practises as a solicitor in a court of equity, without having been admitted a solicitor, can only recover from his client, on taxation, the money which he has actually paid to the clerk in court; and though his bill of costs has been taxed, and the money paid, yet the Court will order the Master to review his report, and the money overpaid to be refunded. *Hookley v. Bantock*, 3 Law J. (n.s.) Chanc. 98, s. c. 2 M. & K. 437.

To enable an attorney to recover his costs, he must be duly inrolled in the book kept by the clerk of the warrants; and he is obliged to take to that officer the parchment instrument of his admission, signed by the Judge, for the purpose of having his name so inrolled.

Where, in an action, the defendant has obtained a verdict, the Court will, upon motion on the part of the plaintiff, stay all further proceedings if the defendant's attorney has not been inrolled, though in other respects qualified to practise, on the ground that the defendant's attorney had not been inrolled an attorney of the court. *Humphrys v. Harvey*, 3 Law J. (n.s.) C.P. 300, s. c. 1 Bing. N.C. 62; 4 Mo. & Sc. 500.

In a penal action against the defendant for having acted as an attorney without being duly inrolled, the Court will not allow the inrolment to be made matter of record, so as to protect the defendant from the consequences of the action, and interfere with the rights of the party who sues. *Mathews v. Smith*, 4 Law J. (n.s.) C.P. 192, s. c. 1 Bing. N.C. 734; 1 Sc. 705.

#### (B) CERTIFICATE.

Where an attorney, through the negligence of his clerk, has omitted to make the entry, pursuant to the 37 Geo. 3, c. 90, s. 27, in due time, the Court will allow that entry to be made *nunc pro tunc* if he has taken out his certificate regularly and paid the duty for that year. *Ex parte Fry*, 3 Dowl. P.C. 338.

An attorney, who has taken out his certificate within a year from the expiration of a former certificate, but has transacted business between the expiration of the first certificate and taking out of the second, may recover for such business done, unless it appears that he delayed renewing the certificate with intent to evade the higher duties imposed by stat. 55 (1 Geo. 3, c. 184, sched. part 9, tit. 'Certificates') in which case he is disabled from recovering, by that act and by stat. 37 Geo. 3, c. 90, s. 30. *Munier v. Brown*, 2 Ad. & E. 116, s. c. 4 N. & M. 17.

Though an attorney, admitted and inrolled in one of the courts at Westminster, may, under the 2 Geo. 2, s. 24, s. 10, practise in the name of an-

other attorney, by the authority of such attorney, duly given according to the statute, in any other court at Westminster, in which he (the attorney first mentioned) has not been sworn or admitted; yet, if the attorney giving such authority have not duly taken out his certificate, any proceeding in his name after the period allowed for taking out such certificate has expired is irregular, and will be set aside by the Court. *Paterson v. Powell*, 2 Law J. (n.s.) C.P. 68, s. c. 9 Bing. 320, 620; 2 Mo. & Sc. 399, 773.

*Semble*—A solicitor on taking out his certificate, according to 37 Geo. 3, c. 90, will be entitled to his costs for business done previously in the same year. *Burchett v. Parsons*, 3 Law J. (n.s.) Chanc. 24.

If an attorney, who has not taken out his certificate at the suing out of the writ, proceed with an action after payment of the debt, and recover nominal damages, and issue execution, the Court, on motion by the defendant, will stay the proceedings.

Accordingly, an attorney sued out a writ in December, but omitted to take out his yearly certificate until the following March. The defendant paid the debt; but the attorney proceeded with the action, recovered nominal damages, and issued execution. The Court, on motion by the defendant, stayed proceedings. *Meakin v. Whalley*, 3 Law J. (n.s.) C.P. 298, s. c. 1 Bing. N.C. 59; 4 Mo. & Sc. 494.

An attorney, who has discontinued taking out his certificate for more than one whole year, is liable to the penalties of 22 Geo. 2, c. 46, s. 12, if he practises afterwards at the Quarter Sessions without re-admission. *Slack v. t., v. Williams*, 2 Law J. (n.s.) Exch. 23, s. c. 1 C. & M. 23; 3 Tyr. 158.

#### (C) RETAINER.

[See *INSOLVENT*, Authority to oppose.]

A solicitor ought to have a special authority from his client for instituting a suit, but such authority need not be in writing. *Lord v. Kellett*, 2 M. & K. 1.

If an attorney appears for one without authority, and he applies quickly to the Court—*Semble*, that the Court will interpose to protect him. *Williams v. Smith*, 1 Dowl. P.C. 632.

A, an attorney, was employed by B, another attorney, as his clerk, and it was agreed between them that A should have the benefit of the common law business. C applied at the office of B, and common law and other business was done for him there. In an action brought by A against C, for the common law business, held, that there was evidence to go to the jury of a retainer of A by C. *Semble*—That money paid cannot be given in evidence under a count on an account stated. *Penley v. Raynall*, 3 Doug. 155.

An attorney who takes proceedings on the faith of a retainer derived through a power of attorney, which turns out to be forged, proceeds at his peril, and is liable to pay costs to a party who is affected by such proceeding. *Doe d. Davies v. Eytan*, 1 Law J. (n.s.) K.B. 265, s. c. 3 B. & Ad. 785.

Where a solicitor, by mistake, has entered an appearance for a party, for whom he is not authorized, the Court will not, on the application of the solicitor alone, cancel the appearance. *Sambrook v. Hayes*, 4 Law J. (n.s.) Chanc. 175.

Where the plaintiff is out of the kingdom, and the plaintiff's attorney refuses to accept service of process in a cross action, the Court will not grant a rule, calling upon him to shew his authority. — *v. Davis*, 3 Law J. (n.s.) Exch. 212.

An attorney who is retained as the agent of a candidate to represent a place in parliament, is not entitled to recover anything for a retaining fee, unless there has been an express agreement that such fee should be paid to him. *Parker v. Robinson*, 7 C. & P. 241. [Williams]

#### (D) DUTIES AND LIABILITIES.

[See ATTACHMENT, For Non-payment of Costs.]

*Semble*—An attorney ought himself to peruse a title on the part of his client, before he sends it for counsel's opinion. *Drax v. Scrumps*, 1 Dowl. P.C. 69.

The prudent course for attorneys, when they enter into any arrangement with an opposite party, is to draw up a memorandum of the terms agreed upon, and read it over to the party and let him sign it. *Greenwood v. Eldridge*, 6 C. & P. 128. [Gurney]

An attorney who gives a false residence of his client, without using proper means to ascertain whether it is correct or not, subjects himself to the costs which may be occasioned by moving for an attachment against him: but he is not liable to pay the costs of the action, if he is *bona fide* unable, after proper inquiry, to give his client's residence. *Neal v. Holden*, 3 Dowl. P.C. 493.

An attorney is not justified in proceeding with an action after it has been settled between the parties themselves, though it is known that costs have been incurred, and that the plaintiff himself is not in a condition to pay them: it must be shewn affirmatively that the settlement was come to for the purpose of cheating the attorney. *Jordan v. Hunt*, 3 Dowl. P.C. 666.

An attorney in a cause is not answerable for the absence, neglect, or want of attention in counsel engaged in it. *Leury v. Guilford*, 5 C. & P. 234. [Taunton]

Vendor possessed of a term of years, each undivided moiety of which was determinable upon a life, assigned the term, with an unqualified covenant for quiet enjoyment, to a third person; at the time of the making the assignment one of the lives had died, to the knowledge of the defendant, acting as attorney on the occasion; consequently the vendor's title as to one moiety had determined. The vendee having been ejected, and having recovered damages from the plaintiff for the eviction:—Held, that he (the attorney) was liable to the vendor, for the injury occasioned by inserting the unqualified covenant for quiet enjoyment, the breach of which rendered him liable to damages.

*Quære*—Would it make any difference in the case of defendant, if the vendor also was, at the time of making the assignment, aware of the death of one of the lives? *Semble*, it would not; for, though aware of the fact, he may not have been aware of the legal consequences. *Stannard v. Ulkithorne*, 3 Law J. (n.s.) C.P. 317, a.c. 10 Bing. 491; 4 Mo. & Sc. 359.

In an action for a compensation for a contract, and for a proportion of salary due to the plaintiff, the defendant may give in evidence, accounts of re-

ceipts by the plaintiff, upon the general issue, with out notice of set-off.

Therefore, an action will not lie against an attorney for negligence, for not delivering, in such a case, particulars of the defendant's set-off in time. *Heathcote v. Wilkinson*, 1 Law J. (n.s.) K.B. 96.

Where it is doubtful, upon the construction of an act of parliament, limiting the time within which actions for anything done in pursuance of the act may be brought, whether defendant was within the protection, an attorney employed to bring the action is not liable to an action for negligence in not bringing the action within the time limited. *Kemp v. Burt*, 2 Law J. (n.s.) K.B. 69, a.c. 1 N. & M. 262; 4 B. & Ad. 424.

A solicitor of the Court of Chancery is liable to an action for damages resulting to his client, by the dismissal of a bill, in consequence of his neglecting to obey an order of the Court, although such order has been obtained prematurely, and is irregular, according to the practice of the Court, if he has allowed the time to elapse, during which he might have moved to vacate such order.

Accordingly, where the defendants, in pursuance of the printed orders, but before the time allowed by a subsisting order not contained therein, moved to dismiss the plaintiff's bill, and obtained thereon an order to go to commission in the ensuing vacation, and give rules to pass publication in the next term, and the plaintiff's solicitor omitted to give rules to pass publication, within the time required, and did not move to vacate the order, whereby the bill was dismissed:—It was held, that the solicitor was liable to the plaintiff for the costs incurred by him in respect of such bill, as well as the costs occasioned by two subsequent motions to restore the same. *Frankland v. Cole*, 1 Law J. (n.s.) Exch. 189, a.c. 2 C. & J. 590.

The defendant, who was the solicitor to the London creditors of a bankrupt, wrote to the plaintiff, the solicitor of the country creditors, a letter, wherein he stated, that he was willing "on behalf of the London creditors," to bear two-thirds of the expenses of the attendance of a barrister to resist a particular claim, and of investigating the accounts; concluding with the words—"I hereby undertake to bear and pay, on behalf of these creditors, two-thirds of the expenses incident thereto accordingly." A further attendance of a barrister becoming necessary, he again wrote—"I shall have no objection to bear, as before, the proportion of expense of the barrister attending the meeting stated in your letter":—Held, that the defendant was personally liable to the plaintiff for the two-thirds of the expenses he had so undertaken to pay. *Hall v. Ashurst*, 2 Law J. (n.s.) Exch. 295, a.c. 1 C. & M. 714; 3 Tyr. 420.

A letter from a client, wishing to change his solicitor for another solicitor, stating the amount of property in the suit and his own circumstances, and stating that the client is wholly unable to pay his solicitor's bill, and offering the conduct of the suit to the new solicitor, followed by a letter from the solicitor agreeing to act for the client in the suit, is not sufficient to constitute an agreement by the solicitor to look to the property for satisfaction of his costs, and to exonerate the client from liability.

A dismissal of a bill in Chancery, at the hearing, affords a presumption that the suit was improperly

instituted, but it is not a case for a reference to a Master for inquiry.

Where an action at law has been brought by a solicitor for his costs, and the defendant permitted judgment to go by default at law, equity cannot interfere to order taxation.

Counsel's opinion is not necessarily a justification of a solicitor for the course he adopts in the conduct of a suit.

Whether a petition of appeal can be brought by a party who is in contempt for non-payment of costs—*quære*. *Bryan v. Twigg*, 3 Law J. (N.S.) Chanc. 114.

#### (E) PRIVILEGES AND DISABILITIES.

[See ABATEMENT—NEW TRIAL—PRACTICE, Indorsement on Process—VENUE, Change of.]

An attorney, by employing another to bring an action for him, waives his privilege, and therefore cannot, as a matter of course, try his cause in the county of Middlesex. *Harrington v. Page*, 2 Dowl. P.C. 164.

An attorney is entitled to retain his venue in Middlesex, notwithstanding the Uniformity of Process Act and his not having entered his certificate. *Parlington v. Woodcock*, 2 Dowl. P.C. 550.

Since the Uniformity of Process Act, an attorney sued with an unprivileged person does not lose his own privilege, and cannot be arrested. *Keep v. Biggs*, 2 Dowl. P.C. 278.

Where an attorney of the King's Bench has been arrested on process issuing out of the Common Pleas, the King's Bench will relieve him summarily. *Anonymous*, 1 Dowl. P.C. 3.

An attorney of the Court of Common Pleas having arrested an attorney of the Court of King's Bench, the latter was discharged on finding common bail. *Carlton v. Donford*, 2 Mo. & Sc. 588.

A plea of privilege of attorney having been overruled by the answer, the defendant not permitted to avail himself of his privilege, from answering fully. *Skeates v. Shearly*, 4 Law J. (N.S.) Chanc. 5.

A plea of privilege by an attorney must be verified by affidavit, otherwise the plaintiff may treat it as a nullity and sign judgment. *Anonymous*, 4 Law J. (N.S.) C.P. 28.

An attorney sued jointly with an unprivileged person, is not liable to be arrested on a *capias*; but the unprivileged person may be arrested, and the attorney must be served with a copy of the *capias*, according to section 4 of 2 Will. 4, c. 39. *Pitt v. Pocock*, 3 Law J. (N.S.) Exch. 4, a.c. 2 C. & R. 146; 4 Tyr. 85.

If an attorney be arrested, and claim privilege, he must, in the affidavit on which the motion is grounded, allege that he is duly *certificated*—an allegation that he is *duly licensed* is not sufficient. *Clymer v. Mayhew*, 3 Law J. (N.S.) C.P. 47.

#### (F) CONNEXION BETWEEN ATTORNEY AND CLIENT.

[See ATTACHMENT, For Non-payment of Costs.]

[*Leves v. Morgan*, 3 Y. & J. 280, a.c. 2 Law J. Dig. 72. See *contra*, *Morgan v. Evans*, 8 Bligh, N.S. 777; *post*, PRACTICE IN EQUITY, Report.]

The contract between attorney and client is an entire contract to carry on the suit to its termination, determinable by the attorney on reasonable

notice only; and, therefore, where no such notice has been given, in an action by an attorney for business done in one cause, the Statute of Limitations is no bar to that part of the demand contracted more than six years before the commencement of the action. *Harris v. Osburn*, 3 Law J. (N.S.) Exch. 182, a.c. 2 C. & M. 623; 4 Tyr. 446.

A solicitor may refuse to continue in the conduct of a suit upon sufficient grounds, and, upon his giving up the suit before it is concluded, upon good grounds, he may sue his client for the costs incurred during the time of being employed. *Bryan v. Twigg*, 3 Law J. (N.S.) Chanc. 114.

An attorney may refuse to proceed with a cause, unless he be supplied with funds; but he must give reasonable notice to that effect. Therefore, where on the commission day of the notices, he said that he should not deliver briefs till the plaintiff gave him money to fee counsel,—that was held not to be sufficiently reasonable notice to entitle him to abandon the case, because he had received no money; although the plaintiff promised to return and bring the money, but did not, before the cause was called on. *Heby v. Beait*, 1 Law J. (N.S.) K.B. 121, a.c. 3 B. & Ad. 350.

To entitle an attorney to costs, he is not compelled to proceed to the end of a suit, but may, upon reasonable cause and reasonable notice, abandon the further conduct of the suit, and recover his costs for the time during which he was employed. *Fausenda v. Browne*, 2 Law J. (N.S.) C.P. 34, a.c. 9 Bing. 402; 2 Mo. & Sc. 543.

An attorney who has undertaken a cause, is not bound to proceed without adequate advances from time to time by his client, for expenses out of pocket; and, therefore, the Court will not compel an attorney, even after notice of trial, to carry the cause into court, unless the client supply him with sufficient funds to pay the expenses out of pocket thereby incurred. *Wadsworth v. Marshall*, 1 Law J. (N.S.) Exch. 250, a.c. 2 C. & J. 665.

An attorney, who has commenced an action for his client, has a right to refuse to go on without an advance of money on account, provided he gives his client sufficient notice of his intention, to enable him to make the required provision. *Lawrence v. Potts*, 6 C. & P. 428. [Tindal]

An attorney, who has been discharged by his client, except for misconduct, will not be restrained from acting, in the same cause, for the opposite party, unless it clearly and distinctly appear that he has obtained information in his former character, which it is essential to conceal, and which it would be prejudicial to the cause of his former client to communicate.

Accordingly, the Court refused to restrain an attorney from acting for the defendant in an action by the assignees of a bankrupt, in an affidavit by their then solicitor and his client, that he had formerly been the plaintiff's attorney, and was dismissed by them; and that, in that character, as appeared from his bill of costs, he had taken the opinion of counsel on all the facts of the case, had consulted with the bankrupt, had delivered the issue, drawn copies of the pleadings, and had given notice of trial, and, as the deponents verily believed, was fully acquainted with all the facts and circumstances in the cause, and that his being employed by the defendant

would injure the plaintiffs in the action. *Johnson v. Marriott*, 3 Law J. (n.s.) Exch. 40, s.c. 2 C. & M. 183; 4 Tyr. 78.

The Court refused to restrain the defendant's attorneys from acting in the cause, on the ground that they, acting for the defendant and for other parties in a Chancery suit, had obtained a knowledge of the plaintiff's case, the defendant having had no interest in that suit; the defendant's attorneys deposing that they had not thereby obtained any more information respecting the plaintiff's case than would be afforded by a bill of particulars. *Grissell v. Peto*, 1 Law J. (n.s.) C.P. 139, s.c. 9 Bing. 1; 2 Mo. & Sc. 2.

Where advances have been made by a solicitor to his client, by way of loan, the client being in distress, a general account will be ordered of such transactions. *Hicks v. Morland*, 1 Law J. (n.s.) Chanc. 206.

B, a solicitor, not having delivered his bill of costs, represents to his client that he is indebted to him in a certain sum, for which he induces him to execute a bond to W, to whom B is indebted in the same amount, B having acted as W's solicitor: W held to be affected with B's knowledge in the transaction. *Harrison v. Wiltshire*, 4 Law J. (n.s.) Chanc. 260.

An attorney who has the deeds of his client intrusted to his care, is bound to know where they are; and if, upon being employed by his client to raise a loan, he deposits those deeds as an additional security, without informing his client of his intention to do so, and the attorney afterwards forgets what he has done with them, such deeds must be considered as "mislaid by him." *Wilmut v. Elkington*, 2 Law J. (n.s.) K.B. 103, s.c. 1 N. & M. 749.

On a contract for the sale of part of an estate, the purchaser requiring a fine to be levied of it for the purpose of removing admitted defects in the title, the vendor employed an attorney, who was his relation, and had been professionally employed by him on previous occasions, to levy the fine and complete the contract. The attorney advised the levying of a fine of the whole of the vendor's estate, without telling him the effect of it; such fine was accordingly levied, and the vendor died without declaring its uses, and without republishing his will, previously made, by which he had devised the whole estate to his wife, who survived him. After the vendor's death, the attorney claimed the estate as his heir-at-law, alleging that the will was revoked by the fine, and he brought actions of ejectment to recover possession thereof. The widow filed a bill in Chancery for relief, and on an issue directed by that Court, a jury found that the attorney fraudulently omitted to tell the vendor what effect the fine would have upon a devise of the property comprised in it. The Court of Chancery, upon that verdict, decreed the attorney to be a trustee for the devisees of the lands and hereditaments, which so descended to him as heir-at-law. The House of Lords, affirming that decree, further held, that the attorney's alleged ignorance of the effect of a fine on a will of the lands comprised in it, and his omission to inquire whether the donor, his client, had made a will, were such professional ignorance and neglect as afforded a principle by which a court of equity might, independent of the ground of fraud, hold him to be a trustee for a third person, of any benefit resulting to himself from his professional ignorance or neglect,

to the prejudice of that person. *Bulkley v. Wilford*, 2 C. & F. 102, s.c. 8 Bligh, n.s. 111.

Where an attorney is employed both by vendor and vendee to draw a lease, and the draft is left in his custody, he cannot give evidence of it without the consent of both vendor and vendee. *Doe d. Strode v. Seaton*, 4 Law J. (n.s.) K.B. 13, s.c. 2 Ad. & E. 171; 4 N. & M. 81.

The Court will not interfere to set aside an order of *Nisi Prius* at the instance of a person who, "by his attorney," has consented to become a party thereto, on the ground that, nominally, he is no party to the suit, and gave his attorney no authority to consent, unless he has repudiated the agreement, and applied to the Court as early as possible.

In general, it seems that they will not relieve a client against such an act of his attorney in a summary way; on the other hand, they will not enforce the order by process, but will leave the question of authority to be decided in an action upon the agreement. *Thomas v. Hewes*, 3 Law J. (n.s.) Exch. 158, s.c. 2 C. & M. 519; 4 Tyr. 335.

The Court will not stay proceedings in an action against an attorney for the balance of the proceeds of an execution pending a rule before the Master, calling upon the plaintiff or the attorney to refund a part of the amount levied, except upon payment of the amount of the balance into court. *Sibley v. Lester*, 3 Law J. (n.s.) Exch. 62.

The Court will not order a solicitor to produce documents prepared by the defendant as instructions for commencing proceedings at law.

Therefore, an order to produce "a statement of the illness and death" of a party whose life was insured, and a letter inclosing the same, sent by the defendant to his attorney, with a view to commence an action against the insurance office, refused. *Bland v. Wainwright*, 4 Law J. (n.s.) Exch. Eq. 19.

Where a plaintiff was nonsuited, and a rule *nisi* was afterwards granted to set aside the nonsuit on payment of costs, and then the parties entered into an arrangement without the intervention of the defendant's attorney to settle the action by the defendant's giving a bill of sale and warrant to the plaintiff for his debt and costs, but without providing for the costs due by the defendant to his attorney, and the attorney thereupon got the rule discharged for setting aside the nonsuit:—Held, that he was justified in so doing. *Young v. Redhead*, 2 Dowl. P.C. 119.

The defendant received the effects of an intestate, under an administration granted to him in Bengal as the attorney of the plaintiff, who was a bond creditor of the intestate. Administration was afterwards granted in this country, and notice was given by the English administrators to the defendant not to pay over the effects in his hands to the plaintiff:—Held, that the defendant could not deny the title of the plaintiff, but that he was bound to pay over to him the effects of the intestate in his hands. *Farrington v. Clerk*, 3 Doug. 124.

A solicitor, whose bill had been taxed, and more than one-sixth taken off, brought an action against his client, before the costs of taxation were ascertained, for the amount so taxed; the Court granted an injunction to restrain the action. *Barr v. Wiggins*, 4 Sim. 125.

An attorney has no right as against his client to retain money in his hands, which he has received as

attorney for his client, even though it should be the proceeds of an execution against the goods of a defendant who objects to the amount levied, and who has a rule then pending before the Master, calling on the plaintiff or his attorney to refund part of the money. *Sibley v. Leicester*, 2 Dowl. P.C. 234.

Where the plaintiff's attorney receives a sum of money from the defendant, it is incumbent on the plaintiff to shew, that the receipt was without his authority, otherwise it is money paid to his use. *Varley v. Garrad*, 2 Dowl. P.C. 490.

An attorney having taken a bill of exchange from his client in payment of a bill of costs, but the bill of exchange not being paid, the attorney had been sued upon it, the Court allowed him to pay the costs of taxing his bill (more than a sixth having been taken off) to the holder of the bill, in part payment. *Woodison v. Hodgson*, 2 Dowl. P.C. 351.

#### (G) SUMMARY JURISDICTION OF THE COURT OVER.

##### [See ATTACHMENT.]

A motion to compel an attorney to answer the matters in an affidavit, cannot be made on the last day of term. *Re Turner*, 3 Dowl. P.C. 557.

A rule calling on an attorney to answer the matter of an affidavit, cannot be moved for four days before the end of the term; neither can cause be shewn against such a rule on the last day of term. *Ex parte —*, 2 Dowl. P.C. 227.

An application for a rule requiring an attorney to answer the matters of an affidavit must be made by a gentleman at the bar. *Ex parte Pitt*, 2 Dowl. P.C. 439, n. c. 5 B. & Ad. 107.

An attachment against an attorney for misconduct cannot be moved for by a complainant in person, but the motion must be made by a gentleman at the bar. *Ex parte Fenn*, 2 Dowl. P.C. 527; and *In re —*, *Gent*, 3 N. & M. 566; *infra*, Striking off Roll.

Unless there is a cause in court, an application cannot be made at chambers against an attorney. *Ex parte Higgs*, 1 Dowl. P.C. 495.

An attorney giving an undertaking for another, in a cause in which he is not concerned as attorney, will not be forced summarily to fulfil it; but the party to whom it is given will be left to his action. *Walker v. Arlett*, 1 Dowl. P.C. 61.

The undertaking of an attorney cannot be summarily enforced, unless he is acting as attorney in the cause. *Re Bateman*, 2 Dowl. P.C. 161.

The Court will not entertain a motion touching the conduct of an attorney, unless it appears upon affidavit that he is an attorney of the court, or that the transaction arises in part at least out of a cause before the Court; nor will the Court exercise its summary jurisdiction over an officer, unless in a case of palpable fraud. *In re Lord*, 2 Sc. 131.

Directing an attorney to employ a proctor to obtain probate of a will, is not such an employment of him in the character of an attorney as will give the Court summary jurisdiction over him as to money received by him to pay the proctor. *Ex parte Cowie*, 3 Dowl. P.C. 600.

The undertaking of an attorney can only be enforced by attachment, where he has given it for his client. *Ex parte Watts*, 1 Dowl. P.C. 612.

A promise by an attorney after trial to pay a witness a compensation for his loss of time, cannot, it

seems, be enforced either by action or attachment. *Bates v. Sturges*, 2 Mo. & Sc. 172.

The Court cannot permit an attorney to have the benefit of executions issued against a client for damages and costs, which the former has been compelled by a rule to pay in consequence of a personal undertaking.

*Semble*, that the Court will enforce a verbal undertaking by an attorney on behalf of a client to pay damages and costs where the other party has been thereby induced to consent to take a verdict for a certain sum instead of going to the jury. *Kite v. Millman*, 2 Mo. & Sc. 616.

Where an attorney of one Court gives his undertaking, as an attorney, for a debt and costs in an action in another, the Court, of which he is an attorney, will compel him to fulfil his undertaking, though void by the Statute of Frauds. *In re Patterson*, 1 Dowl. P.C. 468.

The Court will not grant an application requiring an attorney to pay over the interest of a sum of money, which has come improperly into his hands. *Fenn v. Wild*, 1 Dowl. P.C. 293.

This Court will not call upon an attorney to repay money, or to account before the Master, on the grounds merely, that the attorney obtained such money from his client as if for the purpose of a suit, but that his bill is said not to account satisfactorily for the obtaining and application of such money, that the amount obtained seems immoderate, and that the client states a case of fraud. *In re Marrie*, 2 Ad. & E. 582.

Where an attorney received a promissory note from a father of a clerk, articulated to him, as his fee for taking him, on an undertaking that the note should not be negotiated until the expiration of a certain period, and he did negotiate it contrary to his undertaking, the Court compelled him to take it up. *Ex parte Gardner*, 2 Dowl. P.C. 520.

The Court will not interfere summarily to try the question of negligence on the part of an attorney towards his client's interest. *Brasier v. Bryant*, 2 Dowl. P.C. 600.

Where a client obtained an order that his attorney should deliver him an account of all monies received on his behalf, and they accordingly delivered an account, the Court refused to grant an attachment against them upon affidavits impeaching the correctness of the account. *Ex parte Laurence*, 2 Dowl. P.C. 280.

An attorney, who is party in a cause, giving an undertaking to the sheriff in that cause, is not liable to have that undertaking summarily enforced by the Court. *Northfield v. Orton*, 1 Dowl. P.C. 415.

After the lapse of nine years, the Court will not compel an attorney to deliver bills for business done by him, without some suggestion of fraud, mistake, or overcharge. *Manning v. Brown*, 3 Dowl. P.C. 31.

Where a rule nisi calling upon an attorney to shew cause why he should not deliver up deeds, &c. to his client, has been obtained and enlarged, the attorney may shew for cause in the intervening vacation, he was, by an order of the Court of Chancery, required to deliver the same deeds, &c. into the hands of the officer of that court, upon a day earlier than that on which such cause is shewn.



The Court will not order an attorney to deliver up papers, &c., when by an order of another Court such attorney has been required to deliver them up to the officer of the latter Court.

When deeds, &c. of a testator are delivered to an attorney in that character by an executor, to whom the testator devised his property in trust for other persons, the attorney cannot, against an application by the executor to the Court to compel him to return those deeds, excuse himself on the ground of an equitable interest under the trusts personally vested in him, the attorney. *In the matter of Walmesley*, 4 N. & M. 543, s. c. 2 Ad. & E. 576.

If a party successfully resists an action by an attorney plaintiff for costs, on the ground of his never having been employed as his attorney, he cannot afterwards summarily compel the attorney to give up documents which have come to his possession in the course of the business, for doing which the action was brought. *Ex parte Elizabeth Maxwell*, 4 Dowl. P.C. 87.

The Court can only interfere to compel an attorney to deliver up deeds in his possession at the instance of the party who deposited them with him. *In re Thornton*, 2 Dowl. P.C. 156.

Where an attorney had obtained, from an aged lady, in the absence of her attorney, her signature to a paper, whereby she agreed to abandon a judgment in ejectment, obtained by her by default of the tenant in possession, and to allow the question of title to be fairly tried as between her and the attorney's client, landlord of the tenant in possession,—the Court compelled him to give up the instrument to be cancelled. *In the matter of Oliver*, 4 N. & M. 471, s. c. 2 Ad. & E. 620.

Where an attorney has drawn his own marriage settlement, under which he takes no interest, but is mentioned in it, and if it is deposited with him for safety, the Court will not compel him to give it up at the instance of a trustee under it. *Ex parte Mason*, 1 Dowl. P.C. 6.

An attorney, with whom a will has been deposited by the testator, will not be compelled to deliver it up to the sole legatee under it. *Ex parte Cripp*, 2 Dowl. P.C. 456.

The Court will not, on a summary application, compel an attorney to deliver up, on payment of what is due to him, deeds which have been intrusted to him for the purpose of raising money upon them. *In the matter of Millard*, 1 Dowl. P.C. 140.

Where bills have been deposited with an attorney, and he has advanced money on them, and he refuses to account, the Court will not compel him summarily to pay over the alleged balance. *Ex parte Schwalbanker*, 1 Dowl. P.C. 182.

On an application against an attorney for an attachment for his contempt of a Judge's order, made a rule of court, the Court will take judicial notice of his being on the roll. *Ex parte Hors*, 3 Dowl. P.C. 600.

Where an attorney is in contempt by disobeying a rule of court, the proper course of proceeding against him is by moving for an attachment, and not by applying to strike him off the roll. A party cannot have a rule absolute in the first instance for an attachment for not paying costs pursuant to a rule of court, where those costs form part of a rule for disobedience, to which a rule nisi only for an

attachment can be granted. *Ex parte Townley*, 3 Dowl. P.C. 39.

Where an attorney disobeya a rule of court, requiring him to do a particular act, an application cannot, in the first instance, be made to strike him off the roll, but a rule nisi for an attachment may be obtained.

If, by the same rule, he is required to pay certain costs, and a clause also is introduced into it, authorizing the issue of an attachment in case of non-payment, that may at once issue, although a rule nisi only will be granted for disobedience to the other part of the rule.

A bankrupt's certificate does not remove an attorney's liability to an attachment for not duly investing his client's money. *Ex parte Grant*, 3 Dowl. P.C. 320.

Where an attorney has not fulfilled his engagement with respect to the loan of money, independent of his character of attorney, the Court will not summarily compel him to fulfil it. *In re Chitty*, 2 Dowl. P.C. 421.

It was held to be no ground for making an application against an attorney, that he had advised his client to hand him over money which the Insolvent Debtors Court, on the client's application there for his discharge, considered a misappropriation, and for which he was remanded by that Court. *Smith v. Tower*, 2 Dowl. P.C. 673.

By a deed of settlement, estates were conveyed to trustees to the use of A, for his life, remainder to such uses as he should direct by his will, the deed giving the usual powers for appointing new trustees in case of death, &c. A devised all the real estates, of which he had power to dispose, and all his personalty, to trustees (whom he also made his executors), to sell and invest the produce, and pay the interest to his widow, during her life, and afterwards to stand possessed of the funds in trust for B and C, share and share alike. A died, leaving his widow surviving. Two of the executors proved the will. The last surviving trustee under the settlement died, leaving a son, to whom, as his heir-at-law, the legal estate in the settled property descended, but who never was appointed a trustee. Before and after the testator's death, an attorney was employed in business relating to the settled and devised estates, for which a sum of money was due to him; and he held the title deeds. After the testator's death, the son of the trustee under the settlement, and one of the executors, joined in an application to the Court, that the attorney might account for all sums received by him in respect of the estates, and deliver up the deeds to the trustees for the said estates, on payment to him of anything that might appear to be due from them. The other executor, and all the parties beneficially interested, objected to the application. The Court refused to interpose, the rights of the parties not being clear, and one executor not concurring in the motion. *In re Bunting*, 2 Ad. & E. 467.

Where an attorney has received money to the use of his client, and not accounted for it, and has afterwards become bankrupt and obtained his certificate, the Court will not, on motion, order him to repay the money so received, the amount being a debt barred by the certificate.

But, if the attorney committed fraud in receiving

and not accounting, the Court, in the exercise of its general jurisdiction over its officers, will enforce such payment, as a modification of the punishment which it might otherwise inflict for his misconduct. The case of fraud, however, ought to be clear, and the attorney should have notice by the form of the rule, that the application is of a penal nature. It is not enough to call upon him to shew cause why he should not pay over the money. *In re Bonner*, 4 B. & Ad. 811, a. c. 1 N. & M. 555.

An attorney's bill having been ordered to be taxed after the client had given a bill of exchange for the amount, it was found he had been overpaid, and he was ordered to refund the overpayment to the client, and also, by a subsequent order, to pay the costs of taxation, more than a sixth having been taken off. Upon an application of the attorney to be allowed to pay these sums to the holder of the bill of exchange (which had been dishonoured) instead of his client, he was ordered to do so within a week, or, in default, that an attachment should issue:—Held, that no demand of these two sums was necessary to ground an attachment, but that it was his duty to seek the holder of the bill, and pay the money to him. *Woolless v. Hodgkinson*, 3 Dowl. P.C. 178.

Where it appeared, that an attorney had been allowed in account with the executor and residuary legatee, a certain sum, as for legacy duty, but that legacy duty had never in fact been paid, this Court would not entertain a summary application, that the attorney should pay the sum, so allowed in account, to the Receiver General. *In re Fenton*, 4 Law J. (n.s.) K.B. 204, a. c. 5 N. & M. 239.

An order for the taxation of a solicitor's bill on the undertaking of A to pay the same, does not extend to a bill of costs, for which A is liable jointly with B.

A was individually indebted to a solicitor for costs in a cause, and A and B were jointly indebted to the same solicitor for costs relating to other business. A obtained an order for the taxation of the solicitor's bill of costs in the cause, and all other suits, causes, and matters wherein he had been employed by A; and it was ordered, that all proceedings against A should be stayed. The solicitor afterwards arrested A and B for their joint account:—Held, that such proceeding was not a breach of the order. *Collins v. Price*, 1 Law J. (n.s.) Chanc. 94.

#### (H) CHANGING ATTORNEY.

In all cases the order for changing an attorney must be served on the opposite party. *Rex v. Sheriff of Middlesex*, 2 Dowl. P.C. 147.

If the attorney on the record is changed without an order for that purpose, but the opposite party treats the new attorney as the attorney in the cause, he cannot afterwards object that no order was obtained. *Farley v. Hebbes*, 3 Dowl. P.C. 538.

#### (I) UNAUTHORIZED USE OF ATTORNEY'S NAME.

Where bail made a motion in the name of an attorney, who denied having given any authority to allow his name to be used, the Court discharged the rule, but refused to make an order for costs against the person making the affidavit, on the ground that he was not before the Court. To obtain such

costs, a special application must be made against him. *Norton v. Curtis*, 3 Dowl. P.C. 245.

#### (K) LIEN.

Trover against an attorney for deeds; cause referred; award, a nonsuit, and each party to pay his own costs:—Held, that the attorney had no lien on the deeds for the costs.—Held, also, that the attorney had no lien on the deeds for expenses, incurred by him in consequence of application made to him for the deeds. *In re Sharpe*, 1 Dowl. P.C. 432.

The plaintiff was trustee for sale of real estates. The decree directed the estates to be sold, and the title deeds (which were in the possession of the plaintiff's solicitor for the purposes of the suit,) to be deposited. The solicitor refused to produce them, and claimed a lien on them for his costs of the suit, but the Court ordered him to deposit them. *Baker v. Henderson*, 4 Sim. 27.

An attorney has a lien upon deeds and papers in his hands to the extent only of the right of the party depositing them there: where, therefore, in a mortgage transaction, the mortgagor had given to the mortgagee his title deeds for the latter to send them to his attorney to investigate, and, upon the negotiation being broken off, the attorney refused to give up the deeds to the mortgagor without being paid his bill of costs; and the mortgagor paid the bill of costs under protest:—Held, that he might recover back the sum so paid in an action for money had and received. *Pratt v. Visard*, 3 Law (n.s.) K.B. 7, a. c. 5 B. & Ad. 808; 2 N. & M. 455.

The solicitor's lien on a fund recovered, applies in equity to the defendant's solicitor as well as the plaintiff's.

A solicitor has no lien on a fund received by his client, for compromising a suit, where it is clear, that the result of the suit, if successfully prosecuted, would not have been to realize a fund on which such lien might attach.

*Seem*, that where a solicitor has a lien for costs on a fund in the hands of a third party, a notice of such lien is not alone sufficient to make the third party responsible for paying over the fund, without providing for the costs, if the solicitor has had an opportunity of taking other proceedings to secure the fund, and has neglected to do so. *Townsend v. Reade, and Dooley v. Reade*, 4 Law J. (n.s.) Chanc. 235.

A is plaintiff in two actions, which, by an order of Nisi Prius, are, with all matters in dispute, referred to arbitration, the costs to abide the event. The arbitrator directs a verdict to be entered for the plaintiff, with damages, in the first action, and for the defendant in the second. He also finds a debt due to the defendant from the plaintiff upon other matters in dispute, and orders that the defendant should set off the debt and costs of the second action against the damages and costs of that in which the verdict was directed to be entered for the plaintiff:—Held, that the award of such set-off could not be absolute and unconditional, but that it should be subject to and qualified by the lien of the plaintiff's attorney for his costs. *Cowel v. Bettsley*, 3 Law J. (n.s.) C.P. 148, a. c. 10 Bing. 431; 4 M. & Sc. 265.

An attorney who is not admitted to practise in this court has no lien for fees or money out of

procket is conducting a suit therein; and, therefore, in cross actions, the Court will allow one judgment to be set off against another, without regard to such a lien. *Latham v. Hyde*, 2 Law J. (N.S.) Exch. 72, s. c. 1 C. & M. 128; 3 Tyr. 143.

The lien of an attorney upon the damages and costs in a cause is confined (where there are conflicting claims between the parties,) to his costs incurred in the prosecution of the particular cause. *Watson v. Maskell*, 1 Sc. 286.

#### (L) Costs.

[See COSTS, Taxation of Attornies' Bills.]

##### (a) In general.

[See ante (B) Certificate.]

If an attorney has reasonable and probable grounds for commencing an action, and desists from prosecuting it, because he afterwards discovers that the cause cannot be successfully proceeded with, he is entitled to recover his costs from his client. *Lawrence v. Potts*, 6 C. & P. 428. [Tindal]

An agreement was entered into between A and B; B died, and administration of his effects was granted to C; his daughter D, who was a friend of C, employed the same attorney who had prepared the original agreement, to prepare an agreement between him and C, by which he was authorized to bring an action against A on the original agreement in C's name, and also to instruct the attorney to bring such action. The action was brought, and, after argument on demurrer, was declared void, on the ground of champerty; but it appeared that the attorney, on his preparing the original agreement, consulted a conveyancer, who gave it as his opinion that the agreement was valid:—Held, at Nisi Prius, that the attorney was entitled to recover from D, his employer, the costs of preparing the second agreement, and the costs of bringing the action upon the first agreement. *Potts v. Sparrow*, 6 C. & P. 749. [Tindal]

Costs incurred subsequently to an offer to plaintiff's attorney, to pay the costs of an attachment for non-payment of costs irregularly issued and to waive the attachment,—ordered to be paid by the plaintiff's attorney. *Hallen v. Stocking*, 1 Law J. (N.S.) Exch. 88, s. c. 2 C. & J. 60; 2 Tyr. 165; 1 Dowl. P.C. 296.

The plaintiffs were partners as attornies, but one only was an attorney of the Palace Court:—Held, that upon its appearing that the contract was with both jointly, they might both bring an action for business done for the defendant. *Arden v. Tucker*, 2 Law J. (N.S.) K.B. 137, s. c. 1 N. & M. 759; 4 B. & Ad. 815.

##### (b) Bill.

[See ACCOUNT STATED.]

In an action on an attorney's bill, it is not necessary to give notice to produce the original bill delivered to the party, but the production of a duplicate thereof is sufficient. And it is not necessary that the parties examining, should read the two bills alternately. *Fyson v. Kemp*, 6 C. & P. 71. [Gurney]

If a solicitor retains money received by him in his character of solicitor, for the use of his client, his bill is taxable, though it contains no charges for business done in a court of law or equity. *In re Barker*, 6 Sim. 476.

Items in a solicitor's bill for preparing and settling a bill in equity, will render the solicitor's bill taxable, though the bill in equity was never filed, *semble*. *In re Barker*, 6 Sim. 476.

Procuring an appearance to be entered by a proctor in the consistory courts, is not a taxable item in an attorney's bill. *In the matter of Morris*, 2 Ad. & E. 582.

A defendant in an action on an attorney's bill, being let in to plead on an affidavit of merits, after suffering judgment by default, is not permitted to plead that no bill has been delivered pursuant to the statute. *Beck, one &c. v. Mordant*, 2 Bing. N.C. 140, s. c. 2 Sc. 178.

A solicitor cannot receive a deposit of title deeds as security for future bills. *Ex parte Leung*, 2 Mont. & A. 381.

An attorney's bill for business done at the court of Quarter Sessions, is liable to taxation as well as his bill for business done in a superior court at Westminster, and therefore must be delivered, signed, before an action can be brought thereon, one month before such action brought, pursuant to 2 Geo. 2, c. 23. *Syloester v. Webster*, 2 Law J. (N.S.) C.P. 24, s. c. 9 Bing. 388; 2 Mo. & Sc. 506.

A sum paid by an attorney, in the course of his employment, to a proctor, is an item which is properly included in his bill, and is a disbursement within the 2 Geo. 2, c. 23, s. 23. *Franklin v. Featherstonhaugh*, 3 Law J. (N.S.) K.B. 163, s. c. 1 Ad. & E. 475; 3 N. & M. 779.

An attorney's bill for business done in a court which has no taxing officer, is not within the statute 2 Geo. 2, c. 23, s. 23.

Therefore, an attorney may recover for business done in the Middlesex Court of Requests, without delivering a signed bill one month before action brought. *Becke v. Wells*, 2 Law J. (N.S.) Exch. 26, s. c. 1 C. & M. 75; 3 Tyr. 173.

*Quare*, whether preparing and engrossing a warrant of attorney, is a charge which renders it necessary for an attorney to deliver a bill, pursuant to 2 Geo. 2, c. 23.

An attorney having transacted common law, as well as conveyancing and other business, not taxable, was referred for payment, in respect of a part of the conveyancing business, before he had sent in any bill thereof, to other parties; he then delivered a bill for all the common law business, (except some agency charges, which it was stated he could not insert,) which his client examined and admitted to be correct, and, on application for payment, directing the attorney to borrow for him a sum of money, which was accordingly done, and credit given to him in account for that amount; subsequently, on failing to obtain payment of any part of his charges for conveyancing, the attorney brought an action for the residue of his demand:—Held, that he had no right to separate the common law and conveyancing bills, and to appropriate the sum credited in discharge of the former; and therefore, that he could not sustain an action, without delivering a signed bill, pursuant to the statute. *James v. Child*, 2 Law J. (N.S.) Exch. 78, s. c. 2 C. & J. 678.

In considering an attorney's bill, a charge for work entirely useless may be rejected by the jury; *contra*, as to a charge for work partly useless, or in respect of which there had been any negligence, the

client's remedy in that case being by a cross action only. *Shaw v. Arden*, 2 Law J. (N.S.) C.P. 1, s. c. 9 Bing. 237; 2 Mo. & Sc. 341.

A defendant in an action, being advised to pay 40s. l.s. into court, gives his attorney 50l. that he may do so, which is accordingly done. *Quære*, whether that is a disbursement by the attorney, in the course and progress of the cause, within 2 Geo. 2, c. 23. At all events, if an attorney delivers a bill without setting that down as an item of disbursement, he cannot, afterwards, (upon more than one-sixth being taxed off) treat it as such. *Hoyes v. Foster*, 3 Law J. (N.S.) K.B. 91, s. c. 5 B. & Ad. 1106; 3 N. & M. 174.

The plaintiff left his bills of costs, as an attorney, at a certain house which he supposed to be the residence of the defendant, and a servant of which stated at the time, that the defendant was not then there, but that he was expected that day with his furniture. The jury, to whom the question was left, found that the house referred to was not the residence or abode of the defendant; consequently, that the bills were not left at the dwelling-house or last place of abode, according to the statute 2 Geo. 2, c. 23, s. 23. Upon motion for a new trial, the Court refused to disturb the verdict.

Whether evidence of an admission by the defendant that the bills of costs came to his hands, would entitle the plaintiff to maintain the action without positive proof of delivery, according to the act? What is evidence of such admission. *Ecker v. Nobes*, 2 Law J. N.S. C.P. 256, s. c. 1 Bing. N.C. 69; 4 Mo. & Sc. 585, 586.

"Attending the clerk of replevin, and giving instructions to him to issue precept and summons"—"attending and attending replevin bond," are taxable items, within 2 Geo. 2, c. 23; and the bill containing them, among other items, requires to be delivered one month before action brought.

Where the particulars of demand contain items which are taxable, combined with others that are not, but which are for business done in the course of the plaintiff's employment as an attorney, he cannot recover for the latter, unless a bill has been delivered in proper time. *Wardle v. Nicholson*, 2 Law J. N.S. K.B. 76, s. c. 1 Nev. & M. 355; 4 B. & Ad. 469.

#### (c) Remedy for.

The rule for an attachment for non-payment of costs, between attorney and client, pursuant to the Master's allocatur, is nisi in the first instance. *Broy v. Yates*, 1 Dowl. P.C. 459; s. r. *Bonner v. Meller*, 2 Dowl. P.C. 523; *Green v. Light*, 3 Dowl. P.C. 578; and *Anon.* 3 Law J. (N.S.) K.B. 41; (*ante*, ATTACHMENT, for Non-payment of Money and Costs).

*Scrabble*, that an attorney cannot, upon the settlement of the suit by the parties, continue the proceedings for the obtaining of his costs, unless there was collusion between the parties for the purpose of depriving him of his costs. *Hubert v. Steiner*, 4 Law J. (N.S.) C.P. 233.

#### (M) STRIKING OFF THE ROLL.

A motion calling upon an attorney to answer matters alleged against him on affidavit, must be

made by a barrister. *Ex parte Pitt*, 5 B. & Ad. 1077.

The Court will not receive an application to strike an attorney off the roll, except at the hands of a barrister. *In re —, Gent., one, &c.* 3 N. & M. 566. And see *Ex parte Penn*, 2 Dowl. P.C. 527; (*ante* (G) Summary Jurisdiction of the Court over Attorney).

A conviction of conspiracy is not of itself sufficient ground for striking an attorney off the roll. *Ex —, 1 Dowl. P.C. 174.*

On a reference to the Prothonotary of a rule for striking an attorney off the roll, on a charge of having hired sham bail in error, the officer reported that the attorney did not actually hire the bail, but was aware that they were hired:—The Court discharged the rule on the terms of the attorney paying all the costs of, and occasioned by the proceedings. *Dicas v. Warner*, 4 Mo. & Sc. 471.

The Court of King's Bench will not grant a rule, calling on an attorney to shew cause why he should not be struck off the roll, if the affidavit in support of the rule state an offence for which he would be liable to indictment. *Anon.* 5 B. & Ad. 1088.

A verdict having been obtained against an attorney, in an action for publishing a libel of a very aggravated nature, but in which the jury only gave 1s. damages, the Court refused to strike him off the roll, on the mere ground of the publication of that libel. *Scrabble*, that the Court will not strike an attorney off the roll, unless for some misconduct in his business of attorney, or where criminal proceedings have been taken against him. *Ex parte —, 2 Dowl. P.C. 110.*

The Court will not strike an attorney off the roll, on the ground that a verdict in a civil suit has been found against him for a libel. *In re Dicas*, 2 Law J. (N.S.) Exch. 267.

In order to enable the Court to punish an unqualified person, who has acted in the name of an attorney with his knowledge, it is necessary first to shew under the 22 Geo. 2, c. 46, s. 11, that such practice was with the knowledge of the latter.

If such knowledge be proved on such application, the Court will direct that he shall be required to shew cause why he should not be struck off the roll pursuant to the same section, although the party seeking to punish the unqualified person is not desirous of enforcing such a proceeding. *In re Hodgson*, 3 Dowl. P.C. 330.

If, from the facts appearing before them, the Court is satisfied and convinced that an attorney has "permitted his name to be made use of, upon the account, or for the profit, of an unqualified person, thereby to enable him to act as a solicitor," &c. contrary to the statute 22 Geo. 2, c. 46, s. 11, it is the duty of the Court to strike the attorney off the roll, although the instances in which the attorney has so permitted his name to be used are not perfectly clear and specific. *In re Palmer*, 4 Law J. (N.S.) K.B. 110, s. c. 4 N. & M. 529.

By the 22 Geo. 2, c. 46, s. 11, if any sworn attorney shall act as agent for any person not duly qualified to act as an attorney, or suffer his name to be made use of upon the account or for the profit of any unqualified person, &c., knowing him not to be duly qualified, every such attorney so offending shall be struck off the roll, and for ever disabled from practising as an attorney, &c. By the 37 Geo. 3, c. 91, s. 31, any attorney neglecting to take out

his certificate, for the space of one whole year, shall from thenceforth be incapable of practising, and the admission, entry, enrolment, or register of any such person, shall be from thenceforth null and void:—Held, that looking at the different objects of the two statutes, the admission of a person, who had neglected to take out his certificate for a year, was not made, by the latter statute, so far null and void as to render the attorney an unqualified person within the meaning of 22 Geo. 2, c. 46, s. 11. *In re Ross and Hodgson*, 4 Law J. (N.S.) K.B. 264, s.c. 4 N. & M. 763.

## (N) RE-ADMISSION.

All matters relating to the re-admission of an attorney, must be settled in term time, in court, and not at chambers. *Ex parte Owen*, 1 Dowl. P.C. 511.

An attorney, intending to apply for re-admission, stuck up his notice in the King's Bench office at its opening, on the first day of the term of which his notice was intended to be given:—Held, a sufficient compliance with the rule Trin. Term, 33 Geo. 3. *Ex parte Senior*, 1 Dowl. P.C. 517.

A notice by an attorney on the last day of one term, to apply for re-admission in the next, is not sufficient, although the notice remains up throughout the vacation. *Ex parte Cross*, 4 Dowl. P.C. 18.

An attorney, who has given his notices to apply for re-admission on the last day of one term, cannot apply on those notices for re-admission in the next. *Ex parte Mosley*, 4 Dowl. P.C. 69.

Where an attorney has by accident omitted to pay the proper amount of certificate duty for some years, as also to take out his certificate during another period, and has practised during that time, the Court will re-admit him on payment of the arrears of duty, and a nominal fine. *Ex parte Jones*, 2 Dowl. P.C. 199.

If an attorney practises after the expiration of his certificate, even though with the hope of taking one out, he cannot be re-admitted without payment of the arrears of duty, for the years during which he has practised, and something more than a nominal fine. *Ex parte Philpot*, 3 Dowl. P.C. 339.

If an attorney has practised abroad during a period for which he has not taken out his certificate, he may be re-admitted without payment of arrears of duty or fine. *Ex parte Philcox*, 2 Dowl. P.C. 450.

The Court, will upon payment of a moderate fine, re-admit an attorney who has inadvertently practised without a certificate, through the omission of a clerk usually employed to take it out. *Ex parte Rigby*, 1 N. & M. 593.

An attorney, who through inadvertence has practised without his certificate, cannot be re-admitted without an affidavit, shewing that a notice has been given at the Stamp Office of his intention to apply for re-admission. *Ex parte Franks*, 3 Dowl. P.C. 319.

If the agent of an attorney neglect to take out his certificate, and the latter continues, in ignorance of the neglect, to practise, he may be re-admitted on payment of a nominal fine, and the arrears of duty. *Ex parte Thorp*, 3 Dowl. P.C. 592.

As an attorney may be struck off the roll of the Common Pleas upon reading a rule for striking him off the roll of the King's Bench, so he may be re-admitted in the Common Pleas upon reading a rule

of King's Bench, for his re-admission in that court. *Ex parte Yates*, 9 Bing. 455.

An attorney cannot be re-admitted without deposing to his having given notice to the Stamp Office, of his intention to apply for re-admission. *Ex parte Bridgman*, 3 Dowl. P.C. 371.

*Semble*, that if an attorney has been admitted, and does not take out his certificate for a year, he need not be re-admitted previous to taking it out; but whether he need or not, if he has taken out his certificate, under such circumstances the client's interest will not be affected. *Hillary v. Hungate*, 1 Dowl. P.C. 56.

## (O) ACTION BY, AND EVIDENCE.

It is no ground of demurrer, to a declaration in an action by an attorney, that he seeks to recover for "materials" supplied by him to his client. *Fisher v. Snow*, 3 Dowl. P.C. 27.

In an action for a libel, the plaintiff alleged, that he was an attorney of the Court of King's Bench:—it was held, that the Stamp Office certificate, countersigned by a Master of that Court, was sufficient *prima facie* evidence to satisfy such allegation. *Sparling v. Haddon*, 1 Law J. (N.S.) C.P. 142, s.c. 9 Bing. 11; 2 Mo. & Sc. 14.

An attorney employed by a party about to take the benefit of the insolvent act, to prepare a list of debts, which were afterwards to be inserted in the schedule, omitted a debt due from the insolvent to himself, and sued for that debt after the party's discharge:—Held, by Denman, J., and Parke, J., that this was not such a fraud upon the general policy of the Insolvent Act, as would bar the action.

*Quære*, whether if he omitted to insert the debt in breach of his duty to his client, that would be a defence to an action brought by him against the latter to recover the debt, or whether it would only be the subject of a cross action? If a defence, *quære* whether or not it should be specially pleaded? *Howard v. Bartolozzi*, 4 B. & Ad. 555; see also *Tabram v. Freeman*, ib. 387, s.c. 1 N. & M. 69.

Where plaintiff and defendant claim through the same person, and books of the steward of the former owner of the estate are in the hands of the plaintiff's attorney, as part of the muniments of his title, the defendant is entitled to call for the production of these books, and to give in evidence entries in them in support of his own title. *Doe d. Strode v. Seaton*, 4 Law J. (N.S.) K.B. 13, s.c. 2 Ad. & E. 171; 4 N. & M. 81.

## (P) AGENT.

Where a country solicitor acts by a town agent, such agent, and not the principal, is liable for the costs of taking a bill off the file for irregularity. *Burgesses and Corporation of Ruthin v. Adams*, 4 Law J. (N.S.) Chanc. 167.

If the agent of an attorney does wrong, the client cannot make a summary application against the agent. *Ex parte Jones*, 2 Dowl. P.C. 161.

If a London agent receives money improperly, the remedy of the client is not against him, but against his attorney. *Gray v. Kirby*, 2 Dowl. P.C. 601.

## (Q) ATTORNEY'S CLERK.

If the clerk of an attorney has the management of a cause, what he says is receivable in evidence,

the same as if it had been said by the attorney himself. *Standage v. Creighton*, 5 C. & P. 406. [Denman]

### AUCTION AND AUCTIONEER.

[See VENDOR AND PURCHASER.]

#### (A) SALE, AND DUTY OF THE AUCTIONEER.

##### (B) AUCTION DUTY.

#### (A) SALE, AND DUTY OF THE AUCTIONEER.

A sale by a mortgagee, at which the purchaser employed a clerk of the mortgagee's solicitor to bid, set aside. *Parnell v. Tyler*, 2 Law J. (N.S.) Ch. 195.

A, being requested to attend an auction to bid for the vendors, declined, saying he intended to bid for himself. The estate was put up in lots, and three in-bidders were appointed, without notice to the company. A purchased two lots, but it did not appear whether or not his biddings were upon those of the respective in-bidders. Assuming that they were severally appointed to bid for respective lots, and that some one of them bid upon each of the lots purchased by A,—Held, that it could not be inferred that A's biddings were upon those of a puffer, and that he, at any rate, could not claim relief for want of notice, because he knew that biddings would be made for the vendors. Specific performance therefore decreed.

*Semble*, that, there being one bidder for the vendors upon each lot, without public notice, is not in itself sufficient to vitiate the sale,—at least if the final bidding is not upon that of a puffer. *Birch v. Hanson*, 1 Law J. (N.S.) Chanc. 42.

The defendant, an auctioneer, being employed by a person who was in embarrassed circumstances, to sell his property, sold the same, and paid the proceeds to the order of his employer, who shortly afterwards was declared insolvent, and the plaintiff chosen assignee of his estate:—Held, that the defendant, being an agent merely for such employer, was justified in so paying over such proceeds to his order, although he was aware of his embarrassment. *White v. Bartlett*, 2 Law J. (N.S.) C.P. 43, s.c. 9 Bing. 378; 2 Mo. & Sc. 515.

An auctioneer, who receives goods for sale, *prima facie* is bound to account with the party by whom they were delivered to him; at all events, he cannot set up the *jus tertii* in an action for not accounting, unless he shews that the person who has given him notice to retain the proceeds has a legal title. *Crosskey v. Mills*, 3 Law J. (N.S.) Exch. 297, s.c. 1 C. M. & R. 300.

The verbal statements of an auctioneer, at the time of a sale by auction, are not admissible evidence to vary the printed particulars of sale, either in respect of the highest bidder, or a sub-purchaser from him, after the lot has been knocked down, unless there be distinct evidence that the sub-contract was different from the original.

A condition of sale, "that no mistake as to the description of the lot, whether as to quantity or any other error, shall vitiate the sale thereof," does not apply to a sale of "red Lammass wheat," sown in the spring for "spring wheat."

Accordingly, at a sale by auction, the plaintiff and defendant bid for a crop of growing wheat, described in the printed particulars of sale, as "ten

acres of spring wheat, more or less;" the printed particulars also containing a memorandum, that the keep of all the fields would be sold with the crops; and a condition, "that no mistake as to the description of the lot, whether as to quantity or any other error, should vitiate the sale thereof." The lot was knocked down to the plaintiff, as the highest bidder, and his name then entered as the purchaser in the auctioneer's book; but after the sale, the plaintiff and defendant directed the auctioneer to enter the name of the defendant as the buyer, at the sum which he had bid for the lot, which the auctioneer did, and received a deposit from the defendant. The wheat turned out not to be "spring wheat," but "red Lammass wheat," sown in the spring:—Held, in an action to recover the price of the crop, that the plaintiff was bound by the particulars of sale, in the same manner as the original party on whose account the auctioneer had sold; and therefore, could not give evidence of a statement made by the auctioneer at the time of the sale, that the keep of the field was not to form part of the lot; and that the misdescription of the crop, as *spring* wheat, was not within the condition, but vitiated the contract. *Shelton v. Livius*, 1 Law J. (N.S.) Exch. 189, s.c. 2 C. & J. 411; 2 Tyr. 420.

Whether, on a plea that a cheque was given without consideration, the defendant can insist that the cheque was given for the amount of a deposit on a sale by auction, which sale was void;—and whether, if he cannot, the Court would give judgment on the stat. 3 & 4 Will. 4, c. 42, s. 24.

If a party has given a bill of exchange or cheque for the amount of a deposit on a sale by auction, any ground on which the party could recover back his deposit, if paid in money, will be a good ground of defence in an action upon the bill or cheque. *Mills v. Oddy*, 6 C. & P. 728. [Parke]

#### (B) AUCTION DUTY.

In an action at the suit of the King, against an auctioneer, upon the bond given to make returns of sales by auction, held upon demurrer to the surrejoinder, that an estate, which has been mortgaged by a person who has become bankrupt, and is sold by auction by direction of the assignees, and with the concurrence of the trustees appointed to sell the estate, to discharge incumbrances, &c., or with the consent of the mortgagees, is, by the stat. 6 Geo. 4, c. 16, s. 98, exempt from the auction duty. *Attorney General v. Winstanley*, 5 Bligh, N.S. 130.

### AUSTRALIA.

Power to erect into a province, and provisions for the colonization and government of. 4 & 5 Will. 4, c. 95; 12 Law J. Stat. 207.

### AUSTRALIA AND NEW HOLLAND.

Continuation of an act of 10 Geo. 4. relating to government of. 5 & 6 Will. 4, c. 14; 13 Law J. Stat. 10.

### AUTREFOIS CONVICT.

The Court will not reject a plea of *autrefois convict*, on account of the informal manner in which it

is handed in by the prisoner, but will assign counsel to put it into a formal shape, and postpone the trial, to give time for its preparation. *Rex v. Chamberlain*, 6 C. & P. 93.

A plea of *autrefois convict* can only be proved by the record; and the indictment, with the finding of the jury, &c., indorsed by the proper officer, is not sufficient, although it appears that no record has been made up. But the Court, before whom brought to be tried the second time, will postpone the trial at the request of the prisoner, on affidavit of the fact, to give time for an application for a mandamus to compel the making up of the record. *Rex v. Bowman*, 6 C. & P. 101.

A plea of *autrefois convict* stated that the prisoner was indicted, convicted, and sentenced, at a session of the peace, duly holden, by adjournment, on Friday the 5th of July. The record produced in support of the plea stated, that the indictment was found at a session commenced and holden on Monday the 1st of July, and that the Court was adjourned till Tuesday the 2nd; and that the Court re-assembled on Thursday the 4th, was adjourned till Friday the 5th, when the prisoner was tried and convicted:—It was held, that the plea of *autrefois convict* was not proved by the record, inasmuch as, for want of adjournment from the Tuesday to the Thursday, the proceedings on the Friday were *coram non judice*, and therefore a nullity. *Rex v. Bowman*, 6 C. & P. 337.

#### AVERAGE.

[See INSURANCE—BOTTOMRY BOND.]

#### BANK.

[See EXECUTOR AND ADMINISTRATOR.]

Banks, issuing promissory notes, to make returns of notes payable to bearer on demand, and to be allowed to issue notes payable in London for less than 50*l*. 3 & 4 Will. 4. c. 83; 11 Law J. Stat. 184.

A person suing as the public officer of a joint stock banking company, established in pursuance of the 7 Geo. 4, c. 46, may give other evidence of his appointment than the return made to the Stamp Office in pursuance of that act.

The omission in such a return, of the address of some of the partners, is not an objection, of which a defendant, in an action brought by the company, in the name of their public officer, can take advantage.

The description of such public officer, in such a return, as "esquire," is sufficient, without stating what is the office he fills with respect to the affairs of the company. *Edwards v. Buchanan*, 1 Law J. (N.S.) K.B. 217, s.c. 3 B. & Ad. 783; and see *Armitage v. Hamer*, 1 Law J. (N.S.) K.B. 217.

To entitle a banking company to sue by its public officer, pursuant to 7 Geo. 4, c. 46, it is sufficient if, in the return made to the Stamp Office, he be described as A B, Esq., of &c., a "public officer" of the copartnership: at least, in the absence of proof that he had any specific office, it will not be presumed that he was more than an officer appointed for the purpose of suing and being sued.

The right of such company to sue by its public officer is not defeated if it appear that, in the return to the Stamp Office, the places of abode of one or more partners are omitted, there being no evidence that the return varies in this respect from the company's books: and if such proof were given, *semble*, that the return, if correct, as to the public officers, would still be sufficient to maintain the action. *Armitage v. Hamer*, 3 B. & Ad. 793, s.c. 1 Law J. (N.S.) K.B. 217.

#### BANKER.

A banker's pass-book delivered to his customer, in which there are entries on one side only, is not evidence of a settled account between the parties, although the customer keeps the book, and does not make any objection to the entries contained in it. *Ex parte Randleson*, 2 D. & C. 534.

Where a cheque drawn by one customer in favour of another was paid into the bankers' on whom it was drawn by the payee, and he requested that the amount might be placed to his credit; and the bankers, at the time when it was so paid in, knew that the drawer of the cheque had no effects in their hands, but gave no intimation to the payee, whether it would be placed to his credit or not:—Held, that the bankers must be considered as having received the cheque as agents to the payee, and not of the drawer; and that they were not bound to tell the payee at the time when he so presented it, that they had no funds, but that they had the same time to obtain payment and give notice of the dishonour of the cheque, as if it had been drawn on any other bankers. *Boyd v. Emerson*, 4 Law J. (N.S.) K.B. 43, s.c. 2 Ad. & E. 184; 4 N. & M. 99.

A creditor who receives from his debtor a cheque upon a banker, has until the close of banking hours next day to present it, although the cheque be crossed by his own banker's name, and although it is proved to be the usage of bankers, where they hold cheques upon each other, to present such cheques on the same day; it not appearing that the custom extends to a cheque given by a debtor to his creditor, and crossed by a banker's name. *Boddington v. Schlenker*, 2 Law J. (N.S.) K.B. 138, s.c. 1 N. & M. 540; 4 B. & Ad. 752.

The declaration stated, that the defendants were bankers, and the plaintiff one of their customers, and that the terms of their dealing were, that they would pay all such bills of exchange accepted by him, payable at their bank, out of such cash balance belonging to the plaintiff as should be in their hands at the time when they were duly presented; and then alleged an acceptance by the plaintiff of a bill of exchange, payable at their bank, and non-payment by the defendants, when it was duly presented for payment. It was proved, that at the time when the bill was presented, the defendants had not a sufficient cash balance to pay it, but in the course of the day, money was paid in by the plaintiff, and another presentment was made in the afternoon, but after banking hours. A clerk of the defendants then answered that there were not sufficient assets:—Held, first, that the defendants were not bound to pay the bill at that time, and, therefore, were not answerable in damages for not

doing so. Secondly, if they were in default in not giving notice on the second presentment, that the bill would be paid the next day, the declaration did not meet that complaint. *Whitaker v. the Governor and Directors of the Bank of England*, 4 Law J. (N.S.) Exch. 57, s. c. 1 C. M. & R. 744; 5 Tyr. 268; 6 C. & P. 700.

A foreign judgment being equally conclusive against the debtor as an English judgment, may be set aside in equity for fraud. Therefore, where a bill was brought against a banker by his customer for an account, and for an injunction to restrain an action on a foreign judgment obtained by the banker from the customer in respect of their mutual dealings; and, it appeared by specific allegations in the bill, that, notwithstanding the judgment, the balance of accounts was in favour of the customer:—Held, that the case made by the bill was *prima facie* a case of fraud in the banker, which he was bound to answer; and, consequently, his demurrer was overruled, without reference to the question, whether the bill was sustainable for the account. *Bowles v. Orr*, 1 Y. & C. 464.

Where money is paid in to a bank on the joint account of persons not partners in trade, the bankers are not discharged by payment to one of those persons without the authority of the others. *Innes v. Stephenson*, 1 M. & R. 145. [Tenterden]

Money deposited with a banker under special circumstances. It was expressly provided, that while it continued in deposit, it should not carry interest. It was afterwards demanded back by the assignees of one of the depositors, and refused:—Held, that it did not carry interest from the time of the demand and refusal. *Edwards v. Vere*, 2 Law J. (N.S.) K.B. 190, s. c. 2 N. & M. 120; 5 B. & Ad. 282.

Certain stock was vested in trustees, upon trust, amongst other things, to pay the dividends to A during his life; and, after his death, upon trusts for his widow and children. M & Co. were the bankers of the trustees, and employed by them to receive the dividends. During the life of A, the amount of the dividends on the stock was regularly carried to the account of A, in the books of the firm, and drawn for and received by him. A died on the 23rd of January, 1824; and, on his death, a new account was opened with the trustees in the books of M & Co.; and, in that account, credit was given to the trustees for dividends, amounting to 1,403*l.*, as received in April and July 1824, and the trustees were debited with several sums, amounting to 225*l.*, paid to cheques drawn upon the house on the presumption that the dividends had been actually received.

In point of fact, the above dividends had not been received by M & Co.; F, a partner in the house, having in the lifetime of A, sold and transferred the stock in question by means of forged powers of attorney, F continued, after this transfer, to enter in the day-book of M & Co. the amounts of the half-yearly dividends, on the days when they would have become due, as if he had duly received the same at the Bank of England, which amounts were, in the ordinary course of business, regularly posted from such day-book to the credit of the trustees by the clerks of M & Co. Commissions of bankrupt issued against the members of the firm

of M & Co. in September and October 1824:—Held, that, at the date of those commissions, the bankrupts were not indebted to the trustees for the balance of the dividends appearing by the books to have been received. *Hume v. Bolland*, 1 C. & M. 130, s. c. 2 Tyr. 575.

### BANK NOTES—LOST.

[See BILL OF EXCHANGE, Lost Bills and Notes.]

### BANK OF ENGLAND.

[See PRODUCTION AND INSPECTION OF BOOKS, DOCUMENTS, &c.]

Certain privileges given to, for a limited period. 4 & 5 Will. 4, c. 98; 11 Law J. Stat. 198.

Provisions for the repayment of a fourth part of the debt due to, from the public. 4 & 5 Will. 4, c. 80; 12 Law J. Stat. 162.

A bequest of stock in the public funds, will not of itself pass bank stock. *Mills v. Mills*, 4 Law J. (N.S.) Chanc. 266.

### BANKRUPT.

[See ANNUITY—BARON AND FEME—LEGACY, Construction of—MASTER AND SERVANT.]

Amendment of laws relating to. 2 & 3 Will. 4, c. 114; 10 Law J. Stat. 281.

(A) PERSONS LIABLE TO BECOME BANKRUPT.

(B) ACTS OF BANKRUPTCY.

(a) *In general.*

(b) *Departure from Dwelling-house, and otherwise absenting himself.*

(c) *Beginning to keep House.*

(d) *Assignment and Sale of Property.*

(e) *Fraudulent Conveyance or Transfer.*

(C) OF THE PETITIONING CREDITOR.

(a) *Who may be.*

(b) *Substitution of another Petitioning Creditor.*

(c) *Rights, Duties, and Liabilities.*

(d) *Debt, Amount and Nature of.*

(D) OF THE FIAT.

(a) *In general.*

(b) *Striking the Docket.*

(c) *Opening the Fiat.*

(d) *Declaring the Bankruptcy.*

(e) *Errors.*

(f) *Validity of.*

(g) *Alteration of.*

(h) *Second and renewed Fiats.*

(i) *Country Fiat.*

(j) *Removed Fiat.*

(k) *Auxiliary Fiat.*

(E) OF THE MESSENGER.

(F) OF THE OFFICIAL ASSIGNEE.

(G) OF THE PROVISIONAL ASSIGNEE.

(H) OF THE COMMISSIONERS.

(a) *In general.*

(b) *Authority.*

(c) *Duty.*

(d) *Liability.*

(e) *Examination before.*

(f) *Commitment by.*



## (I) PROOF OF DEBTS.

- (a) *In general.*
- (b) *Creditor's election.*
- (c) *Judgments, &c.*
- (d) *Mortgages.*
- (e) *Contingent Demands.*
- (f) *Marriage Settlements.*
- (g) *Annuities.*
- (h) *Servant.*
- (i) *Assignees.*
- (j) *Bonds.*
- (k) *Bills of Exchange and Promissory Notes.*
- (l) *Securities.*
- (m) *Executors.*
- (n) *Trustees.*
- (o) *Cestui que trust.*
- (p) *Sureties.*
- (q) *Double Proof.*
- (r) *Expunging.*
- (s) *Effect of Proving.*

## (K) OF SET-OFF AND MUTUAL CREDIT.

## (L) OF THE ASSIGNEES.

- (a) *Choice of.*
- (b) *Rights.*
- (c) *Duties and Liabilities.*
- (d) *Petition by.*
- (e) *Election by.*
- (f) *Removal of.*

## (M) OF THE ASSIGNMENT.

- (a) *Of Bankrupt's Property, real and personal.*
- (b) *Property of the Bankrupt's Wife.*
- (c) *Trust Property.*
- (d) *Possession, Order, and Disposition, or reputed Ownership.*
- (e) *Voluntary Assignment.*

## (N) MORTGAGE, AND SALE OF PREMISES.

## (O) OF RELATION.

- (a) *Payments made by, to, and on account of, the Bankrupt.*
- (b) *Other Dispositions of Bankrupt's Property.*
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## (AA) COURT OF BANKRUPTCY.

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## (BB) SECRETARY OF BANKRUPTS.

## (CC) COSTS.

## (DD) OF THE SOLICITOR.

## (EE) BANKRUPT IN SCOTLAND.

## (A) PERSONS LIABLE TO BECOME BANKRUPT.

*Semble*—A coach proprietor is not a trader. *Ex parte Walker*, 2 Mont. & A. 267, s. c. 1 Dea. 88.

Single act of buying and selling by farmer, with evidence of intent to continue, sufficient trading. *Ex parte Lavender*, 4 D. & Ch. 487.

A contracted a debt, and afterwards became a trader; the debt remained unpaid; he went out of trade, and then committed an act of bankruptcy:—Held, that a commission of bankruptcy could be maintained upon such debt and act of bankruptcy. *Baillie v. Grant*, 1 C. & F. 238, s. c. 6 Bligh, n.s. 459; 9 Bing. 121; 2 Mo. & Sc. 193.

A person who purchases some unfinished houses, with a view to finishing and letting or selling them, if he has called himself a builder, and expressed an intention of continuing such speculations, is a builder within the 2nd sec. of 6 Geo. 4, c. 16, notwithstanding he had a term in the land, and employed a builder under him. *Ex parte Nerinckx re Nerinckx*, 4 Law J. (n.s.) Bankr. 73, s. c. 2 Mont. & A. 384; 1 Dea. 78.

A person who keeps a lodging-house, and also seeks a profit by furnishing her guests with provisions, at a small profit, although those provisions do not form a common stock, but are set apart as the separate property of the lodgers for whom so procured, is an hotel-keeper, within 6 Geo. 4, c. 16, s. 2, and subject to the bankrupt laws. *Smith v. Scott*, 1 Law J. (n.s.) C.P. 143, s. c. 9 Bing. 14; 2 Mo. & Sc. 35.

A commission cannot be supported, on an act of bankruptcy, by lying in prison, if the trading has commenced subsequent to the arrest, and been carried on during the imprisonment. *Ex parte Lynche re Lynche*, 1 Law J. (n.s.) Bankr. 78, s. c. Mont. 453.

As soon as a banker ceases to receive deposits, the trade of banking ceases. *Griffiths v. Jay*, 4 Law J. (n.s.) Chanc. 68.

The question whether a debtor was a trader at the time of his death, is a proper question for a reference to the Master, where there is not sufficient evidence to prove it. *Sedgwick v. Coverdale*, 3 Law J. (n.s.) Chanc. 140.

A scrivener is one who lends out money for others on commission. *Yeo v. Allen*, 3 Doug. 214.

A, a livery-stable keeper at Brighton, is found, on case reserved for the opinion of the Court, to have been in the habit of purchasing hay and corn, which he kept in his own stable—which he supplied to the horses at livery—and which he also sold to all who wished to buy, as is done in all livery stables:—Held, that such party is a trader within the 2nd section of 6 Geo. 4, c. 16, and that his character, or responsibility, as such, is not qualified by the words, "as is done in all livery stables." *Cannan v. Denew*, 3 Law J. (n.s.) C.P. 65, s. c. 10 Bing. 292; 3 Mo. & Sc. 761.

The wife of a convicted felon, sentenced to transportation beyond the seas for the term of fourteen years, but removed to, and confined on board, one of the hulks in this country, is liable to be made a bankrupt if she trade on her own account, although she is in the habit of visiting her husband and holding communication with him during his confinement. *Ex parte Franks*, 1 Mo. & Sc. 1.

## (B) ACTS OF BANKRUPTCY.

### (a) In general.

A commission of bankrupt may be supported on a debt accruing before the bankrupt became a trader and an act of bankruptcy committed after he has ceased to be a trader. *Baillie v. Grant*, 9 Bing. 121, s. c. 2 Mo. & Sc. 193; 1 C. & F. 238; 6 Bligh, n.s. 459.

Admissibility of declarations made by a bankrupt in the absence of a party to whom he had given security, towards establishing an act of bankruptcy, founded on the giving of such security. *Ridley v. Gyde*, 2 Law J. (n.s.) C.P. 25, s. c. 9 Bing. 349; 2 Mo. & Sc. 448.

### (b) Departure from Dwelling-house, and otherwise absenting himself.

A country trader having been arrested on a bill, and having put in bail, promised to attend next day to pay the same; he, however, went to London to procure funds, and wrote to the creditor, that that would prevent his keeping the appointment:—Held, not an act of bankruptcy by absenting, there being no intent to delay. *Ex parte Lavender*, 2 M. & A. 11, s. c. 4 D. & Ch. 484.

The declarations of a trader, made shortly after an absence, are not admissible to prove such absence an act of bankruptcy. *Semble*—That a breach of an appointment by a trader to call at his creditor's house to pay a debt, is not an act of bankruptcy. *Lees v. Marion*, 1 M. & Ro. 210. [Parke]

Where a trader at Bath left her dwelling-house, and went to London for the purpose of persuading a creditor to withdraw his execution, and left word of the place to which she had gone, but, failing to procure the withdrawing of the execution, did not return to her dwelling-house:—Held, that this was no act of bankruptcy. *Aldridge v. Ireland*, 3 Doug. 307.

If a trader, through apprehension of being arrested, abstain from going to a place, to which, but for such apprehension, he would have gone, such conduct on his part amounts to an act of bankruptcy, and brings him within the words of the statute—"absenting himself with intent to defeat or delay creditors." *Robson v. Rolfe*, 2 Law J. (n.s.) C.P. 80, s. c. 9 Bing. 648; 2 Mo. & Sc. 786.

Letters written by the acceptor to the holders of certain bills not then due, stating the deaths of the drawers, and asking further time, though written before the party absented himself from home, receivable as evidence of the intention of the party in thus absenting himself, in an action, where the question was, whether he had, on or before a certain time, committed an act of bankruptcy. *Smith v. Cramer*, 4 Law J. (n.s.) C.P. 190, s. c. 1 Bing. N.C. 190; 1 Sc. 541.

Where a trader, whose goods are under seizure, quits his house, it is for the jury to say whether he

departs with the *bond fide* intention to endeavour to procure the means of removing the execution, or whether, having gone for that purpose, he stays away for the purpose of avoiding his creditors. *Batchelor v. Vyse*, 4 Mo. & Sc. 552.

### (c) Beginning to keep House.

Where a trader gave orders to be denied on the 26th of May, but was not in fact denied till the 28th:—Held, that there was no act of bankruptcy till the 28th. *Hawkes v. Sands*, 3 Doug. 429.

A trader, having been denied to a creditor who called for money, was, after a little time, seen peeping over his wife's shoulder. Upon another occasion, seeing a creditor coming, he retired behind a partition at the back of his shop, and his wife coming forward said he was not at home:—Held, that a jury were properly directed to consider whether the trader "had kept his house;" had wilfully secluded himself, that is, had withdrawn himself from a part of the house where he was likely to meet a creditor, to a more retired part. *Key v. Shaw*, 8 Bing. 320, s. c. 1 Mo. & Sc. 462.

### (d) Assignment and Sale of Property.

A trader conveying away property to such an extent as will prevent him from continuing his business and render him insolvent, commits an act of bankruptcy. But those who rely upon such act of bankruptcy, on a trial, must shew that it was calculated to have the alleged effects, by evidence of the general state of the party's affairs at the time of such conveyance. It is not sufficient to prove that the trader, under pressure, disposed of some article essential to the carrying on of his business; as that a miller, by bill of sale, transferred his wagon and horses to a creditor who arrested him. *Wedge v. Newlyn*, 4 B. & Ad. 831.

An assignment to trustees for the benefit of creditors, executed by the party, is an act of bankruptcy, although none of the trustees execute it. *Botcherly v. Lancaster*, 3 Law J. (n.s.) K.B. 157, s. c. 1 Ad. & E. 77; 3 N. & M. 383.

The sale of a tradesman's stock in trade, to a *bond fide* purchaser, at a fair price, without any knowledge on the part of the latter, of a fraudulent intention on the part of the vendor to abscond with the proceeds of the sale, and defraud his creditors (which he actually did),—not an act of bankruptcy. *Baxter v. Pritchard*, 3 Law J. (n.s.) K.B. 185, s. c. 1 Ad. & E. 456; 3 N. & M. 638.

A sale of the whole of a trader's property is not, of itself, an act of bankruptcy.

The party who seeks to treat the sale as an act of bankruptcy must shew some fact from which fraud may be inferred. *Ross v. Haycock*, 1 Ad. & E. 460, s. c. 3 N. & M. 644.

The assignment of all a trader's property in trust for the benefit of creditors, is an act of bankruptcy, though, in point of fact, he does not intend to delay or defeat his creditors, because, as that is its natural effect, he must, in law, be presumed to have so intended. *Stewart v. Moody*, 4 Law J. (n.s.) Exch. 55, s. c. 1 C. M. & R. 777; 5 Tyr. 493.

### (e) Fraudulent Conveyance or Transfer.

A fraudulent delivery of goods by a trader, will be of itself an act of bankruptcy. A delivery of goods

to one to whom no debt was due, would be such a fraudulent delivery; and the delivery would likewise be fraudulent, though a debt was due, if the transfer of the goods was made voluntarily, and in contemplation of bankruptcy.

Personal property may be transferred for a sufficient consideration without writing, if the possession be also transferred; and a debtor may prefer one creditor to another, if the debtor be not a trader; but if he be a trader, he cannot prefer one creditor to another, unless he be pressed. *Scott v. Thomas*, 6 C. & P. 611. [Parke]

An act of bankruptcy (by assignment) concerted between the bankrupt and the petitioning creditor, will not support a commission issued thereupon. The stat. 1 & 2 Will. 4, c. 56, has made no difference in this respect. *Marshall v. Burdworth*, 2 Law J. (N.S.) K.B. 75, s. c. 1 N. & M. 279; 4 B. & Ad. 508.

Deeds executed by a trader before a commission of bankruptcy has issued against him, for the purpose of vesting his freehold and leasehold estates in trustees, in trust to sell and pay debts, and subject thereto in trust for himself, do not amount to an act of bankruptcy, without circumstances, on the face of the deeds, or dehors the deeds, shewing an intention to defeat the rights of general creditors, or to give a fraudulent preference; and creditors taking interests in the property so vested in trustees, by way of assignment from the trustees, and before the bankruptcy of the trader, by way of security for their debts, have a specific lien under such assignment, which is valid against the assignees under the commission. *Churchill v. Greenwood*, 2 Law J. (N.S.) Chanc. 146, s. c. 1 M. & K. 546.

To constitute a fraudulent preference to a particular creditor by a trader, the act done must originate with the trader himself. If it originate with the creditor, and be pressed by him, the fact that the trader contemplated bankruptcy at the time of the act done, will not make it a fraudulent preference. *Morgan v. Brundrett*, 2 Law J. (N.S.) K.B. 195, s. c. 2 N. & M. 280; 5 B. & Ad. 289.

A trader carrying on business as a soap and alkali maker, being indebted to his bankers to a large amount, assigned all his stock in trade, machinery, and effects to them, to secure his then debt and future advances, provided that he should continue in possession thereof until default made by him in payment of the balance which he might owe them after notice. Besides the property so assigned, he was possessed of some ships of large value, which were not included in that conveyance:—Held, that this assignment was not an act of bankruptcy.

*Semble*, that payment of a debt in money with the intention of giving to the creditor a fraudulent preference, is not an act of bankruptcy. *Carr v. Burdiss*, 4 Law J. (N.S.) Exch. 60, s. c. 1 C. M. & R. 443; 5 Tyr. 136.

*Quære*, whether the payment of a country bank-note to a creditor, with the intention of giving him a fraudulent preference, is an act of bankruptcy within the 6 Geo. 4, c. 16, s. 3. *Carr v. Burdiss*, 1 C. M. & R. 782, s. c. 5 Tyr. 309.

A conveyance of part of a bankrupt's property in trust to sell and dispose of the proceeds as he shall direct, is not an act of bankruptcy. *Ex parte Carrington*, 1 Mont. & A. 1.

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## (C) OF THE PETITIONING CREDITOR.

### (a) Who may be.

No creditor can take out a renewed fiat, whose debt would not support an original fiat. *Ex parte Maude re Hudson*, 3 Law J. (N.S.) Bankr. 1, s. c. 1 Mont. & A. 46; 3 D. & Ch. 365.

If a trader take the benefit of the Insolvent Debtors Act, a creditor whose debt is inserted in the schedule, may afterwards issue a fiat on that debt against the trader. *Ex parte Barrington*, 2 Mont. & A. 255.

The same creditor cannot strike another docket, before the time for opening has expired. *Ex parte Gerrish*, 2 Mont. & A. 491.

A party who has been discharged twice under the Insolvent Act, and is afterwards bankrupt, and does not pay 15s. in the pound, cannot have property, and therefore cannot be petitioning creditor. *Ex parte Mascarenas*, 1 D. & Ch. 607.

### (b) Substitution of another Petitioning Creditor.

When the commissioners find the petitioning creditor's debt insufficient to support the fiat, they should also expressly find, that the debt proposed to be substituted was incurred not anterior to the petitioning creditor's debt. *Ex parte Hunter*, 2 D. & Ch. 507.

The Court will permit a surety, who has paid the debt, to use the name of the original creditor in a petition to substitute another petitioning creditor's debt, under the 18th section of the 6 Geo. 4, c. 16. *Ex parte Rogers re William Rogers*, 4 Law J. (N.S.) Bankr. 19, s. c. 2 Mont. & A. 153; 4 D. & Ch. 623.

*Semble*, on an application to substitute a new petitioning creditor's debt, the Court must be satisfied that there is no action pending in which the validity of the original petitioning creditor's debt will be tried. *Anonymous*, 2 Law J. (N.S.) Bankr. 80.

When the debt of the petitioning creditor has been expunged, the Court will, if the assignees are willing to work the commission, substitute another; and when one of the assignees has been discharged, pending the choice of others, the order to substitute will be made, subject to the concurrence of the assignees to be chosen. *Ex parte — re Smith*, 4 Law J. (N.S.) Bankr. 5.

[And see *Ex parte Vipond re Hill*, 1 Law J. (N.S.) Bankr. 74.]

### (c) Rights, Duties, and Liabilities.

Costs of the application to substitute another debt for the debt of the petitioning creditor, ordered to be paid by the petitioning creditor. *Ex parte Lloyd*, 2 D. & Ch. 506.

The circumstance of a petitioning creditor residing at a distance of 85 miles from the place where the fiat is to be opened, is not of itself a sufficient reason for dispensing with his personal attendance before the commissioners to prove his debt. *Ex parte Cox*, 1 D. & Ch. 205, s. c. Mont. 390.

Personal attendance of petitioning creditor at opening of commission 200 miles off, dispensed with, on ground of personal inconvenience. *Ex parte Ross*, 1 D. & Ch. 552.

Attendance of petitioning creditor dispensed with, under the circumstances, at the opening of the fiat. *In re Polton*, 3 D. & Ch. 688.

Where a fiat is annulled after adjudication, for an insufficient act of bankruptcy, it is always at the costs of the petitioning creditor. *Ex parte Fletcher*, 2 D. & Ch. 374.

Reference to the commissioners to allow, on the taxation of the petitioning creditor's bill of costs, certain expenses incurred before adjudication, by parties appointed by the creditors to act for the benefit of the estate. *Ex parte Evans*, 4 D. & Ch. 392.

Although the petitioning creditor is not entitled to an order on the assignees to pay the amount of his costs, before they have received money under the fiat, he is nevertheless entitled to an inquiry, whether any assets have been received by the assignees. *Ex parte Abram*, 4 D. & Ch. 401.

Where the petitioning creditor's bill, after being taxed by the commissioners, had been paid, and the assignee's accounts had been audited, for the space of six years, the Court refused to order a retaxation of it by the Registrar. *Ex parte Christy*, 4 D. & Ch. 414.

A petitioning creditor is entitled to be repaid out of the estate, a sum paid to a creditor to render him a competent witness to support the fiat. *Ex parte Forth*, 2 Mont. & A. 381.

The solicitor to the assignees of a bankrupt received from them a sum of money, to be applied in payment of the costs of the petitioning creditor, up to the time of the choice of assignees. The solicitor offered to pay the money, on condition that the bill should undergo a subsequent taxation, but to that the petitioning creditor would not consent:—Held, that the latter could not maintain money had and received thereupon against the solicitor, though, after the above offer and refusal, he had authorized the solicitor to pay over part of the money in discharge of commissioners' fees. *Baron v. Husband*, 4 B. & Ad. 611, s. c. 1 N. & M. 728.

The plaintiff being the petitioning creditor and assignee of the defendant, a bankrupt, took, in the interval between the suing out of the commission and the granting of the certificate, a bill of exchange, at twelve months, by way of security for a portion of his debt, and proved for the residue under the commission:—Held, that such security was void, as being contrary to the policy of the Bankrupt Law, and prohibited by the 8th section of the statute 6 Geo. 4, c. 16. *Rose v. Main*, 4 Law J. (N.s.) C.P. 18, s. c. 1 Bing. N.C. 357; 1 Sc. 127.

*Semble*, the forfeiture of the debt by the petitioning creditor, for compounding, cannot be enforced by the creditors under another commission, issued against the surviving partner.

Payment by a person who has become bail for the bankrupts, when sued on the bail-bond by the petitioning creditor, is not a compounding within the act; neither is a promissory note a security within the terms of the section. *Ex parte Green re Madders*, 1 Law J. (N.s.) Bankr. 24, s. c. 1 D. & Ch. 230.

The Court will not favour any attempt on the part of a petitioning creditor to come to a compromise with a bankrupt. *In re Joseph Wisden*, 1 Law J. (N.s.) Bankr. 17.

(d) *Debt, Amount and Nature of.*

[See, *ante*, (B) Act of bankruptcy, In general:—*post*, PRACTICE.]

Adjudication reversed on the petition of the bankrupt, upon the ground that the petitioning creditor's debt was clearly an equitable, and not a legal debt. *Ex parte Morgan re Morgan*, 4 Law J. (N.s.) Bankr. 33.

A composition has been accepted upon a debt, which has been released by deed, and afterwards a promissory note is given by the debtor, for the amount so released:—*Semble*, such promissory note is not a sufficient petitioning creditor's debt. *Ex parte Hall re Hall*, 4 Law J. (N.s.) Bankr. 91.

A advanced a sum to B, to enable him to set up in business, of which A was to have one-eighth of the profits:—Held, A might take out a commission against B on this sum. *Ex parte Nolley re Nolley*, 3 Law J. (N.s.) Bankr. 1, s. c. 1 Mont. & A. 46; 3 D. & Ch. 367.

The bare legal debt of a trustee is not sufficient, without the concurrence of the *cestui que trust*, to support a fiat. *Ex parte Grey re Grey*, 4 Law J. (N.s.) Bankr. 70, s. c. 1 D. 105; 2 Mont. & A. 283.

Where a docket has been struck on a note, on which the bankrupt and W were liable, a subsequent tender on the part of W will not so extinguish the debt as to entitle a party to petition to supersede, as payment after docket struck would have been invalid. *Ex parte Jones re Lamplough*, 3 Law J. (N.s.) Bankr. 97, s. c. 1 Mont. & A. 442; 3 D. & Ch. 637.

Where the petitioning creditor's debt is a bill of costs, which, if taxed, will not support the fiat, yet the Court will not, on the petition of the bankrupt, order it to be taxed, (the obvious result of which will be a supersedeas, if the bankrupt has admitted the bill to be correct by inserting the amount in his schedule when he passed the Insolvent Debtors Court. *Ex parte Gingell re Gingell*, 2 Law J. (N.s.) Bankr. 22, s. c. 2 D. & Ch. 546.

If a creditor has received and transferred a bill of exchange, the holder of the bill is the proper petitioning creditor. *Ex parte Bollen*, M. & B. 412.

Notwithstanding a trader take the benefit of the Insolvent Act, and the debt of a creditor be duly inserted in the schedule, the debt is still a good petitioning creditor's debt to support a subsequent fiat. *Ex parte Barrington*, 1 D. 3.

The bankrupt entered into a deed of composition with his creditors, by which they released him from his debts:—Held, that a promissory note subsequently given to a creditor for the remainder of the debt, was a *nudum pactum*, and consequently a bad petitioning creditor's debt. *Ex parte Hall*, 1 Deac. 17.

The bankrupt, who was in partnership with W P, borrowed various sums of him by way of loan, and upon the dissolution of the partnership, purchased the stock in trade for a stipulated sum. W P made out an account, entitled "Mr. H P (the bankrupt) in account with H and W P":—Held, that W P had a good petitioning creditor's debt, notwithstanding this mode of entitling the account. *Ex parte Richardson*, 3 D. & Ch. 244.

A lends B money, to enable him to commence a trade, at five per cent. interest. After the loan, B agrees to pay to A one eighth of the annual profits, by monthly payments, which offer A accepts, and B accordingly makes several monthly payments, for which A gives B receipts on account: Held, that the balance of the principal and interest due from B to A, was a good petitioning creditor's debt, not arising out of a partnership, nor affected by usury. *Ex parte Briggs*, 3 D. & Ch. 367.

A bill of exchange drawn by a bankrupt before his bankruptcy, but not indorsed to the petitioning creditor until after the act of bankruptcy, is a good petitioning creditor's debt. *Bingley v. Malleson*, 3 Doug. 338.

*Semble*, that pending a replevin on a distress for rent, the landlord cannot sue out a commission of bankrupt against the tenant, founded on his demand for rent. *Emery v. Mucklow*, 4 Mo. & Sc. 263.

#### (D) OF THE FIAT.

##### (a) In general.

Where all the creditors lived in London, except two, a London fiat was directed, instead of the country commission already issued, which last was ordered to be impounded. *Ex parte Johnson*, 1 D. & Ch. 221.

Where a party in the country applied to strike a docket, and issue a fiat, on the 14th of January, on papers sent from Worcester, the day after the issuing of the orders of the 12th of January, which papers used the word "commission" instead of "fiat;" and upon the application being refused at the office, the papers were sent back to the country to be altered, and in the meantime another party applied for and struck a docket:—Held, that the first applicant was entitled to the fiat upon his amended papers. *Ex parte Lechmere*, 1 D. & Ch. 10.

Where a party by pretence of coming into proposed arrangement with other creditors, protracts the prosecution of a fiat over the fourteen days, and then applies for a new fiat, and to supersede the first, even if such second fiat be granted, the Court will supersede the second, and order the first to stand: *a fortiori*, if the second be not in fact granted, but the first is proceeded with, the Court will sustain the first under such circumstances. *Ex parte Baker*, 1 D. & Ch. 533.

Where a commission (issued before the new act) had been transferred to one commissioner, and a fiat against the same bankrupt had been directed to another; the Court ordered the commission to be transferred to the commissioner, to whom the fiat was directed. *In the matter of Knox*, 1 D. & Ch. 317.

##### (b) Striking the Docket.

Where the time expired for opening a commission, through the contrivances of the bankrupt, the petitioning creditor obtained leave to strike a new docket. *In re Matthews*, 1 D. & Ch. 35.

A tendered docket papers, of which the affidavit of debt was sworn before the solicitor to the petitioning creditor; at the same time B tendered papers not so sworn; they drew lots, and the lot fell to A, whose papers were entered:—The Court refused to interfere to give the fiat to B. *Ex parte Dakins*, 1 Mont. & A. 417.

##### (c) Opening the Fiat.

[See *ante*, (C) Petitioning Creditor, — Rights, Duties, and Liabilities of.]

The Court will not enlarge the time for opening the fiat, unless there be an affidavit to negative concert with the bankrupt, or the existence of any negotiation for a composition, and that the party intends to prosecute the fiat. *Ex parte Smith re Jones*, 3 Law J. (N.S.) Bankr. 99, s. c. 1 Mont. & A. 473; 3 D. & Ch. 761.

The Court will not enlarge the time for opening a fiat, upon the suggestion that a compromise is pending. *Anonymous*, 4 Law J. (N.S.) Bankr. 7.

Time for opening fiat not enlarged to give effect to arrangement for composition. *Ex parte Moody*, 2 D. & Ch. 210.

Where the time has expired for opening a fiat, the Court will not grant further time for this purpose to the petitioning creditor, merely because he has been negotiating for a composition with the general body of the creditors. *Ex parte Downton*, and *Ex parte Cradock*, 1 D. & Ch. 111, s. c. 1 D. & Ch. 487; M. & B. 264.

Time of opening a fiat enlarged, where witness in support of the bankruptcy keeps out of the way, and is summoned by the commissioner to attend on a future day. *Ex parte Fox*, 1 D. & Ch. 572.

Under special circumstances time enlarged for opening a commission, issued on the day before the commencement of the jurisdiction of the new Court of Bankruptcy, and a petition was answered for the same day on which the order was applied for. *Ex parte Moody*, 1 D. & Ch. 34.

Where both the quorum commissioners are unable to attend to open the fiat, the Court cannot make an order that the other three commissioners may open it, but the proper course is to annul the fiat, and take out a new one. *Ex parte Sutton*, 1 D. 43.

##### (d) Declaring the Bankruptcy.

The advertisement in the Gazette will not be stayed, unless the fiat is disputed. *Re Hambden*, 2 Law J. (N.S.) Bankr. 20, s. c. 2 D. & Ch. 209.

The Court will not stay the advertisement in the Gazette, unless the proceedings be in court. *Ex parte Pownall re Pownall*, 3 Law J. (N.S.) Bankr. 55, s. c. 1 Mont. & A. 116; 3 D. & Ch. 723.

The advertisement will not be stayed if the requisites are sufficient. *Ex parte Edwards*, M. & B. 255.

The publication of the advertisement of a bankruptcy will not be postponed, although a large majority of the creditors consent. *Ex parte Raffenstein*, M. & B. 84.

Where a trader against whom a fiat issues, swears that he owes no debt to the petitioning creditor, and has committed no act of bankruptcy, the Court will stay the advertisement in the Gazette; *a fortiori*, if there does not appear to be a clear debt, and act of bankruptcy, on the proceedings. *Ex parte Fletcher*, 2 D. & Ch. 327.

Where the person against whom a fiat is issued, applies to the Court for a suspension of the advertisement in the Gazette, and swears positively that

he owes no debt to the petitioning creditor, it is not necessary the Court should inspect the proceedings. *Ex parte Fletcher*, 2 D. & Ch. 317.

Adjudication stayed, on affidavit that the party owed no debt to the petitioning creditor, and had not committed an act of bankruptcy. *Ex parte Fletcher*, 2 D. & Ch. 90.

#### (e) Errors.

[See *In re Roberts*, 2 Law J. (n.s.) Bankr. 96; and *Ex parte Todd*, 1 Law J. (n.s.) Bankr., s. c. Mont. 455, and 1 D. & Ch. 319.]

How a fiat may be amended. *In re Walker*, 1 D. & Ch. 381.

An unopened fiat amended, to agree with the docket papers. *Ex parte Jarvis re Elliot*, 3 Law J. (n.s.) Bankr. 121, s. c. 1 Mont. & A. 619; 4 D. & Ch. 211.

Unopened fiat not amended. *Ex parte Hawes*, 1 Mont. & A. 703.

*Quære*—Whether the date of a fiat, which has not been opened, can be altered, so as to give effect to a subsequent act of bankruptcy. *In re Roberts*, 3 D. & Ch. 315, s. c. 2 Law J. (n.s.) Bankr. 96.

Fiat unopened. Description of bankrupt's parish allowed to be amended. *Ex parte Humphrey*, 3 Law J. (n.s.) Bankr. 122, s. c. 4 D. & Ch. 484; 1 Mont. & A. 664.

Unopened fiat amended by inserting the proper parish. *Ex parte Elliot*, 3 Law J. (n.s.) Bankr. 122, s. c. 1 Mont. & A. 664.

Docket papers and the fiat cannot be amended by inserting the bankrupt's place of business.

*Quære*—If the docket be correct, and the fiat incorrect, through the error of the office. *Ex parte Graves*, 1 Mont. & A. 315.

A fiat will not be amended by altering the date to let in a later act of bankruptcy, unless under special circumstances. *Ex parte Jacobs*, 2 Mont. & A. 102, s. c. 4 D. & Ch. 277.

Fiat amended, no proceedings having taken place under it. *In re Graham*, 1 D. & Ch. 458.

*Semble*—That the name of one of the commissioners, who has not acted under the fiat, being mis-spelt, is not such an error as to require amendment. *In re Bell*, 3 D. & Ch. 326.

*Quære*—Whether the Court can direct the amendment of a fiat, without the approbation of the Lord Chancellor; and whether this can be done now, after adjudication. *In re Bell*, 3 D. & Ch. 326.

#### (f) Validity of.

Signing a deed reciting the bankruptcy, &c. is an acquiescence in the validity of the commission. *Ex parte Hall*, Mont. 354.

*Quære*—Whether a joint commission against two joint traders, with a third not included in the commission, on a debt due from the two, is valid. Neither surrendering, interfering in the choice of assignees, interposing as to the deposition of the assignees, passing the last examination, nor endeavouring to obtain the certificate, are acts of acquiescence. *Ex parte Chambers*, 2 Mont. & A. 440.

A commission issued against a man by the name of "Wicks," under which name he traded, and contracted debts, although "Knox," was his real name. Two years afterwards, and before the bankrupt had passed his last examination under the commission,

a fiat is issued against him by his right name. The commission was preferred to the subsequent fiat. *Ex parte Sambourne*, 2 D. & Ch. 22.

A fiat taken out for the purpose of dissolving a partnership will be annulled. *Ex parte Grey re Grey*, 4 Law J. (n.s.) Bankr. 70, s. c. 1 D. 105; 2 Mont. & A. 283.

#### (g) Alteration of.

[See *Ex parte Todd*, 1 Law J. (n.s.) Bankr. 44, s. c. Mont. 455; 1 D. & Ch. 319.]

#### (h) Second and renewed Fiats.

The defendants took goods under a second commission of bankrupt, pending a former subsisting commission: Held, that they could not retain them, even against a colourable title, the second commission being void; nor could they set up the title of the assignee under the first commission, to defeat the action. *Nelson v. Cherrill*, 1 Law J. (n.s.) C.P. 95, s. c. 8 Bing. 316; 1 Mo. & Sc. 452.

If a fiat be lost, a duplicate one will not be granted, but a new fiat will be issued. *In re Levett*, 3 Law J. (n.s.) Bankr. 46, s. c. 1 Mont. & A. 308; 3 D. & Ch. 567.

The Court, in the case of a second or other commission being issued against a member of a firm, will follow the direction of the 1 & 2 Will. 4, c. 56, s. 14, notwithstanding the 17th section of 6 Geo. 4, c. 16. *Ex parte Beadle re Schonswar*, 3 Law J. (n.s.) Bankr. 72, s. c. 1 Mont. & A. 445; 3 D. & Ch. 747.

The Court will not allow a new fiat to be issued, on the plea that the petitioning creditor in a fiat that has not been prosecuted, has gone abroad, unless the fourteen days have expired. *Ex parte Medley re Hayday*, 3 Law J. (n.s.) Bankr. 929, s. c. 1 Mont. & A. 79; 3 D. & Ch. 502.

The Court will not interfere to save a petitioning creditor, who has lost the evidences of his debt, from the costs and expenses of a new fiat. *Ex parte Osborn re Gunning*, 4 Law J. (n.s.) Bankr. 18, s. c. 2 Mont. & A. 140; 4 D. & Ch. 398.

New fiat issued on the petition of the same petitioning creditor, before the time for opening had expired, he having been unable to prove an act of bankruptcy before, but one having been since committed. *Ex parte Llewellyn*, 2 Mont. & A. 293, s. c. 3 D. & Ch. 103.

A new fiat issued on the application of the petitioning creditor, to give effect to a more recent act of bankruptcy; the time for opening the first fiat not having expired. *In re Crawley*, 3 D. & Ch. 251.

Unless there are special circumstances, the Court will never allow the petitioning creditor to take out a new fiat before the time for opening has elapsed. *Ex parte Jacobs*, 4 Law J. (n.s.) Bankr. 45, s. c. 2 Mont. & A. 102; 4 D. & Ch. 277.

Order necessary to enable same party to issue a new fiat, where, from mistake in former, it had not been prosecuted in time. *In re Edwards*, 1 D. & Ch. 531.

When a renewed fiat is prayed by a creditor, by reason of the death of commissioners, the assignees must be served with the petition. *Ex parte Ray*, 1 D. & Ch. 341.

The petitioning creditor, after issuing a fiat, found he could not support it, on account of his

inability to prove the trading. The Court refused to permit another petitioning creditor to issue a second fiat, before the time for proceeding in the first was expired. *Ex parte Howes*, 3 D. & Ch. 493.

(f) *Country Fiat.*

[See *Ex parte Leonard*, 2 Law J. (n.s.) Bankr. 17.]

Where a country fiat will be preferred to a London one. *Ex parte Bolan*, 2-D. & Ch. 331.

Bankrupt has houses of business at L and M, majority of creditors living at M. Order necessary to obtain country commission at M. *Ex parte Wood*, 1 D. & Ch. 410.

The Court will not (except under very special circumstances,) annul a town fiat, for the purpose of issuing a country fiat, after a lapse of twelve days. *In re Samuel Riley*, 3 Law J. (n.s.) Bankr. 56, s. c. 4 D. & Ch. 481.

(g) *Removed Fiat.*

When a country fiat is superseded, because the commissioners decline to act, and a new one issues to a London commissioner, this is not a "removed" fiat under 1 & 2 Will. 4, c. 56, s. 47, and full fees must be paid. *Ex parte Wellman*, 2 Mont. & A. 292.

Held, that the fact of there being inquiries necessary, which cannot be so well pursued in the country as in London, is sufficient to remove the fiat to London, though no case of improper behaviour is established against the commissioners in the country. *Ex parte Grant re Burrell*, 2 Law J. (n.s.) Bankr. 86.

(k) *Auxiliary Fiat.*

[See *Ex parte Carter*, 2 Law J. (n.s.) Bankr. 37.]

(E) OF THE MESSENGER.

As to the summary jurisdiction of the Court to order restitution of goods of third persons, seized by the messenger. *Ex parte Heath re Heath*, 2 Law J. (n.s.) Bankr. 8, s. c. 2 D. & Ch. 140; M. & B. 169.

A messenger under 6 Geo. 4, c. 16, may maintain an action against the assignee for necessary charges and expenses of acts which must have been known to the assignee, without proving that he was employed by the assignee or appointed to act as messenger to the particular commission. *Hamber v. Parser*, 3 Law J. (n.s.) Exch. 2, s. c. 2 C. & M. 209; 4 Tyr. 41.

The Court will not allow a messenger's bill to be taxed after a lapse of five years, unless there be a charge of fraud lately discovered. *Ex parte Wilment re Wilment*, 3 Law J. (n.s.) Bankr. 73, s. c. 1 Mont. & A. 45; 3 D. & Ch. 364.

The Court will not interfere by ordering the messenger to withdraw from the possession of goods which he has seized under the bankruptcy, in any case of reputed ownership. *Ex parte Harling*, 2 D. & Ch. 389.

(F) OF THE OFFICIAL ASSIGNEE.

[See COURT OF REVIEW, Jurisdiction, *post.*]

An official assignee ought not, except under very peculiar circumstances, to present a petition to the Court in his own name. *Anon.* 1 D. 106.

The Court will not permit the official assignee to petition, unless under the direction of the com-

missioner. *Ex parte Gibson re Davenport*, 2 Law J. (n.s.) Bankr. 84.

The official assignee is merely a ministerial officer, and must act under the directions of the commissioner; he has therefore no right to detain a dividend in his hands, under the plea, that the creditor claiming is indebted to the estate. *Ex parte Alexander re Elder*, 1 Law J. (n.s.) Bankr. 90, s. c. Mont. 503; 1 D. & Ch. 513.

A solicitor or person having a lien on the money of the bankrupt's estate in his hands, need not pay it over to the official assignee, until his lien is satisfied. *Ex parte Bowden re Bush*, 2 Law J. (n.s.) Bankr. 18.

If an official assignee be included in an order for the payment of 200*l.*, the order may be enforced against him alone, at the option of the party. *Ex parte Murray re Smith*, 3 Law J. (n.s.) Bankr. 91; s. c. 1 Mont. & A. 475.

The Court has power to review the amount of allowance made by the commissioner to the official assignee, but, it seems, will not exercise it, unless there be very strong circumstances. *Ex parte Tip-lady re Dickenson*, 3 Law J. (n.s.) Bankr. 48, s. c. 1 Mont. & A. 161; 3 D. & Ch. 570.

The official assignee is a mere formal party to a conveyance, and need not appear on a petition to compel the creditors' assignees to convey. *Ex parte Birket, re Fox*, 3 Law J. (n.s.) Bankr. 72, s. c. 4 D. & Ch. 503.

On a petition to supersede, by consent of creditors, the official assignee need not sign the petition. *Ex parte Parker*, 3 D. & Ch. 112.

Although the Court has a controuling power in the appointment of the official assignee by the commissioners, yet the Court will not interfere, unless the commissioner has exercised an unsound discretion in the appointment. *Ex parte Bramston*, 2 D. & Ch. 375.

Official assignee cannot, under 1 & 2 Will. 4, c. 56, s. 22, take bankrupt's money out of the hands of a solicitor, without discharging his lien. *Ex parte Bowden*, 2 D. & Ch. 182.

Where official assignee had been appointed under an old commission, on a suggestion that a majority of creditors objected to such appointment, the Court, on motion, suspended an order for delivery up of proceedings, &c. to official assignee till hearing of petition. *Ex parte Parker*, 1 D. & Ch. 530.

If an official assignee becomes insolvent, the creditors' assignees will have leave to sue in the names of the registrars on the bond given by the sureties. *Ex parte Topham*, 2 Mont. & A. 484.

There is nothing in the appointment or character of the official assignee chosen under 1 & 2 Will. 4, c. 56, s. 22, which exempts him from personal liability; he is, therefore, responsible to a party whose money he has received, and retains in his official capacity, if the party who sues can successfully impeach the validity of the commission. *Munk v. Clark*, 2 Law J. (n.s.) C.P. 186, s. c. 10 Bing. 102; 3 Mo. & Sc. 463.

(G) OF THE PROVISIONAL ASSIGNEE.

The provisional assignee of a bankrupt employed an agent to take possession of the bankrupt's effects, and manage the business, and receive monies; he in consequence received a considerable sum, and

absconded without paying it over:—Held, that such provisional assignee was not responsible for the fraud of an agent, he having been appointed with due caution. *Raw v. Cutten*, 1 Law J. (n.s.) C.P. 171, s. c. 9 Bing. 96; 2 Mo. & Sc. 123.

In 1825 an assignment from the provisional assignees was prepared, but, through neglect of the solicitor, never executed. The provisional assignment was ordered to be vacated, and a new assignment executed by the commissioners. It seems the 25th section of 1 & 2 Will. 4, c. 56, does not apply to such a case. The solicitor, having been paid for the assignment, must refund. *Ex parte Bennett*, 2 Mont. & A. 306, s. c. 1 D. 70.

Where the provisional assignee is directed to carry on the business of the bankrupt for the benefit of his creditors, the official assignee will be ordered to supply him with funds for that purpose. *Ex parte Wyatt*, 1 D. & Ch. 229.

The Court will not compel the official assignee to join the other assignees in a suit. If he improperly refuses to join, and is made defendant, he may have to pay his own costs. *Ex parte Evans*, 1 Mont. & A. 335, s. c. 3 D. & Ch. 470.

#### (H) OF THE COMMISSIONERS.

##### (a) In general.

[See, *post*, Solicitor.]

The Court will, in all cases, uphold the general order of Lord Loughborough, which directs, that, in country commissions, there must be inserted the names of two barristers. *Ex parte Kilsby*, 3 D. & Ch. 19.

A barrister cannot petition to have his name inserted in a commission. *Ex parte Ward*, 2 Mont. & A. 219.

The quorum commissioners in a country fiat, have a right to be summoned to attend the meeting held under that fiat, in priority to the other commissioners who are solicitors. *Ex parte Douglas re Ellis*, 4 Law J. (n.s.) Bankr. 45, s. c. 2 Mont. & A. 218.

If a fiat issue against one member of a firm, another fiat against another will be ordered to go to the same commissioners. *Ex parte Blake*, 2 Mont. & A. 481, s. c. 1 D. 191.

The sum of 3*l.* is payable, on the signing of the bankrupt's certificate, to the commissioner by the official assignee—47th and 55th sections of 1 & 2 Will. 4, c. 56. *In re Dawson*, 2 Law J. (n.s.) Bankr. 98, s. c. 3 D. & Ch. 317.

##### (b) Authority.

[See, *post*, Dividend.]

The commissioner of the Court of Bankruptcy appointed under the 1 & 2 Will. 4, c. 56, when sitting alone, has no power to fine or imprison for a contempt. *Rex v. Faulkner*, 4 Law J. (n.s.) Exch. 308, s. c. 2 C. M. & R. 255; 2 Mont. & A. 311: see 5 & 6 Will. 4, c. 29, s. 25.

It is not competent for a commissioner of bankrupts to examine an executrix of a debtor to the bankrupt's estate, touching the amount of property in her hands, as such executrix. *Ex parte Solarte re Alzedo*, 1 Law J. (n.s.) Bankr. 42, s. c. Mont. 495; 1 D. & Ch. 311; 1 Mont. & A. 270.

The commissioner has power, under the 33rd section of the 6 Geo. 4, c. 16, to order the delivery and inspection of a letter written by the wife of the bank-

rupt to a witness, in order that the person inspecting it may, through it, obtain collateral evidence of an act of bankruptcy. *Ex parte Groom re Chambers*, 4 Law (n.s.) Bankr. 22, s. c. 2 Mont. & A. 143; 4 D. & Ch. 640.

The commissioner has no jurisdiction to review accounts allowed by former commissioners; neither has he, in investigating the accounts, jurisdiction to inquire whether any action has been properly brought or not, as that belongs to the Court of Review. *Ex parte Benham*, 4 Law J. (n.s.) Bankr. 65, s. c. 1 D. 26; 2 Mont. & A. 272.

Semble, the commissioners, in declaring a dividend of the net produce of the bankrupt's estate in the hands of the assignees, cannot give a judicial decision as to the liability of any particular assignee to refund money to the estate, by making him jointly liable with another assignee, who had been a defaulter. *Ex parte Learmouth re Thompson*, 1 Law J. (n.s.) Bankr. 84, s. c. 1 D. & Ch. 491.

The general order does not authorize the commissioners to order a sale of an estate, on which an annuity is charged, for payment of the value of the annuity. *In re Daloes*, Mont. 492.

If the barristers in a country commission are absent, an order may be obtained for the others to hold the third meeting. *Ex parte James*, Mont. 454.

*Quære*—whether the commissioners can convey an estate tail after the death of the bankrupt.

The commissioners would not do wrong in executing a conveyance, to enable the question to be tried. *Ex parte Somerville*, 1 Mont. & A. 408, s. c. 3 D. & Ch. 668.

Although a commissioner has no power, under the 106th section of 6 Geo. 4, c. 16, to charge the assignees with monies, which, but for their wilful default, they might have received; yet, where he charged them with certain sums as received "by themselves, or their solicitors," the Court referred it back to him to ascertain the amount, which the assignees, or any person for them, had received, or which, but for their wilful default, might have been received. *Ex parte Keys* and *Ex parte Weston*, 2 D. & Ch. 633.

Although an audit meeting has closed, and the assignees' accounts are then settled, the commissioner, at any future meeting, has power to examine the assignees as to money received before, and not included in such accounts, and to re-investigate those accounts generally, if need be. *Ex parte Applethath*, 2 D. & Ch. 101.

##### (c) Duty.

The failing to shew that the bankrupt was possessed of any property, is not a sufficient reason for refusing to adjudicate. *Ex parte Johnson re Jones*, 4 Law J. (n.s.) Bankr. 82, s. c. 2 Mont. & A. 390.

Where the commissioners were absent from the first meeting, the Court will appoint another. *Ex parte Hall*, 2 Mont. & A. 294.

##### (d) Liability.

If more than the statutable fees are taken by the commissioners, they are perpetually disqualified from acting under any future fiat.

Two travelling fees, for attending two meetings on the same day, under the same bankruptcy, are beyond the fees allowed by the statute. *Ex parte Carter*, 3 D. & Ch. 678.



(e) *Examination before.*

The Court will not restrain the commissioners from carrying on an examination to discover the amount of interest the bankrupt had in a partnership, on the ground that the bankrupt has forfeited his right to become a partner. *Ex parte Marks re Marks*, 1 Law J. (N.S.) Bankr. 111, s. c. 1 D. & Ch. 499.

The bankrupt cannot refuse to answer a question concerning his estate, on the ground that a prosecution is pending against him for fraudulently disposing of part of his estate, and that his answer may be used against him on the trial of that indictment. *Ex parte John Heath re John Heath*, 2 Law J. (N.S.) Bankr. 27, s. c. 2 D. & Ch. 214; M. & B. 184.

A bankrupt, in his examinations before the commissioners, stated that he had no interest in certain premises settled, in trust, on his marriage; his wife, at the time, admitting that she had the settlement, but would not give it up, or allow it to be seen; these facts, together with the lapse of twelve years, do not estop the bankrupt from petitioning for a renewed fiat to inquire into the conduct of the assignees and others, as to this property, in which the bankrupt now states that he has discovered that he has and always had a life interest. *Ex parte Holder re Holder*, 2 Law J. (N.S.) Bankr. 64, s. c. 3 D. & Ch. 276.

A bankrupt, though certificated, must answer all questions concerning his estate and effects, and cannot demur to such questions, on the ground that his answer may subject him to a prosecution for felony, for having given false answers on his last examination. *In re Smith*, 2 Law J. (N.S.) Bankr. 33, s. c. 2 D. & Ch. 230.

In 1811, A and B entered into a partnership, which continued till 1818, when it was dissolved, and the affairs wound up, except as to some outstanding debts. In 1820, a deed of release was executed, from which these debts were excluded. Partnership books relating generally to these and other debts were all along suffered to remain in A's hands. All the outstanding debts were subsequently settled. In 1830, B was declared bankrupt, till which time the books were never called for by B:—Held, that A and B nevertheless continued tenants in common in respect of them, and that the length of time did not affect that relationship; and, therefore, although there was no charge of fraud in the settled account, yet the commissioner had jurisdiction to call A before him, and examine him and the books relative to the former dealings of the bankrupt. *Ex parte Trueman*, 1 D. & Ch. 464.

Where, from unavoidable accident, the commissioners are prevented from meeting to take the bankrupt's last examination, the Court will appoint another day for that purpose. *Ex parte Wilson*, 2 D. & Ch. 388.

Where a bankrupt has sold goods to a party for a price considerably lower than what he gave for them, the purchaser, when summoned before the commissioners for examination, is bound to answer the question "To whom did you subsequently sell these goods?" for it materially concerns the estate of the bankrupt, to ascertain whether the sale by him was *bond fide*. *Ex parte Falk*, 2 D. & Ch. 415.

(f) *Commitment by.*

The examination of a third person by commissioners is not evidence for the formation of their judgment, but merely a brief to enable them to interrogate the witness. *In re John Goodwin*, Mont. 304.

A commitment by two commissioners of the Court of Bankruptcy is valid. A warrant is sufficient, if enough appear to shew the Court has jurisdiction. *Ex parte Smith*, Mont. & B. 418.

If a bankrupt be examined before one commissioner, and committed to the custody of the messenger, and after a short time brought before two commissioners, who ask a few questions and commit him, the commitment is bad. *Ex parte Lampon*, 1 Mont. & A. 245, s. c. 3 D. & Ch. 761.

To justify a committal of a bankrupt for not answering satisfactorily, the commissioners should point out the unsatisfactory answers, and press those points. *Ex parte Lee*, 2 Mont. & A. 15.

(I) *PROOF OF DEBTS.*(a) *In general.*

Where a creditor delayed proving her debt until after a dividend had been declared, having relied on the promise of the assignee to inform her of the progress of the commission, which he failed to do, an order was made that the creditor might prove her debt within a month, and that the payment of the dividends should be, in the meantime, suspended. *Ex parte Colton*, 2 Law J. (N.S.) Bankr. 83, s. c. 3 D. & Ch. 194.

Where a creditor sent up the proper documents to prove his debt at a dividend meeting, and his solicitor forgot the day, another meeting was appointed at his expense, to enable him to prove his debt, the payment of the dividend being ordered to be stayed in the meantime, and to be calculated afresh, in case he substantiated his proof. *Ex parte Graham*, 2 D. & Ch. 564.

Under a fiat against a banker, one person allowed to prove on behalf of a large number of holders of 14. notes; not interfering as to the assignees or the certificate. *Ex parte Gordon*, 1 Mont. & A. 282.

On one petition by the assignees, ordered, that the respective agents of several societies be allowed to tender proof of their respective debts before commissioner, but not to have any power over certificate or in choice of assignees. *Ex parte Ellis*, 1 D. & Ch. 463.

On a petition for leave to prove, and stay the bankrupt's certificate, the Court will, where the circumstances are suspicious, direct a meeting to enable the creditor to prove, and order the commissioners to review the certificate. *Ex parte Bray*, 3 D. & Ch. 495.

A petition for leave to prove must state the grounds on which the proof was rejected by the commissioners. *Ex parte Worth*, 2 D. & Ch. 4.

Where a creditor's petition is to prove a debt which is not in its nature proveable, the petition will be dismissed with costs, notwithstanding the commissioners rejected the proof for an insufficient reason. *Ex parte Worthington*, 1 D. & Ch. 288.

It is not necessary for a co-trustee with a bankrupt to come to the Court in the first instance, for

liberty to go in and tender his proof: if he does, although the Court will give him the order, yet he must pay the expenses of the assignees in appearing. *Ex parte Courtmayre Davis*, 4 Law J. (N.s.) Bankr. 76.

Where a petition to prove is unnecessary, the petitioner is liable to costs. *Ex parte Rodgers*, 1 D. & Ch. 38.

The Court will make no order for proof of a debt, in anticipation of a probable objection that may be made to such proof by the commissioner. When any application of this nature is made previous to the choice of assignees, the petitioning creditor should be served with the petition. *Ex parte Beaumont*, 1 D. & Ch. 360.

Faunteroy, a partner in a banking-house, transferred bank stock, belonging to a customer, by a forged power of attorney; the proceeds were paid to the account of the partnership, and afterwards appropriated by Faunteroy, who was subsequently executed for other forgeries, and a commission issued against the other partners, who were ignorant of the transaction, but, with common diligence, would have known of it. *Quere*—Whether the customer can prove for the value of the stock under the commission. *Ex parte Bolland*, 1 Mont. & A. 570.

Where an actuary embezzled various sums, rendering forty indictments necessary, and became bankrupt, and five indictments were preferred, which failed from technical reasons, which would apply to any other indictment, the proof was allowed for the whole sum embezzled. *Ex parte Jones*, 2 Mont. & A. 193, s. c. 3 D. & Ch. 525.

Where goods, in which the bankrupts were jointly interested with A B, were pledged with a creditor to secure the payment of an acceptance of the bankrupts, and part of the proceeds were received by the creditor before he applied to prove:—Held, that he must deduct the amount so received before he could prove on the acceptance. *Aliter*, if the goods had belonged to A B alone. *Ex parte Prescott*, 4 D. & Ch. 23.

Payments improperly made, as the consideration for signing a composition deed, may be deducted, or set off, from a proof made under a subsequent fiat, for a subsequent debt. *Ex parte Minton*, 1 Mont. & A. 440, s. c. 3 D. & Ch. 688.

By a deed of composition entered into by the bankrupt with his creditors, dated the 5th of September 1831, he agreed to pay 10s. in the pound by two instalments of 5s. each; in consideration of which, the creditors covenanted to release him from his debts as soon as both instalments were paid. This deed was executed only by the major part of the creditors. After the payment of the first instalment, on the 31st of October 1831, a commission issued on an act of bankruptcy committed in June 1831:—Held, that the creditors, who had received the first instalment, were entitled to prove for the residue of their debts, without refunding the amount of the instalment. *Ex parte Wood*, 2 D. & Ch. 508.

C & Co., before their bankruptcy, guarantee to A the payment of 300*l.* for the erection by him of a sugar-mill for D, on the production of a certificate by an engineer that the mill was erected according to the terms of a certain specification. A produces a certificate of the erection of the mill, stating, however, a deviation from the original plan, with the consent of D; upon which, C & Co., without making

objection to such deviation, inform A it was not in their power to pay the money:—Held, that A might prove the 300*l.*, under the fiat issued against C & Co. *Ex parte Ashwell*, 2 D. & Ch. 281.

Where a creditor, after the issuing of the fiat, assigns his debt, this does not give the assignee a right to prove it, but merely a right to call upon the assignor to prove the debt, as a trustee for the assignee. *Ex parte Dickenson*, 2 D. & Ch. 520.

A and B exchange their acceptances of various bills drawn upon them respectively by C., and all three become bankrupt before any of the bills fall due. The acceptances of A are negotiated by the drawer, C, and are proved by the holders under each commission, who receive dividends on their respective proofs:—Held, that A's assignees might prove the amount of B's acceptances under B's commission, subject to a retention of the dividends, until it was ascertained what each estate would pay on the whole of their liabilities. *Ex parte Solarte*, 3 D. & Ch. 419.

A and B entered into partnership as brewers, A buying in, as his share of the capital, a brewhouse and other premises, which were subject to mortgages for debts due by him; A retired from the business, which was continued by B alone, who agreed to take the brewhouse, &c. at a valuation, but the amount was not to be paid till the mortgages were satisfied. B becomes bankrupt, and the mortgage debts remaining unpaid, his assignees, before any proof made in respect of A's debt, paid off the mortgages:—Held, that the assignees were entitled to deduct the sums paid by them from the dividends on the sum which was due to A from B at the time of his bankruptcy. *Rowe v. Anderson*, 4 Sim. 267.

A composition creditor, who receives a bond as part of the composition, is, when the old debt revives, entitled to retain the bond, on a question of proof. *Ex parte Reay*, 2 Mont. & A. 33, s. c. 4 D. & Ch. 525.

B & Co., being largely indebted to R & Co. indorse to them various bills, which had been drawn or indorsed by C & Co. for the accommodation of B & Co. B & Co. and C & Co. respectively become bankrupt, and R & Co. prove the bills under each commission:—Held, that the estate of C & Co. was a security to make good the amount of principal and interest due to R & Co. from B & Co., and that R & Co. were entitled to receive dividends on their proof under C & Co.'s commission, until not only the balance of the principal sum due from B & Co., but also all interest thereon, was fully satisfied. *Ex parte Reed*, 3 D. & Ch. 481.

A party is not estopped from amending his deposition of proof, by making a second deposition contradictory to the first; the only question is, which is the most worthy of credit. *Ex parte Britten*, 3 D. & Ch. 35.

Upon a composition, the original debt revives, upon failure of the debtor in performing his undertaking, or upon *bond fide* reviving the old debt, 2 Mont. & A. 393, s. c. 1 D. 107.

A discounts for K & Co., who afterwards become bankrupt, three bills drawn by K & Co. on D & S; one of the bills becomes due before the bankruptcy, and the two others afterwards; none of them are paid by the acceptors, and A gives no notice to K & Co. of their dishonour. K & Co. also sent to A

five other bills drawn by them on D & S, and received from him in return his acceptances for the precise amount, which they discounted with their own bankers, but none of which being paid by A (who became bankrupt himself before they fell due), they were proved by the holders under K & Co.'s commission, A having never negotiated the five bills sent by K & Co.:—Held, that his assignees could not prove them under K & Co.'s commission. *Ex parte Ventura*, 2 D. & Ch. 261.

F & Co. sold cochineal to John W, for which a small part of the price was paid in cash and the remainder by two bills at four months, but the cochineal was to remain in the hands of F & Co. as a security for the payment of the bills. The bills not being paid when due, John W sent F & Co. two other bills drawn by himself on Joshua W, for which no consideration was given to Joshua W, the acceptor. Before these bills fell due, both John W and Joshua W became bankrupts, and the price of cochineal had fallen so much in the market that F & Co. afterwards sold it for not a third of the price at which John W had bought it, and they then proved for the deficiency under John W's commission:—Held, that they had also a right to prove the amount of the two bills under Joshua W's commission, without deducting the proceeds arising from the sale of the cochineal. *Ex parte Fairlie*, 3 D. & Ch. 285.

The bankrupt, who was a tavern-keeper, had bought of the petitioners large quantities of wines lying in the docks, which were sold to him by sample, for stipulated prices and at long credit, and for which the petitioners delivered to him the usual transfer warrants. The assignees sold the wines by auction at a considerable loss, in consequence of which the commissioner made a reduction in the petitioners' proof, on the ground that the prices charged for the wines were too high:—Held, that he was not justified in making such reduction.

The costs of the petitioner, under these circumstances, were ordered to be paid out of the estate. *Ex parte Reay*, 3 D. & Ch. 175.

If bills, amounting to 1,320*l.*, be delivered by the drawer to a creditor, as collateral security for a debt of 4,000*l.*, and the drawer and acceptor become bankrupt, but the estate of the acceptor prove solvent, the creditor is entitled to receive 20*s.* in the pound on the bills against the estate of the acceptor, and also prove the debt of 4,000*l.* and receive dividends in liquidation of the remaining portion of his debt under the commission against the drawer. *Ex parte Sammon*, 1 D. & Ch. 564.

It is no objection to the proof of a debt under a third commission, that the creditor might have proved it under the second commission, under which the bankrupt has obtained his certificate, if the bankrupt has not paid 15*s.* in the pound under the second commission. *Ex parte Morley*, 2 D. & Ch. 45.

A joint creditor, having a separate security from one of his co-debtors, will be allowed to prove upon the estate of the other, without surrendering his security, notwithstanding the death of the grantor of the security. *Ex parte Bowden, in re Brettell*, 1 Law J. (N.S.) Bankr. 37, a.c. 1 D. & Ch. 135.

If a testator be indebted on a bond, and, his executors being sued thereon, a joint judgment is taken out against them, and then one of them becomes

bankrupt, the creditor cannot prove under this separate commission, though he swears that the other executors are insolvent. *Ex parte Pearce re Foxwell*, 1 Law J. (N.S.) Bankr. 109, a.c. 1 D. & Ch. 574; M. & B. 262.

Where part of the account between mercantile houses becoming bankrupt consists of bills not due at the time of the bankruptcy, there can be no dividend on such bills, unless there is a surplus after satisfying the holders thereof. *Ex parte Laforest*, *Ex parte Wetherell re Living*, 2 Law J. (N.S.) Bankr. 49, a.c. 2 D. & Ch. 199; M. & B. 363.

The cashier of a savings bank embezzled various sums of money, and became bankrupt; the commissioners rejected the proof till after he had been prosecuted; five indictments were preferred, which all failed, through technical difficulties; the commissioners then rejected the proof on all sums not included in those indictments:—Held, that the *bond fide* prosecution of the five indictments enabled proof to be made on all the sums embezzled, whether included in an indictment or not. *Ex parte Jones re Jones*, 3 Law J. (N.S.) Bankr. 11, a.c. 1 Mont. & A. 704.

#### (b) Creditor's Election.

If there be a sequestration abroad (in nature of a joint commission here), and a separate commission in this country, a bill-holder cannot prove, and receive dividends both abroad and here, upon the same bills, but must elect which he will come in under, the sequestration or the commission. *Ex parte Cotenworth re Vanzeller*, 2 Law J. (N.S.) Bankr. 18, a.c. 1 D. & Ch. 281; M. & B. 92.

A firm abroad drew bills on one of its own partners, trading on his own account in England, payable to an agent of the foreign government. The bills were not paid. Process of insolvency issued against the foreign firm, and a commission against the English partners:—Held, that the agent might prove under the commission, but would be restrained from receiving dividends, unless he elected not to prove under the insolvency abroad. *Ex parte Chevalier*, 1 Mont. & A. 345, a.c. 2 D. & Ch. 27.

#### (c) Judgments, &c.

A testator, indebted on bond, devises his real estate to the bankrupt and two other trustees, for payment of his debts. The bond creditor, after the testator's death, brings an action against the bankrupt and the other devisees, and recovers a joint judgment against them:—Held, that he could not prove under the separate commission against the bankrupt, even for the purpose of voting in the choice of assignees. *Ex parte Pearce*, 2 D. & Ch. 451.

A person having been ordered to pay a sum into Chancery, became bankrupt without having done so; a supplemental bill was filed against his assignees, but no order made thereunder. Ordered, that a claim be entered for the sum. *Ex parte Richards*, 1 Mont. & A. 219, a.c. 3 D. & Ch. 479.

A party having been ordered to pay money into court, became bankrupt without having done so; a supplemental bill was filed against his assignees, but they had not appeared:—Ordered, that a claim be entered for the sum. *Ex parte Hancock*, 1 Mont. & A. 220, a.c. 3 D. & Ch. 523.

K

(d) *Mortgages.*

An equitable mortgagee of one partner, for a debt due from the other, may prove his whole debt against the separate estate of that other partner, and retain his security against the first. *Ex parte Rodgers*, 1 D. & Ch. 38.

The bankrupt being indebted to the petitioners, as the acceptor of two bills of exchange, entered into an agreement with them and W L that the bills should be paid out of the proceeds of certain property, the deeds of which were then in the hands of W L for sale:—Held, that the petitioners might claim as equitable mortgagees, but subject to any prior lien of W L. *Ex parte Greenhill*, 3 D. & Ch. 334.

(e) *Contingent Demands.*

Proof cannot be made under the bankruptcy of a surety to an annuity deed, where no default had been made by the principal before the bankruptcy. *Ex parte Thompson re Wyatt*, 2 Law J. (N.S.) Bankr. 5, a.c. 2 D. & Ch. 126; M. & B. 219.

A debt on a guaranty, under which the bankrupt did not become liable for a loss, till after the bankruptcy, is proveable under the fiat, after default shall have happened. *Ex parte Myers in re Henry Sudell*, 2 Law J. (N.S.) Bankr. 41, a.c. 2 D. & Ch. 251; M. & B. 229; but see *Ex parte Thompson*, *supra*.

A contingent debt upon an original undertaking, under which the bankrupt did not become liable for a loss until after the bankruptcy, is proveable under the fiat, after default shall have happened: confirming *Ex parte Myers re Sudell*. *Ex parte Simpson re Sudell*, 3 Law J. (N.S.) Bankr. 113, a.c. 1 Mont. & A. 541; 3 D. & Ch. 792.

Where the bankrupt gives an indemnity bond, which is not forfeited till after the fiat, and the amount of damage not yet ascertained, a claim may be entered. *Ex parte Sir C. Marshall re Fox*, 2 Law J. (N.S.) Bankr. 52, a.c. 2 D. & Ch. 589; M. & B. 242.

Where the bankrupt had given an indemnity bond, which was not forfeited till after the fiat, there is no debt proveable. *Ex parte Marshall re Fox*, 3 Law J. (N.S.) Bankr. 37, a.c. 1 Mont. & A. 118, 145; 3 D. & Ch. 120.

By marriage settlement, W W S covenanted to cause 4,000*l.* to be paid to the trustees of his marriage settlement, within twelve months after his decease, the interest to be paid to his wife for her life in case she survived him, and afterwards the principal to their children; but, if they had no children, to the survivor of them, W W S and his wife, his or her executors or administrators. W W S having become a bankrupt, and the trustees of such settlement claiming to prove for the value of such 4,000*l.*:—Held, that this was a debt on a contingency, within 6 Geo. 4, c. 16, s. 56, and proveable under such commission. *Ex parte Tindal re Gibbons*, 1 Law J. (N.S.) Chanc. 193, a.c. 8 Bing. 402; Mont. 375, 402; 1 D. & Ch. 291; 1 Mo. & Sc. 507.

Where the contingency depends upon the separation of husband and wife, and of a widow's not marrying, it is not within sect. 56. *Ex parte Davis*, Mont. 297.

The bankrupt, previous to his marriage, entered into a bond, and the case his wife should survive

him, and should, within two months after his death, at the costs and charges of his heirs or devisees, release her dower, his heirs or executors should, within three months after his death, pay to her 2,000*l.*; the wife survived the bankrupt, but did not within two months after his death release her dower, although she was always ready and willing to do so:—Held, that the bond was not proveable, either under the first or the last part of the 56th section of the Bankrupt Act, inasmuch as the contingency had not happened, and no value could be set upon it. *Ex parte Davies*, 1 D. 115.

(f) *Marriage Settlements.*

[See ante, (e) Contingent Demands.]

Where a trader has, in contemplation of marriage, settled upon his intended wife a certain sum, reserving to himself a life interest in the dividends;—on his becoming a bankrupt, the trustees of the settlement may prove for the sum, and invest the dividends until they shall amount to the sum settled. *Ex parte Turpin re Brown*, 1 Law J. (N.S.) Bankr. 46, s.c. Mont. 443; 1 D. & Ch. 120.

The bankrupt had covenanted to pay a sum, to be invested on the trusts of his marriage settlement, for the benefit of his wife and the issue of the marriage. He became bankrupt without having done so:—Proof ordered in the usual way, and the dividends to be paid into the bank, and the interest thereof to be paid to the parties entitled under the settlement. A B having advanced the wife sums for her support, ordered, on the consent of all interested, the sum being small, and there being no chance of further issue, that the interest might be paid over to A B till he was repaid. *Ex parte May re May*, 2 Law J. (N.S.) Bankr. 72.

A bond given in consideration of a wife's fortune, payable within three months from the marriage on receiving notice, is proveable, although no notice has been given before the bankruptcy. *Ex parte Hooper re West*, 3 Law J. (N.S.) Bankr. 38, a.c. 1 Mont. & A. 395; 3 D. & Ch. 655.

A person settled on his marriage, by bond given to trustees, 1,200*l.* (part thereof being 150*l.*, the property of his intended wife), upon trusts for himself for life, except in the event of his bankruptcy or insolvency, and, in that event, upon trust for his wife for life for her separate use; and subject thereto, upon trusts for the issue of the marriage:—Held, that such a limitation was a fraud upon the bankrupt laws, and, the husband having become bankrupt, that the dividends on the proof, for such 1,200*l.* should form a fund to make good any deficiency of the 150*l.*, and that being done, the interest on such 150*l.* to be paid to the wife for life; and, on the remainder, to be paid to the assignees during the life of the bankrupt, her husband. *Ex parte Shute re Shute*, 2 Law J. (N.S.) Bankr. 26, a.c. 3 D. & Ch. 1; M. & B. 385.

A bankrupt is indebted, on bond, to testator, his father-in-law, who bequeaths a sum to his daughter for life, and after her decease to the bankrupt for life, and afterwards to their children:—Held, that the assignees of the bankrupt could not, after the death of the wife, receive the interest on the dividend received by the trustees under the will, until the sum bequeathed was made good by the accumulation of interest. *Ex parte Young re Prior*, 4 Law

*J. (N.s.) Bankr. 40, s. c. 2 Mont. & A. 228; 4 D. & Ch. 645.*

(g) *Annuities.*

The arrears of an annuity which have become due after the bankruptcy of a surety for the payment of such annuity, are not proveable under the commission; consequently, his certificate is no bar to an action by the grantee, to recover such arrears.

Damages occasioned by non-performance of covenants for payment of an annuity, and for completing buildings within a specified time, are not debts or demands proveable under a commission of bankruptcy. *Thompson v. Thompson, 4 Law J. (N.s.) C.P. 311, s. c. 2 Bing. N.C. 168; 2 Sc. 226.*

If an annuity is granted in consideration of the relinquishment of a business, the creditor is entitled to prove for the market value, without reference to the original consideration given, or lapse of time since the grant. *Ex parte Saxe, M. & B. 134, s. c. 2 D. & Ch. 172.*

An annuity may be valued, though no price were given for it. (*Cross, J. remb. dissent.*)

What is sufficient evidence of a marriage contract to entitle the party to prove. *Ex parte Annandale, 2 Mont. & A. 19, s. c. 4 D. & Ch. 511.*

(h) *Servant.*

A clerk and foreman hired at two guineas a week, and two suits of clothes a year, is entitled to six months' wages in full, under the 6 Geo. 4, c. 16, s. 48. *Ex parte Humphreys re Humphreys, 2 Law J. (N.s.) Bankr. 71, s. c. 3 D. & Ch. 114; M. & B. 413.*

The 48th section of 6 Geo. 4, c. 16, is not confined to trade clerks. *Ex parte Gough re Wyatt, 2 Law J. (N.s.) Bankr. 72, s. c. 3 D. & Ch. 189; M. & B. 417.*

The guard of a stage coach, hired at weekly wages, is not a servant, within the meaning of the 6 Geo. 4, c. 16, s. 48. *Ex parte Skinner, 3 D. & Ch. 352, s. c. 2 Law J. (N.s.) Bankr. 72; M. & B. 417.*

To entitle a servant to an allowance of six months' wages in full, the hiring need not be for a year. *Ex parte Collyer, 2 Mont. & A. 29, s. c. 4 D. & Ch. 520.*

(i) *Assignees.*

Assignees, applying to prove, are not bound by the same laches as might bind a mere individual creditor. *Ex parte Smith, 1 D. & Ch. 267.*

(j) *Bonds.*

The holder of a joint and several bond against five, may not prove it against the joint estate of two of the five. *Ex parte Phillips re Whitlow, 4 Law J. (N.s.) Bankr. 83.*

(k) *Bills of Exchange and Promissory Notes.*

The depositor of a promissory note has no greater right to prove upon the estate of the accommodation maker than the depositor would have had; and where an accommodation note is merely deposited with him, without being indorsed in the usual course of business, he cannot prove against the estate of the maker as a *bona fide* holder.

Where such a note and bills of exchange are deposited with a banker as a security for a loan, he may prove for the whole amount of the note, but

can only receive dividends in full payment of the balance of the loan, after deducting the other securities. *Ex parte Voss re Bentley, 4 Law J. (N.s.) Bankr. 34, s. c. 2 Mont. & A. 123; 4 D. & Ch. 295.*

Where a party holds bills of exchange, indorsed by the bankrupt as collateral security for his debt, if one of them is paid before the dividend declared, the proof must be reduced by the amount of the bill paid, and he will receive dividends on the remainder of his debt. *Ex parte Brunskill re Bentley & Co., 4 Law J. (N.s.) Bankr. 48, s. c. 2 Mont. & A. 220; 4 D. & Ch. 442.*

In a deposition on a bill of exchange, the holder must state that he gave a valuable consideration for it. *Ex parte Maberley re Youngman, 4 Law J. (N.s.) Bankr. 3, s. c. 2 Mont. & A. 23.*

Notice of dishonour of a bill must be sent to the house of a bankrupt indorser, though he be not there.

The holder of a bill must use due diligence to give notice; the effect thereof is another thing.

Notice must be given to the messenger, if in possession.

*Quere*, as to the necessity of giving notice to the assignees. *Ex parte Johnston, 1 Mont. & A. 622, s. c. 3 D. & Ch. 433.*

(l) *Securities.*

Where bills or other securities are deposited as a security for payment of a composition, and the depositor becomes bankrupt, the deposites cannot prove for his original debt, unless he delivers up the securities; but he may have the securities sold or valued, and applied in payment of the composition, and prove for any deficiency. *Ex parte Ellis re Chitty, 4 Law J. (N.s.) Bankr. 77, s. c. 2 Mont. & A. 371.*

H, a money broker, was in the habit of depositing bills of exchange with B & Co. as a security for advances, but he did not indorse the bills, nor were they negotiated by B & Co., or ever presented for payment. Amongst the bills so deposited was one for 1,000*l.*, accepted by C, who became bankrupt on the 5th of March 1824, which was some time after the bill fell due. H also became bankrupt on the 12th of December 1825, when B & Co. proved the amount of the balance he owed them, accepting this bill as a security, but made no attempt to prove the bill under C's commission until January 1826, when the commissioners rejected the proof:—Held, that the delivery of the bill by H to B & Co. must be taken to have been by way of pledge, to secure the amount of the advances then due from H to B & Co., and not with an intention to transfer the property in it; and that the amount of those advances having been since paid, B & Co. could not, under these circumstances, prove the bill under C's commission. *Ex parte Britten, 3 D. & Ch. 35.*

(m) *Executors.*

One of three executors becoming bankrupt, the two others may prove against his estate. *Ex parte Brown, 1 D. & Ch. 118.*

Where one of two executors becomes bankrupt, the solvent executor may prove against the bankrupt's estate without an order. *Ex parte Courtmay, 4 Law J. (N.s.) Bankr. 76, s. c. 2 Mont. & A. 227; 4 D. & Ch. 456.*

Bankrupt executor ordered to prove against his own estate, and the assignees to pay the dividends into the hands of the Accountant General, to the credit of a cause pending for the administration of assets. *Ex parte Colman*, 2 D. & Ch. 584.

(n) *Trustees.*

The trustees of a marriage settlement cannot prove for the interest on the principal, after the bankruptcy, where the husband and wife are living together. *Ex parte Green re Ellis*, 2 Law J. (n.s.) Bankr. 2, a. c. 2 D. & Ch. 113.

By the terms of a devise, the interest of a sum was payable to a bankrupt for life, remainder to his children: the trustees (of which the bankrupt was one) were authorized to lend the principal to the bankrupt firm, which they did. On bankruptcy, and proof against the firm,—held, the dividend on the proof should be invested in stock, the interest of which was to accumulate, in the first instance, till the principal sum was made good again. *Ex parte King*, 2 Mont. & A. 410, a. c. 1 D. 143.

(o) *Cestui que trust.*

Proof by *cestui que trust* allowed, under special circumstances. *Ex parte Freeman re Alderson*, 1 Law J. (n.s.) Bankr. 85.

Where a bankrupt trustee had suffered the trust fund to be misappropriated, the Court directed that the son of the *cestui que trust* might prove for the amount, retaining the dividends till further order. *Ex parte Vine*, 1 D. & Ch. 357.

(p) *Sureties.*

By the 6th Geo. 4, c. 16, s. 52, the principal is not only discharged from the debt, which a surety is liable to on his account, but also from any consequential damages arising therefrom. *Beeson v. Metcalfe*, 1 Law J. (n.s.) K.B. 149.

Where two persons give a joint and several promissory note for the debt of a third person, on the bankruptcy of one of them, the co-surety cannot prove upon his estate under the 52nd section of the Bankrupt Act. *Ex parte Porter re Deacon*, 4 Law J. (n.s.) Bankr. 86, a. c. 2 Mont. & A. 281.

(q) *Double Proof.*

*Quere*—Whether a person holding a bill drawn by a firm, and accepted by another firm composed of one of the partners of the drawing firm and a third person, and indorsed by such partner as a third firm, is entitled to double proof. *Ex parte Mould re Harrow*, 1 Law J. (n.s.) Bankr. 26, a. c. 2 D. & Ch. 419.

If two proofs be made on a joint and several bond, against two separate estates, a subsequent consolidation of the estates does not affect the double proof. *Clarke v. Fell*, 2 Law J. (n.s.) K.B. 84, a. c. 1 N. & M. 244; 4 B. & Ad. 404.

(r) *Expunging.*

*Quere*—If a double proof made more than six years ago, and the debt is expunged, according to *Ex parte Mould*. But dividends received on the expunged proof more than six years back, cannot be refunded, although there was no chance of re-couping the same out of future dividends from

the remaining proof. *Ex parte Soper*, 4 D. & Ch. 569.

On petition by assignees to expunge a proof, the examination of the bankrupt before the commissioners, taken at the time the proof was admitted, is receivable in evidence. *Ex parte Freeman*, 4 D. & Ch. 404.

The acceptor of a bill became bankrupt, and the bill was proved against his estate, and then taken up, for the honour of drawer, by A B; twenty-eight years afterwards the assignees petitioned to expunge the proof:—Held, that the Court could not proceed to hear the case in the absence of A B, who was not served. *Ex parte Greenwood re Baillie*, 3 Law J. (n.s.) Bankr. 24.

(s) *Effect of proving.*

Plaintiff having proved, under a commission of bankrupt, in 1816,—Held, estopped to sue for the same debt after the passing of 6 Geo. 4, c. 16, though that statute repeals 49 Geo. 3, c. 121, which makes proof of a debt an election not to sue. *Adames v. Bridges*, 8 Bing. 314, a. c. 1 Mo. & Sc. 438.

(K) OF SET-OFF AND MUTUAL CREDIT.

[See (I) Proof of Debts;—and (Y) Pleading.]

A, being about to convey his estate to trustees for sale, to pay off incumbrances, and to pay him over the residue, obtained advances of the auctioneer intended to be employed, to be repaid out of the deposits. The estate was accordingly conveyed to the trustees; the sale took place, and the auctioneer received deposits to a greater amount than his advances; the auctioneer became bankrupt:—Held, that A was entitled to an equitable set-off of deposits against his debt to the bankrupt's estate, according to the amount in which, on taking the account, A should appear to be in reality interested beneficially in the surplus of the proceeds of the sales. If he was not so interested, then the deposits were the monies of the trustees. *Alvanley v. Lewis*, 1 Law J. (n.s.) Chanc. 55.

The plaintiffs had sent a stanhope, to be repaired, to a party, (who, afterwards, and before the repairs were completed, became a bankrupt,) on a contract to pay ready money for the repairs to be done; they had afterwards become the holders of a bill of exchange, accepted by the bankrupt, for a larger amount than the sum to which the bill for repairs amounted; the assignees completed the repairs:—Held, that the plaintiffs were not entitled to have the stanhope delivered to them by the assignees, on an offer to indorse the amount of repairs, as part received, on the bill of exchange; that as the contract was for ready money, they could entitle themselves to have the stanhope delivered, only by tendering in ready money the amount of the bill for repairs. *Clarke v. Fell*, 2 Law J. (n.s.) K.B. 84, a. c. 1 N. & M. 244; 4 B. & Ad. 404.

(L) OF THE ASSIGNEES.

[See (Q) Of the Dividend.]

(a) *Choice of.*

*Quere*—Whether a creditor on a voluntary bond is entitled to vote in the choice of assignees. *Ex parte Venables*, Mont. 494.

Where two assignees were elected, one of whom was chosen without his own consent, and refused to

serve, the Court directed a new choice altogether. *Ex parte Cattaraugus*, 1 D. 193.

On application tending to enforce a party to take the office of assignee upon him against his wish, he must be served with notice of it. *Ex parte Green*, 1 D. & Ch. 487.

Where order of court is necessary to enable a party to prove, he cannot vote or sign certificate; for instance, trustees, executors, &c. *Ex parte Wyatt*, 2 D. & Ch. 211.

Creditors having, subsequent to the appointment, signed resolutions authorizing the assignees to do certain acts, as assignees, which they could not have performed without such authority, and to act generally as assignees, are debarred from questioning the validity of the appointment at a subsequent period, upon grounds of which they were aware at the time of signature.

*Semble*, that a creditor, who has proved, is entitled to vote in the choice of assignees, if he apply before the commissioner has signed the declaration of appointment, though the commissioner had previously verbally declared the choice complete.

*Semble*, also, that the appointment is not complete till the declaration of appointment is signed by the commissioner. *Ex parte Nash*, 1 D. & Ch. 445, s. c. Mont. 501.

A creditor and next of kin of an intestate, who applies for leave to prove against the estate of the administrator, (who has become bankrupt,) cannot vote in choice of assignees, or sign the certificate. *Anonymous*, 2 Law J. (n.s.) Bankr. 20.

An agreement by the solicitor of a bankrupt, at a meeting of creditors, where all refuse to become assignees, to indemnify a stranger to the commission on his consenting to accept the office at the request of the solicitor, and on receiving such indemnity, is not invalid as being against the policy of the bankrupt law. *Gilmour v. King*, 2 Law J. (n.s.) Exch. 226, s. c. 1 C. & M. 612; 3 Tyr. 581.

#### (b) Rights.

[See (1) Proof of Debts, Assignees—PARTNERS, Actions and Suits—TROVER, Where maintainable.]

One of two assignees petitioned that his co-assignee, or the solicitor to the commission, (one of whom had the custody of the proceedings,) might enrol them, pursuant to 6 Geo. 4, c. 16, s. 96:—Held, that before he petitioned for this purpose, he ought first to have applied to the co-assignee, or solicitor, to produce the proceedings at the office for enrolment. *Ex parte Evans*, 1 D. & Ch. 353.

Money paid into the hands of an agent, after the bankruptcy of the principal, for the purpose of being remitted to the principal, will not pass to the assignees of the bankrupt; and if, in settling their accounts with the agent, they have allowed him to retain the sums so paid in, they will have to repay the money to the persons who had so paid the money in. *Ex parte Cunningham re Maberley*, 2 Law J. (n.s.) Bankr. 58, s. c. 3 D. & Ch. 58; M. & B. 269; and *Ex parte Solomons re Maberley*, 2 Law J. (n.s.) Bankr. 62, s. c. 2 D. & Ch. 77; M. & B. 308.

The same order made as in *Ex parte Cunningham*, (3 D. & Ch. 58). The notes in this case were paid in by the customer, on the 3rd of January, to a sub-

agent of the banker, at Glasgow, who remitted them on the 4th to the banker's managing agent, at Edinburgh. *Ex parte Wylie*, 3 D. & Ch. 82.

The Court will not confirm a purchase made by an assignee of part of the bankrupt's property, without leave, though all the creditors consent. *Ex parte Thwaites re Knowles*, 3 Law J. (n.s.) Bankr. 48, s. c. 1 Mont. & A. 323.

Rule, that the assignee cannot be a purchaser of the bankrupt's property.

No rule to prevent a mortgagee bidding at a sale of the mortgaged premises—Per Rose, J. *Ex parte Bull re Ditchman*, 2 Law J. (n.s.) Bankr. 76, s. c. 3 D. & Ch. 116.

An assignee will not be allowed to bid at a sale of the bankrupt's property without very special reasons. The consent of some creditors at a meeting is not enough. *Ex parte Beaumont, re Edmonston*, 3 Law J. (n.s.) Bankr. 45, s. c. 1 M. & A. 304.

Where the sole assignee of a bankrupt's estate wishes to bid, he must be removed, or a quasi co-assignee appointed for the purpose of protecting the estate. *Ex parte Molineux re Bligh*, 4 Law J. (n.s.) Bankr. 85, s. c. 2 Mont. & A. 245; 4 D. & Ch. 460.

A, an assignee, purchases, as trustee for B, some shares, which the bankrupt had in certain mines, and, after retaining them in that character a twelve-month, repurchases them of B for his own use:—Held, that the transaction was void, on the general principle that an assignee cannot purchase any part of the bankrupt's property, either for himself or another; and that A must be considered a trustee of the shares for the benefit of the general creditors. *Ex parte Batten*, 2 D. & Ch. 290.

Hutchinson & Co. drew bills on Pole & Co.; these came to Heaviside, who indorsed them, with other bills to which Hutchinson was not party, to Wilson & Co. The parties became bankrupts. The assignees of Hutchinson & Co. are not entitled to have the note delivered up on paying its amount, the other bill indorsed by Heaviside being unpaid. *Ex parte Dickson*, 2 Mont. & A. 99, s. c. 4 D. & Ch. 614.

Assignees are entitled to the expenses of journeys, solely and properly undertaken for the benefit of the estate. *Ex parte Joyner*, 2 Mont. & A. 1; and *Ex parte Lovegrove*, 2 Mont. & A. 4, s. c. 3 D. & Ch. 763.

Where an action is pending at the suit of a bankrupt, and the assignees arrest the defendant for the same cause of action, it is not vexatious. Assignees cannot make themselves party to a suit, commenced by the bankrupt, before interlocutory judgment. *Barnes v. Maton*, 3 Doug. 186.

An agreement for a lease is not annulled by the bankruptcy of the intended lessee. *Morgan v. Rhodes*, 1 Mont. & A. 214.

The 1 & 2 Will. 4, c. 56, s. 27, does not require the certificate of the appointment of assignees to be registered, in order to protect them against subsequent purchasers of the bankrupt's freehold property without notice, unless the property is situate in a register county. *Anonymous*, 1 D. & Ch. 349.

Where there are cross-acceptances, and the right of set-off clear, the Court will restrain the assignees from bringing an action. *Ex parte Clegg*, 1 M. & A. 91.

As to assignees carrying on trade, see *Ex parte King*, 1 Law J. (n.s.) Bankr. 8.

The sanction of the Court given to a pecuniary arrangement by the assignees affecting the estate, see *Ex parte Prater*, 2 Mont. & A. 304, s. c. 4 D. & Ch. 214.

Where a sequestrator has become bankrupt, the Court will restrain him from exercising his power, and permit the assignees to use his name, until a new sequestrator has been appointed. *Ex parte Hall vs Ineson*, 4 Law J. (N.A.) Bankr. 83, s. c. 2 Mont. & A. 392; 1 D. 87.

(c) Duties and Liabilities.

[See (AA) Court of Bankruptcy.]

Upon issuing a renewed country commission, it is the duty of the assignees, or their agent (the solicitor), to ascertain whether the commissioners are able and willing to act; otherwise they are liable to the costs of a new fiat, if it be necessary, from inability or unwillingness to act on the part of the commissioners, who are named in the renewed fiat. *Ex parte Wilkinson*, 2 D. & Ch. 112.

In order to enforce a landlord's claim for rent in arrear against assignees, after a seizure under a *f. fa.*, he must distrain. *Gethis v. Wilks*, 2 Dowl. P.C. 189.

The assignees are bound to furnish a creditor, who has proved, with a copy of their accounts, if he offers to pay the expense of making such copy. *Ex parte Aberdeen*, 2 D. & Ch. 34.

The Court will make no order, on a petition of the assignees to sell any portion of the bankrupt's property by private contract, it being a matter in which they must use their own discretion. *Ex parte Hurly*, 2 D. & Ch. 631.

The Court will not interfere, on the application of the assignees, to sanction an arrangement made by them for the satisfaction of a claim of the bankrupt's wife. The assignees must use their own discretion. *Ex parte James*, 8 D. & Ch. 290.

The Court will not make any order on the application of the assignees, as to the management for the sale of the bankrupt's property; they must act on their own responsibility. *Ex parte Belcher*, 4 D. & Ch. 1.

The petitioner covenants with the bankrupt, that he will procure a lease to be granted to him of certain premises by a third person:—Held, that this was an agreement for a lease, within the 75th section of the Bankrupt Act; and that the petitioner was entitled to call on the assignees to elect, whether they would accept or decline such agreement. *Ex parte Benecke*, 1 D. 186.

Assignees, who make use of a bankrupt's premises for the benefit of the estate, by continuing his contracts, are liable, in the same manner as the bankrupt, for use and occupation.

Thus, where the assignees of a coachmaker continued, after the bankruptcy, to use his premises for performing his contracts for the letting and keeping in repair of coaches:—it was held, that they were liable, in an action for use and occupation, for rent accruing after they had ceased to occupy. *Ansell v. Robson*, 1 Law J. (N.A.) Exch. 216, s. c. 2 C. & J. 610.

A lessee petitioned that his rent might be reduced; the Court referred to a commissioner, who reported it should, and the Court confirmed the order: other creditors, not parties to the first peti-

tion, objected, and the order was not drawn up:—Held, the Court would not interfere on their application to rescind the order, it being in minutes, and they not parties to it: as against them, it had no validity if improperly made; but they may hold the assignees responsible. *Ex parte De Bagnis re Chambers*, 3 Law J. (N.A.) Bankr. 43, s. c. 1 Mont. & A. 277; 4 D. & Ch. 225.

If the assignees have not elected to take or reject a contract, they cannot be called upon to deliver it up to the vendor. *Ex parte Hawley re Bridges*, 2 Law J. (N.A.) Bankr. 4.

The Court will order assignees of a bankrupt mortgagee, who has pledged the mortgage, to take measures for foreclosure, on the equitable mortgagee indemnifying them, and undertaking for a proper application of the proceeds. *Ex parte Coles re Rucker*, 1 Law J. (N.A.) Bankr. 18, s. c. 1 D. & Ch. 100.

The Court will order the assignees' accounts to be investigated before the registrar, in all cases where their expenditure appears improvident. *Ex parte Smith re Britton*, 3 Law J. (N.A.) Bankr. 74.

To make an assignee liable to pay interest of 20l. per cent., there must be a culpable retention of the money. *Ex parte Benham re Bramwell*, 4 Law J. (N.A.) Bankr. 65, s. c. 1 D. 26; 2 Mont. & A. 272.

*Semble*—the sum forfeited by the assignees under the 104th section, for retaining money in their hands, will not give the bankrupt a *locus standi in curia*, on the supposition that it would enable him, by the dividend it might produce, to claim an allowance.

*Quere*—Whether the 20l. per cent. so forfeited is chargeable as one gross per centage only, or per annum; and whether or not chargeable for a period anterior to the act 6 Geo. 4, c. 16. *Ex parte Lowe re Aaron*, 1 Law J. (N.A.) Bankr. 54, s. c. 1 D. & Ch. 137; Mont. 392.

The charge of 20l. per cent. imposed on assignees by 6 Geo. 4, c. 16, s. 104, for retaining the bankrupt's money in their hands, the bankrupt himself has no legal or equitable claim to, either in respect of his allowance, or his right to the surplus.

*Quere*—Whether this charge is to be 20l. per cent. per annum, during the whole period of retention, or only one single charge of 20l. per cent. upon the gross sum retained.

*Quere*—Whether the charge can be sustained on monies retained by assignment previous to the 1st of September 1825, when the 6 Geo. 4, c. 16, first came into operation. *Ex parte Lowe*, 1 D. & Ch. 137, s. c. Mont. 392.

A custom of exchanging acceptances existed between the bankrupt and other houses, through the agency of Blythe; notes were sent by the petitioner to Blythe, but never exchanged, as bankruptcy intervened, and they were stolen from Blythe, and never formed any item in any settlement of accounts between Blythe and the assignees:—Held, the petitioner could not recover the value of the notes from the assignees. *Ex parte Watson*, 1 Mont. & A. 685.

The bankrupt shipped goods to M and F at New South Wales, and the petitioner accepted bills drawn by the bankrupt for the invoice price, upon the express agreement that the proceeds of the several consignments should be received by the petitioner, and be appropriated by him in discharge of such



acceptance; and notice of such agreement was given to M and F. Two bills, which were remitted to England by M and F on account of the proceeds of some of the shipments, made by the bankrupt, came to the hands of the assignees:—Held, that the petitioner was entitled to the proceeds of these bills, as well as all the future proceeds that might come to the hands of the assignees, in respect of the shipments made by the bankrupt to M and F, to be applied in discharge of the petitioner's acceptance. *Ex parte Flower*, 4 D. & Ch. 440.

On a discharge under the Habeas Corpus Act, the prisoner's costs were paid by the assignees, the estate being sufficient to recomp them. *Ex parte Bardwell*, 1 Mont. & A. 193.

A petition, after a lapse of time, by the executors of the bankrupt, to charge the assignees for the default of old assignees, does not lie. *Ex parte Richards*, 2 Mont. & A. 75, s. c. 4 D. & Ch. 183.

To a bill against the assignees of a bankrupt for a general account of their dealings under the bankruptcy, one of the assignees demurred for want of equity, and the demurrer was allowed:—Held, that the other assignees might plead this matter in bar of the suit. *Tarleton v. Hornby*, 1 Y. & C. 333.

The Court will not order assignees to deliver up bargain and sale, &c. to the purchaser, on the possibility of their being of no farther use to them. *Ex parte Pooch re Chapman*, 1 Law J. (N.S.) Bankr. 18, s. c. 1 D. & Ch. 104.

Maberly and the Scotch Bank mutually exchanged their notes at stated times. Maberly became bankrupt, his agent Blythe having notes of the Scotch Bank in his hands. The assignees subsequently allowed Blythe to retain these notes in account with them, he having claims against Maberly:—Held, that the Scotch Bank could recover these notes against the assignees. *Ex parte the National Bank of Scotland*, 1 Mont. & A. 644, s. c. 4 D. & Ch. 32.

Blythe was the agent for Maberly, a banker. 450l. was sent to Blythe, as agent, to retire a note of the petitioner's, which was not done, as Maberly became bankrupt. Blythe having a claim against Maberly, the assignees allowed him to retain 2,000l., including, as was assumed, the 450l.:—Held, that the petitioner was entitled to recover the 450l. from the assignees. *Ex parte Simpson*, 2 Mont. & A. 294, s. c. 1 D. 47.

Where a former memorandum of commissioners finds that a sum of money is in the hands of one assignee, and directs it to be invested in the names of all three assignees, which however could not be done, as the money was not forthcoming; the commissioner is not warranted in finding, by a subsequent memorandum, that the money is in the hands of all three assignees, and thereupon ordering them to divide it; and the Court of Review has no jurisdiction to enter on the liability of the co-assignees to answer the consequences of trusting the assignee in default.

*Semble*—that where one assignee had obtained an order to discharge himself from the office, (which was not drawn up,) but the commissioners had, by their memorandums, virtually recognized such discharge by excluding his name from them, he cannot be made liable by any subsequent memorandums. *Ex parte Learmouth*, 1 D. & Ch. 491.

Where the assignees refuse to bring an action for

the recovery of property, which a creditor alleges to have belonged to the bankrupt, the Court will not order a new election of assignees, but will permit the creditor to bring the action in the name of the assignees, upon entering into a proper indemnity. *Ex parte Ryland*, 2 D. & Ch. 392.

Where a creditor addresses a written request to assignees, in general terms, to pay "the dividends made on the bankrupt's estate" to A B, the assignees are justified in paying subsequent dividends to A B, until they have notice from the creditor that he has revoked A B's authority. *Ex parte Bright*, 2 D. & Ch. 8.

The bankrupt had two agents, one at Glasgow, the other at Edinburgh. A pays to the Glasgow agent a sum in bank notes, for the purpose of being remitted to London, which the Glasgow agent transmits for that purpose, in a parcel, to the Edinburgh agent, from which the notes are stolen by his clerk the day after the parcel is delivered, and a few days before a fiat is issued against the bankrupt:—Held, that A had no claim to recover the value of the notes from the assignees. *Ex parte Watson*, 4 D. & Ch. 45.

(d) *Petition by.*

A petition of assignees is informal, if signed by only one. *Ex parte White*, 3 D. & Ch. 366.

(e) *Election by.*

The bankrupt agreed, in writing, to take a lease of a manufactory for a term of years; and the landlord agreed to erect, at his own expense, certain buildings, on the bankrupt paying as an additional rent 7l. 10s. per cent. upon the amount so expended. The buildings, however, were subsequently erected by the bankrupt, on the verbal assurance of the landlord, that the bankrupt might deduct the amount expended from the rent. The assignees elected not to adopt the agreement for the lease, but refused to deliver up possession to the landlord, unless he allowed them the sum which the bankrupt had expended on the buildings:—Held, that as both the written and verbal agreement between the landlord and the bankrupt contemplated a continuance of the tenancy, which the assignees had themselves repudiated, they had no lien on the premises for the money expended by the bankrupt. *Ex parte Ladd*, 3 D. & Ch. 647.

A question of title is not an answer to a petition seeking that assignees may be compelled to elect whether they will accept or not an agreement for a lease, under the 75th section of the 6 Geo. 4, c. 16. *Ex parte Benecke re Pearson*, 4 Law J. (N.S.) Bankr. 84.

(f) *Removal of.*

On appointment of a fresh assignee, in the room of one who had absconded, it was held unnecessary to vacate the original assignment. *Ex parte Foster*, 1 Law J. (N.S.) Bankr. 8, s. c. M. & B. 37.

A sole assignee will not be removed, on the ground of poverty only; but, if in insolvent circumstances, a co-assignee may be appointed. *Ex parte Copeland*, 3 Law J. (N.S.) Bankr. 47, s. c. 1 Mont. & A. 305; 3 D. & Ch. 561.

The Court will not remove assignees merely because the commissioners improperly rejected the proofs of creditors, who would have been entitled to

vote in the choice, unless there is fraud practised in procuring their debts to be rejected. *Ex parte Milner re Best*, 3 Law J. (N.S.) Bankr. 73, s.c. 3 D. & Ch. 235.

Where an assignee has been guilty of fraud, and petitions to be removed, on payment of costs,—the Court will not prevent his being removed, because there may be some expenses incurred for which he may be liable, as the assignee is still under the jurisdiction of the Court. *Ex parte Angle re Smith*, 4 Law J. (N.S.) Bankr. 5, s.c. 2 Mont. & A. 38; 4 D. & Ch. 118.

Where assignees have been trustees under a deed of composition, the Court will order them to be removed. *Ex parte Mendell re Hughes*, 4 Law J. (N.S.) Bankr. 81.

Where an assignee purchases part of the estate without leave, the general rule is to remove him. *Ex parte Alexander*, 2 Mont. & A. 492.

Where an assignee is removed, and another appointed, there is no need of any assignment under the 1 & 2 Will. 4, c. 56. *Ex parte Falar*, 1 D. & Ch. 32.

Where an assignee is removed for the benefit of the estate, he is entitled to be reimbursed out of any fund in hand, before it is transferred, to the new assignee. *Ex parte James*, 1 D. & Ch. 272.

Where an assignee on being chosen, accepts the office, he can only retire, on payment of the costs occasioned by his removal. *Ex parte Watts*, 1 D. & Ch. 322.

When there is only one assignee surviving, and he, from his advanced age (72), is desirous of being removed from the office, the proper course is to procure a new choice in the room of those that are dead, and then to apply that he may be removed. *Ex parte Rapp*, 1 D. & Ch. 461.

On application to remove one of several assignees, the proper course is to petition for a new choice. *Ex parte Steel*, 1 D. & Ch. 488.

Where one of three assignees declines to act, the two acting assignees should join in the petition for a new choice, or, if one only presents the petition, it should be served upon the other acting assignee. *Ex parte Harris*, 2 D. & Ch. 4.

Under a commission, prior to the 1 & 2 Will. 4, c. 56, where an assignee is removed since that act, it is not necessary that there should be a new assignment, or that the prior assignment should be vacated. *Smith v. De Tastet*, 4 D. & Ch. 360.

#### (M) OF THE ASSIGNMENT.

##### (a) *Of the Bankrupt's Property, Real and Personal.*

[See FIXTURES—SHIP AND SHIPPING, Freight.]

A, who resided at Liverpool, was in the habit of making consignments of goods to B, his agent in South America, for sale, on the faith of and against which consignments, A drew bills proportioned to their amount, to be paid by the agent out of the proceeds; and the bills were negotiated by the indorsement of C, A's correspondent in London. Some of the bills so indorsed were refused acceptance by the agent; C, on receiving information that they had been so dishonoured, requested that A would order his agent, in case he did not pay his, A's, drafts immediately, to hand over to C's agent such property as he had of A's, of an equivalent value

to the bills that should not be paid by him. A agreed to do so, but became bankrupt before his order to transfer the goods reached to South America:—Held, that the bargain between A and C did not operate as a legal or equitable assignment of the property in A's goods, held by B his agent, but that they remained the property of A at the time of his bankruptcy, and passed to his assignees. *Carvalho v. Burn*, 4 B. & Ad. 382, s.c. 1 N. & M. 700.

The 127th section of 6 Geo. 4, c. 16, does not apply where the second commission was before the 6 G. 4.

The bankrupt was insolvent in 1818, and a commission issued in 1832, under which he obtained his certificate, previous to 6 Geo. 4, c. 16:—Held, that the interest in an agreement entered into by the bankrupt subsequently to the certificate, did not pass to the assignees under the commission. *Ex parte Hawley*, 2 Mont. & A. 426.

Section 127 of 6 Geo. 4, c. 16, applies to discharges by a certificate of bankruptcy, or under an Insolvent Act, before as well as after the passing of the act.

The assignees of a bankrupt, who before the commission, was discharged under an Insolvent Act, and whose estate, under the commission, has not paid 15s. in the pound, may maintain an action for money had and received against a banker for a sum deposited with such banker by the bankrupt after he obtained his certificate. *Eaton v. Braddick*, 3 Law J. (N.S.) Exch. 120, s.c. 2 C. & M. 435; 4 Tyr. 123.

If a legal mortgage is ordered to be sold by the commissioners, the assignees are entitled to the rents to the time of sale, unless the mortgagee makes an actual entry, or gave notice to the tenants to pay the rents to him. *Ex parte Living*, 2 Mont. & A. 223, s.c. 1 D. 1.

J apprenticed his son to the bankrupt two years before his bankruptcy, and agreed to pay a premium of 200*l.* J was in partnership with T; and the bankrupt owed them a joint debt exceeding the amount of the apprentice fee due from J to the bankrupt. J cannot set off the apprentice fee against the joint debt due from the bankrupt to J & T.

The Court, under these circumstances, ordered 100*l.* to be paid by J to the assignees, together with the costs of the petition. *Ex parte Soames*, 3 D. & Ch. 320.

A debtor who has a lien on goods for his debt and interest, and who, at the request of the assignees, delays the sale for a better market, and afterwards sells, may apply the proceeds in reduction of the interest accrued due since the fiat. *Ex parte Kensington*, 2 Mont. & A. 300.

If an assignee purchase part of the bankrupt's estate, and improve, the estate must be re-sold, and put up at the price given by the assignee, adding the sum laid out in the improvements. *Ex parte Hewit*, 2 Mont. & A. 477.

##### (b) *Property of the Bankrupt's Wife.*

Furniture, the separate property of the wife, does not pass to the assignees under a fiat against the husband. *Ex parte Elliston*, 2 Mont. & A. 365.

The Court may in its discretion give any portion of the wife's property. *Ex parte Thompson re Wyatt*, 4 Law J. (N.S.) Bankr. 75, s.c. 1 D. 90.

(c) *Trust Property.*

Where a testator bequeaths the whole of his property to trustees, for the payment of an annuity, and other purposes, and the trustee become bankrupt, the trust fund must be set apart for the payment of the whole annuity, without regard to the interests of the person entitled to the residue. *Ex parte Rothwell*, 2 D. & Ch. 542.

Where a conveyance by way of mortgage is made to a trustee for the mortgagee, in trust to sell, and the trustee becomes bankrupt, the mortgagor should join in the application for the appointment of another trustee. *Ex parte Orgill*, 2 D. & Ch. 413.

Where a trustee becomes bankrupt, a new one may be appointed, on petition without any reference to the Master; although the bankrupt had no portion of the trust property in his hands. *Ex parte Buffery*, 2 D. & Ch. 576.

(d) *Possession, Order, and Disposition, or reputed Ownership.*

[See *Hubbard v. Bagshaw*, 2 Dig. Law J. 39, s. c. 4 Sim. 326.]

[See *FIXTURES—LIMITATIONS, STATUTE OF, Computation of Time*; and see, *infra*, *Court of Bankruptcy*.]

A, a ship-owner, assigned to B the freight earned and to be earned by one of his ships, and afterwards chartered her to C, for a voyage to S. The outward freight was paid to A before the ship sailed. The charter-party afterwards was delivered to B, by A's directions, and B gave notice of the assignment to C; afterwards, but before the ship returned, A became bankrupt:—Held, that the homeward freight was not in A's order and disposition at his bankruptcy; and, therefore, that B was entitled to it. *Douglas v. Russell*, 4 Sim. 524.

A, on behalf of the owner of a ship, entered into a charter-party with B, by which B agreed to pay on behalf of the owner, a certain sum for the freight of the ship, by two instalments, one to be paid on the sailing of the ship, and the other, on the completion of the voyage. The owner, being indebted to C, ordered, in writing, A to pay C all monies he might receive under the charter-party; and accordingly, A paid over the first instalment to C. The owner then assigned, by deed, the remainder of the freight to C, who gave notice of the assignment to A, but not to B. The vessel completed her voyage, and afterwards the owner became bankrupt:—Held, that the remainder of the freight was not in his order and disposition at his bankruptcy. *Gardner v. Lachlan*, 6 Sim. 407.

The owner of the major part of a vessel lying in port, mortgaged it, and transferred the bill of sale to the mortgagees. The mortgagees did not take possession, but suffered the mortgagor and the other part owners to have the management, and act as the visible owners of the vessel. The mortgagor, having become bankrupt:—Held, that his share of the vessel passed to his assignees under the stat. 21 Jac. 1, c. 19. *Hall v. Gurney*, 3 Doug. 356.

A landlord distrained for rent arrears before the bankruptcy of his tenant, and when, the goods were appraised, left them on the premises for the use of the bankrupt's wife, the bankrupt himself being in

prison. After the bankruptcy the landlord distrained again for the very same arrears of rent:—Held, that the second distress was void; and the goods passed to the assignees, as being in the order and disposition of the bankrupt at the time of his bankruptcy. *Ex parte Shuttleworth*, 1 D. & Ch. 223.

J S became possessed (in trust as executor of his deceased father,) of certain shares in the joint stock of the Lead Smelting Company. The only evidence of a party's interest in the stock of this company is, a book in which are entered all transfers of shares. In this book there was an entry signed by J S, purporting to be a transfer of the shares in question from himself, as executor, to himself in his individual character. Where the transfer is made in pursuance of a *bond fide* sale for a money consideration, the words "sell and assign" are used, but in this instance those words were erased. On the faith of his apparent ownership of these shares, J S acted as a director of the company, and received the dividends to his own use up to the time of his bankruptcy, and on passing his accounts under the commission, he treated the shares as his own property. Upon an issue directed to try the right to these shares, between J S and another, as executors of the original proprietor and the assignees of J S, it was left to the jury to say, whether or not the shares were at the time of the bankruptcy in the possession, order, or disposition of the bankrupt, with the consent and permission of the true owner. The jury having found for the plaintiffs, the Court refused to disturb the verdict. *Cooper v. De Tastet*, 2 Mo. & Sc. 714.

A letter from the depositary of a policy of insurance, stating, "I am the holder of the under-mentioned policies," and inquiring what the office would give for them if delivered up to be cancelled with the consent of the parties:—Held, a sufficient notice to take it out of the order and disposition of the bankrupt. *Ex parte Streight re Eyles*, 2 Law J. (N.S.) Bankr. 12, s. c. Mont. 502; 2 D. & Ch. 314.

Where the shares in a joint stock company are purchased by a bankrupt in his own name, with the money of another person, as a trustee, they will pass as in the order and disposition of the bankrupt, unless notice has been given before the bankruptcy. *Ex parte Ord re Ralph Ord*, 4 Law J. (N.S.) Bankr. 84, s. c. 1 D. 166.

In general, the furniture of a coal mine let to a trader with the mine, will pass to his assignees, under the 6 Geo. 3, c. 16, s. 72, as goods and chattels of which he was the reputed owner. But not a steam-engine affixed to the freehold. *Coombs, &c. v. Beaumont*, 2 Law J. (N.S.) K.B. 190, s. c. 2 N. & M. 235; 5 B. & Ad. 72.

L took a lease of a mill and iron-forge, and bought the fixed and moveable implements, &c. but it was agreed that they should be delivered up, at the end or other determination of the term, at a valuation, if the lessors should give fifteen months notice of their desire to have them. L afterwards conveyed all his interest in the premises, implements, &c. to a creditor, in trust, if default should be made by L in paying certain instalments, to enter upon and sell the same, and satisfy himself out of the proceeds, re-assigning the residue, and if the lessor should require re-sale of the implements, &c. the

proceeds of such re-sale were to go in discharge of the debt, if unsatisfied. L made default, and subsequently became bankrupt, after which, and during the term, the creditor, who had not before interfered, entered upon the property:—Held, on trespass brought by the assignees, that L had at the time of his bankruptcy the reputed ownership of the moveable goods, but not of the fixtures. *Clark v. Crownshaw*, 3 B. & Ad. 804.

*Semble*—Tenant's fixtures pass, when in the order and disposition of the bankrupt, under 6 Geo. 4, c. 16, s. 72. *Ex parte Austin re King*, 1 Law J. (n.s.) Bankr. 19, s. c. 1 D. & Ch. 207.

A steam-engine erected for the purposes of trade, may be mortgaged, although it might have been removed without injury to the premises, and did not pass as in the order and disposition of the bankrupts, although they continued in possession. *Ex parte Lloyd re Ogden*, 3 Law J. (n.s.) Bankr. 108, s. c. 1 Mont. & A. 494; 3 D. & Ch. 765.

Fixtures erected by the landlord mortgagor, for the purposes of trade, upon property he has mortgaged, do not pass to his assignees. *Ex parte Wilson re Butterworth*, 4 Law J. (n.s.) Bankr. 24, s. c. 2 Mont. & A. 104; 4 D. & Ch. 143.

Where fixtures, which are usually considered tenant's fixtures, have been affixed to the freehold by the mortgagor, they do not, on his bankruptcy, pass to his assignees, as in his order and disposition. *Ex parte Belcher re Maberley*, 4 Law J. (n.s.) Bankr. 29, s. c. 2 Mont. & A. 160.

When goods, upon which he had a lien, are in the hands of a factor, who has transferred his debt, those goods are not in his order and disposition, within the meaning of the 72nd section of 6 Geo. 4, c. 16. *Ex parte Smith re Manning*, 4 Law J. (n.s.) Bankr. 14, s. c. 4 D. & Ch. 579.

Where a bankrupt, the holder of an equitable interest, without notice deposits the deeds with a party as a security—a person who also fails to give notice—the interest does not pass to the assignees, as in the order and disposition of the bankrupt. *Ex parte Newton re Goren*, 4 Law J. (n.s.) Bankr. 16, s. c. 2 Mont. & A. 51; 4 D. & Ch. 138.

Where a notice has been given of a transfer of the shares in a private assurance company, and a memorandum of such transfer made in their books, the shares are not in the reputed ownership of the bankrupt, so as to pass to his assignees, although some of the forms laid down by the company for the purpose of perfecting the transfer, have not been complied with. *Ex parte Masterman re Lett*, 4 Law J. (n.s.) Bankr. 54, s. c. 2 Mont. & A. 209.

The assignment of a debt is not complete without notice to the debtor; but without such notice, the same remains in the order and disposition of the insolvent or bankrupt. *Buck v. Lee*, 3 Law J. (n.s.) K.B. 206, s. c. 1 Ad. & E. 804; 3 N. & M. 580.

Where, previous to an act of bankruptcy, a demand was made by an authorized agent, for the delivery up of goods of the plaintiff, which were in the bankrupt's possession, which was refused:—Held, that such goods were not "in the possession, order, and disposition of the bankrupt, with the consent of the true owner;" and that the plaintiff might bring trover against the assignees. A clerk who transacted the plaintiff's business, but did not accept bills or sell goods for him—held, to have

sufficient authority to make such a demand. *Smith v. Topping*, 3 Law J. (n.s.) K.B. 47, s. c. 5 B. & Ad. 674; 2 N. & M. 421.

*Quære*, whether a life-interest in the dividends of stock, standing in the names of trustees, is within the 72nd section of 6 Geo. 4, c. 113.

A notice of the assignment of such dividends to one of several trustees, by the assignee, although not given for the purpose of completing his title, is sufficient.

Accordingly, a bankrupt, before his bankruptcy, assigned his life interest in the dividends of certain stock, vested in trustees, under his marriage settlement, which dividends one of the trustees was in the habit of receiving, and carrying to his account as his banker. After the assignment, and before the bankruptcy, in conversations with another of the trustees, the assignee several times mentioned that the assignment had been made:—Held, that this was a good notice to all the trustees, and therefore, that the interest so assigned did not pass to the assignees under the fiat of bankruptcy. *Smith v. Masterman*, 3 Law J. (n.s.) Exch. 42, s. c. as *Smith v. Smith*, 2 C. & M. 231; 4 Tyr. 52.

If dock warrants are indorsed to the bankrupt, and he indorse them over before his bankruptcy, the property is not in his reputed ownership at the time of the bankruptcy, though no notice is given of the second indorsement to the dock company before the bankruptcy. *Ex parte Davenport re Leach*, 1 Law J. (n.s.) Bankr. 101, s. c. 1 D. & Ch. 397; M. & B. 165.

Slaves, being real estate, do not pass as under the order and disposition of the bankrupt, and may be the subject of an equitable mortgage. *Ex parte Rucker re Rucker*, 3 Law J. (n.s.) Bankr. 104, s. c. 1 Mont. & A. 481; 3 D. & Ch. 704.

*Semble*—There is a custom in the city of London for letting heavy horses for carts, &c. sufficient to rebut the presumption of reputed ownership by possession. *Ex parte Wiggins re Nichols*, 1 Law J. (n.s.) Bankr. 90, s. c. Mont. 516; 1 D. & Ch. 497; M. & B. 168.

In trover by the assignees of a bankrupt to recover the value of certain barges found in the possession of the bankrupt at the time of his bankruptcy, marked with and registered in his name, and of which he was said to be the reputed owner, under the 72nd section of the 6 Geo. 4, c. 16:—Held, that the proof of a custom of trade to let out barges permanently, and have them marked, &c. in the name of the hirer, was sufficient to take the case out of the statute, and rebut the *prima facie* evidence of ownership derived from the possession.

The proper question for the jury as to such a custom is, not whether it was notorious to all the world, but whether it was known to those conversant with the trade, and likely to have dealings with the bankrupt. *Watson v. Peache*, 4 Law J. (n.s.) C.P. 49, s. c. 1 Bing. N.C. 327; 1 Sc. 149.

Flower accepted bills to enable Cornie to make shipments to Sydney, on an agreement, known at Sydney, to apply the return proceeds in payment of the bills. On the last shipment, Cornie sent notice to Sydney to send the proceeds direct to Flower, and gave the same notice to a partner of the Sydney house, who happened to be in London. Before the notice arrived at Sydney, the return

proceeds were sent off to Cornie, who became bankrupt, and his assignees received them:—Held, not in his reputed ownership, and Flower entitled thereto. *Ex parte Flower*, 2 Mont. & A. 224, s. c. 4 D. & Ch. 449.

The assignment of a policy of insurance without notice to the office, does not prevent the operation of the clause of reputed ownership. *Ex parte Tennyson*, M. & B. 67.

Where shares of an insurance company are held in the name of the bankrupt as trustee, they are not in his reputed ownership. *Ex parte Watkins re Kidder*, 1 Mont. & A. 689, s. c. 4 D. & Ch. 87.

A party, to whom the bankrupt had assigned a policy of insurance, sends an agent to the office for the purpose of paying the annual premium, who, in the course of conversation with one of the clerks in the office, tells him of the policy having been so assigned:—Held, that this was not sufficient notice to the insurance office. *Ex parte Carbis*, 4 D. & Ch. 354.

In deposits of shares of insurance companies, where the parties are partners thereof, the transaction itself is sufficient notice to prevent reputed ownership. *Ex parte Walthman*, 2 Mont. & A. 364, s. c. 4 D. & Ch. 412.

Where shares of a company stand in the name of the bankrupt, who is on all occasions the only apparent owner, and has possession of the certificates of the shares, but the shares belong to another person, in whose favour there exists a secret declaration of trust, the shares are in the reputed ownership of the bankrupt.

That one of the directors and an actuary knew the shares not to be the bankrupt's, is not sufficient to prevent reputed ownership. *Ex parte Watkins*, 2 Mont. & A. 348.

Furniture, settled to the separate use of a wife, the possession being consistent with the settlement, is not in the reputed ownership of the husband. *Ex parte Massey*, 2 Mont. & A. 178, s. c. 4 D. & Ch. 405.

Furniture, the separate property of one partner, used by the firm, is not in the reputed ownership of the firm, *ut semble*. *Ex parte Hare*, 2 Mont. & A. 478, s. c. 1 D. 16.

A debenture for a tontine annuity was deposited by an intestate with his bankers, one of whom received the dividends, and placed them to the credit of the intestate's account. The intestate died in 1801, and a commission issued against the bankers in 1810; notwithstanding which, the same partner continued to receive the dividends, and paid them to the intestate's widow, up to the period of his own death, which happened in 1822; some time after which, the assignees of the bankers claimed a lien on the debenture, for a debt due from the intestate to the banking-house:—Held, that after so long an abandonment of any claim of lien, the assignees could not now support such claim; and that the debenture, also, could not be considered as having been left in the order and disposition of the bankers, having been deposited in the nature of a trust. *Ex parte Douglas*, 3 D. & Ch. 310.

By a clause in the deed of settlement of a banking company, it was stipulated, that the company should have a lien on the shares of such proprietors as were customers and indebted to the bank, and

that no share should be transferred without the consent of the directors; and an abstract of these provisions was indorsed on the certificate of the share held by each proprietor.

The bankrupt, at the time of his bankruptcy, was the owner of thirty of these shares, and had in his possession the certificates of ownership thus indorsed, being then largely indebted to the bank for advances:—Held, that these shares did not pass to his assignees under the clause of reputed ownership in the Bankrupt Act, so as to defeat the lien of the bank, which had been provided for in the deed. *Ex parte Plant*, 4 D. & Ch. 160.

If the mortgagee be himself a trustee to whom notice must be given, the transaction itself is notice enough to prevent reputed ownership. *Ex parte Smart*, 2 Mont. & A. 60.

A is in the habit of sending skins to B's tan-yard to be dressed, with an account, as of a sale, of each parcel of skins to B; and B renders an account of the dressed leather, as being sold by him to A. This mode of dealing was only practised by B with A, nor was B in the habit of dressing skins for any other persons:—Held, that a quantity of these skins, which were mixed with B's general stock at the time of his bankruptcy, passed to his assignees, on the principle of reputed ownership. *Ex parte Batten*, 3 D. & Ch. 328.

Where goods are in the order and disposition of the bankrupt, through the fraud of the bankrupt, the Court will order the assignees to restore them. *Ex parte Carlon re Birks*, 4 Law J. (N.S.) Bankr. 6, 2 Mont. & A. 39; 4 D. & Ch. 120.

#### (c) Voluntary Assignment.

M, trading to a considerable extent, assigns, on the first of July 1831, at the request of his son, to whom he is *bond fide* a debtor, the lease of a valuable house to the trustees of his son's marriage settlement, as a security for his debt. He continues his business till January 1832, and then becomes bankrupt.

In trover for the lease by his assignees against the trustees of the son:—Held, that such assignment was not executed voluntarily, nor in contemplation of bankruptcy.

Whether a certain act is or is not performed in contemplation of bankruptcy, depends upon the idea and opinion entertained of his affairs by the bankrupt at the time of performing such act. Such idea and such opinion are matters of fact, and are to be referred to the decision of the jury. *Belcher v. Prettie*, 3 Law J. (N.S.) C.P. 85, s. c. 10 Bing. 407; 4 Mo. & Sc. 295.

#### (N) MORTGAGE AND SALE OF PREMISES.

[See MORTGAGE, Equitable: and see (DD), Solicitor].

[See *Ex parte Fletcher re Collins*, 1 Law J. (N.S.) Bankr. 44, s. c. 1 D. & Ch. 318.]

Where on application for sale of equitable mortgagee and liberty to bid, one mortgagee being also an assignee, a separate solicitor must be appointed for the sale, and assignees not to have conduct of it. *Ex parte Greenwood*, 1 D. & Ch. 542.

The Court will give leave to a mortgagee to bid at the sale of the mortgaged property, where it is for

the benefit of the estate. *Ex parte Say re Thornton*, 1 Law J. (n.s.) Bankr. 17, s. c. Mont. 364; 1 D. & Ch. 32.

A mortgagee obtained an order from the commissioners, for sale of the mortgaged premises. He bid at the sale, and became purchaser, without previous leave of the Court. The Court refused to set aside the sale. *Ex parte Ashley re Bell*, 3 Law J. (n.s.) Bankr. 9, s. c. 1 Mont. & A. 82; 3 D. & Ch. 510.

Mortgagee applying for leave to bid must always pay costs of petition, unless consent otherwise. *Ex parte Williams*, 1 D. & Ch. 489.

One of a firm, solicitors to the commission, who was also mortgagee, allowed to bid at the sale of the premises. *Anonymous*, 2 Law J. (n.s.) Bankr. 3.

The Court will not exempt a mortgagee who bids from paying a deposit. *Ex parte Tatham*, 1 Mont. & A. 336, s. c. 4 D. & Ch. 360.

Mortgagee allowed to bid, but compelled to pay the deposit money. *Anon.* 4 Law J. (n.s.) Bankr. 4.

On the sale of some policies pledged as security, a reserved bidding refused to the assignees. *Ex parte — re Skinner*, 2 Law J. (n.s.) Bankr. 83, s. c. 1 Mont. & A. 81.

Under what circumstances a reserved bidding refused to assignees, on the sale of property under an equitable mortgage. *Ex parte Barnard*, 3 D. & Ch. 291.

A reserved bidding allowed to assignees, on the sale of an estate, which had been mortgaged by the bankrupt. *Ex parte Ellis*, 3 D. & Ch. 297.

A mortgagee having bid without leave, an order to bid *nunc pro tunc* was made. *Ex parte Pedder*, 1 Mont. & A. 327, s. c. 3 D. & Ch. 622.

Where deeds relating to freehold and leasehold property were deposited with an equitable mortgagee, but the memorandum accompanying the deposit merely related to the leasehold property:—Held, that the mortgagee might nevertheless pray a sale of the freehold, as well as the leasehold property, subject, however, to the payment of the costs of the sale. *Ex parte Robinson*, 1 D. & Ch. 119.

Where freehold title deeds were intended to be deposited with an equitable mortgagee, together with deeds relating to leasehold property, and were, accordingly, specified in the memorandum of deposit, the freehold property was included in the order for sale. *Ex parte Leathes*, 3 D. & Ch. 112.

When mortgaged property is sold, and the same solicitor is concerned for the assignees and the mortgagee, a separate solicitor should be appointed for the purposes of the sale. *Ex parte Rolfe*, 1 D. & Ch. 77.

On a deposit of a policy of assurance by way of equitable mortgage, the onus does not lie on the mortgagee to shew that notice of the deposit was given to the office before the act of bankruptcy, but with the assignees to shew that it was not. *Ex parte Stevens* 4 D. & Ch. 117.

The clerk of a creditor, claiming as equitable mortgagee, drew up and signed the memorandum accompanying the deposit of a lease by the bankrupt; but it was not signed by the bankrupt himself, nor was it alleged that the clerk was authorized by the bankrupt, to draw up such memorandum, or that it was ever shown to the bankrupt:—Held, under these circumstances, that the equita-

ble mortgagee was not entitled to the costs of the sale. *Ex parte Reid*, 1 D. & Ch. 250.

An equitable mortgagee will not be preferred to a subsequent legal mortgagee, who has no notice of the equitable mortgagee; and the onus lies upon the former, claiming a priority, to prove that the latter had such notice. *Ex parte Hardy*, 2 D. & Ch. 393.

A mortgagee with a power of sale, himself put up the premises for sale, and then applied for leave to bid:—Held, that he could not be permitted, unless he waived the power, and had the property sold under the order of the commissioners. *Ex parte Davis*, 1 Mont. & A. 89, s. c. 3 D. & Ch. 504.

A mortgagee of a term gave an equitable mortgage, and subsequently purchased the equity of redemption:—Held, that the equitable mortgagee was entitled to a sale of the equity of redemption, if it were rejected by the assignees. *Ex parte Tuffnell*, 1 Mont. & A. 620, s. c. 4 D. & Ch. 29.

A petition for the sale of property, in respect of which the creditor holds a legal security, will be dismissed with costs. *Ex parte Moore*, 2 D. & Ch. 7.

It is not necessary for the person holding a legal mortgage of an equitable estate to apply to the Court for an order for the sale; and when it is done, the party will have to pay the costs. *Ex parte Jones re Drew*, 4 Law J. (n.s.) Bankr. 56.

A person holding an agreement for a mortgage may apply to the Court as an equitable mortgagee. *Ex parte Jones re Blew*, 4 Law (n.s.) Bankr. 59.

The Court will, to save expense, allow property sold under the order of the Court to be conveyed to the mortgagee, provided the bidding at the sale was not collusive. *Ex parte Prevost re Bowles*, 3 Law J. (n.s.) Bankr. 79.

Whether a mortgage of an equity of redemption can be sold under the order of the commissioner, or an application to the Court is necessary—*quære*. *Ex parte Robinson re Fauccett*, 1 Law J. (n.s.) Bankr. 114, s. c. 2 D. & Ch. 110.

After an order for sale, the equitable mortgagee is entitled to the rents and profits; and, if the completion of the purchase be delayed, and the purchaser agrees to pay interest for the purchase-money, the assignees are not entitled to have the original debt reduced by that interest. *Ex parte Ramsbottom re Penfold*, 4 Law J. (n.s.) Bankr. 33, s. c. 2 Mont. & A. 79; 4 D. & Ch. 198.

An equitable mortgagee is entitled to the rents and standing crops of the premises from the time of the order for sale. *Ex parte Bignold re Keer*, 1 Law J. (n.s.) Bankr. 100, s. c. 2 D. & Ch. 398.

The right of an equitable mortgagee of partnership property is not varied by a subsequent dissolution of partnership between the mortgagors, and a bankruptcy of the continuing partner, notwithstanding there had been the substitution of a separate collateral security, for a joint collateral security, given before the dissolution. *Ex parte Booth re Draper*, 1 Law J. (n.s.) Bankr. 81, s. c. 2 D. & Ch. 69.

An equitable mortgagee is only entitled to the rents and profits from the date of the order for sale. *Ex parte Bignold re Postle*, 2 Law J. (n.s.) Bankr. 1, s. c. 2 Mont. & A.

An equitable mortgagee in possession of a bankrupt's property, is entitled to the rents and profits from the time of taking possession. *Semble*, if not

in possession, only from the date of the order. *Ex parte Bignold re Postle*, 4 Law J. (N.S.) 58, s. c. 2 Mont. & A. 214; 4 D. & Ch. 259.

Where the bankrupt denies that a deposit of deeds was to secure prior advances, and there is not any memorandum, it will be necessary for the mortgagee to supply evidence. *Ex parte Martin re Cowdery*, 4 Law J. (N.S.) Bankr. 85, s. c. 2 Mont. & A. 243; 4 D. & Ch. 457.

*Quere*—Whether a mortgage of an equity of redemption, by deed, can be sold by commissioners, under Lord Loughborough's order. *Ex parte Miller re Coombs*, 2 Law J. (N.S.) Bankr. 81.

The Court will not make an order for a sale by private contract, of premises, under an equitable mortgage, but the commissioner may order such sale, if thought most expedient. *Ex parte Ladbroke re Barker*, 3 Law J. (N.S.) Bankr. 56, s. c. 1 Mont. & A. 384.

A legal mortgage, of an equitable estate, is within the provisions of Lord Loughborough's general order. *Ex parte Apple re Friend*, 3 Law J. (N.S.) Bankr. 121, s. c. 1 Mont. & A. 621; s. r. *Ex parte Attwood*, 2 Mont. & A. 24.

The Court of Review has jurisdiction to order sale of estate legally mortgaged, on application of mortgagee, giving him leave to bid. *Ex parte Bacon*, 2 D. & Ch. 181.

After an order for sale, obtained by an equitable mortgagee, if the assignees delay the sale, *semble* that the course is not to present a fresh petition for a sale, but to prosecute the former order. *Ex parte Robinson*, 3 D. & Ch. 103.

Where an equitable mortgagee is also an assignee, a solicitor will be appointed to take the account and conduct the sale. *Ex parte Lees*, 2 D. & Ch. 360.

Where an equitable mortgagee, with a power of sale, had executed the power by putting up the estate to sale, when it was sold to him for 300*l.* and he applied afterwards for the usual order, held, that the estate must be put up at that sum. *Ex parte Francis*, 1 D. & Ch. 274.

Mortgagee's costs to be paid out of the proceeds of the sale. *Ex parte Brown*, 1 D. & Ch. 34.

Where A accepted bills for the accommodation of B, and B deposited title-deeds of A's with C, the holder of the bills, as security for their payment, a letter from A to C, referring to the existence of the debt, and saying—"The security you hold is a great deal more than you hold acceptances for on my account; my real account is not more than half you hold, but you have full security for all and more:"—Held, a sufficient acknowledgment of the security to the full amount of bills, though B had no direct authority to pledge. *Ex parte Skinner*, 1 D. & Ch. 403.

Although an equitable mortgagee may waive his privilege to bid, the assignees must still have the conduct of the sale. *Ex parte Smith*, 2 D. & Ch. 30.

Though assignees consent to abandon property under equitable mortgage, yet the Court requires an affidavit to shew that such abandonment will be for the benefit of creditors. *Ex parte Wright*, 1 D. & Ch. 573.

Where equitable deposit is made, accompanied with memorandum, for debt subsequently discharged, and, on fresh debt contracted, it is verbally agreed that deposit shall continue as security for latter debt, mortgagee is not entitled to the costs

out of produce of sale. *Ex parte Pigeon*, 2 Law J. (N.S.) Bankr. 3, s. c. 2 D. & Ch. 118.

An equitable mortgagee of leasehold property must satisfy a distress for rent out of the proceeds of the sale, and can only prove for the deficiency, although occasioned by the payment of the rent. *Ex parte Coaks*, 1 D. & Ch. 8.

The petitioner, an equitable mortgagee of leasehold property, obtained an order for a sale, at which 950*l.* was bid for the mortgaged premises, but they were bought in by direction of the assignees. The petitioner afterwards applied to the commissioners for another sale, but the order they made being unsatisfactory to him as to the time of sale, he refused to accept it; and the assignees afterwards obtained another order, when the highest bidding was only 650*l.*:—Held, that the petitioner, by applying for a second sale, waived any claim against the assignees for the difference in the amount of the biddings at the first and second sale, but that he was entitled to be indemnified from the ground-rent and all expenses incurred since the first sale. *Ex parte Baldock*, 2 D. & Ch. 60.

An equitable mortgagee, who applies for a sale, will not be allowed the costs of an action at law, brought for the mortgage money. *Ex parte Fletcher*, Mont. 454.

#### (O) OF RELATION.

##### (a) *Payments made by, to, and on account of, the Bankrupt.*

[See CONTRACT, Action on.]

Money paid into court to abide the event of the suit, under the 7 & 8 Geo. 4, c. 71, s. 2, is not a payment to a creditor within the protection of the 6 Geo. 4, c. 16, s. 82. If paid in after an act of bankruptcy, and less than two months before a commission issued, it is not within the protection of 6 Geo. 4, c. 16, s. 81. *Ferrall v. Alexander*, 1 Dowl. P.C. 132.

A voluntary delivery of goods in satisfaction of a *bond fide* debt, made in contemplation of bankruptcy, is, under 6 Geo. 4, c. 16, s. 3, an act of bankruptcy, and not protected by the 81st section of that act, though made more than two months before the issuing of a commission. *Bevan v. Nunn*, 1 Law J. (N.S.) C.P. 175, s. c. 9 Bing. 101; 2 Mo. & Sc. 132.

A bankrupt made a purchase of timber by two agreements, one before and one after the act of bankruptcy, and, after the act of bankruptcy, received part of the timber without paying for it, but was not entitled to receive the remainder without giving security for the whole. After the act of bankruptcy, the defendant became security, and purchased from the bankrupt the benefit of the contract, which purchase was recited in the instrument by which the defendant became security. The bankrupt afterwards agreed with the defendant, that he, the bankrupt, would pay the money due to the vendor for the timber purchased by the first agreement and in part received, and should be entitled to retain the timber so purchased. The bankrupt then delivered money and bills to the defendant, to be paid to the vendor for the timber first purchased. The defendant paid the cash to his own bankers, and indorsed the bills to them, and afterwards paid the amount of the cash and of the bills to the vendor, by a single draft on those bankers. After

this the commission issued:—Held, that the defendant was not liable to repay the cash to the assignees, nor to indemnify the bankrupt's estate against the bills; for the defendant was the mere agent of the vendor, and neither the cash nor the proceeds of the bills could have been recovered back from him, the transaction on his part being a *bond fide* one, protected by 6 Geo. 4, c. 16, s. 82. *Shaw v. Batley*, 4 B. & Ad. 801, s. c. 1 N. & M. 751.

(b) *Other Dispositions of the Bankrupt's Property.*

On reference to an arbitrator, it appeared that the bankrupt, who was carrying on the trade of a timber-merchant, previous to his bankruptcy, bought some timber as on his own account, but, in fact, for the defendant, without the vendor's knowing that the defendant had any interest in the purchase; afterwards, and before the bankruptcy, contracts of sale and exchange of that timber were entered into between the bankrupt and one L, who was at the time wholly ignorant that the defendant was interested in the timber. On the 17th of May 1828 (the commission of bankruptcy having issued on July 29, 1828), the defendant required the bankrupt to deliver up to him all his timber which then remained unsold, when the bankrupt informed him of his several contracts with L, and, on the 22nd of May, the defendant wrote a letter to L, revoking the agency of the bankrupt, and L accepted the defendant as the principal. On that day, 365 loads of the defendant's timber were in the order and disposition of the bankrupt; and it was proposed at that time by the bankrupt, to deliver other timber of the bankrupt, in satisfaction of the defendant's claim to the timber which had come to the hands of the bankrupt under the contract of sale. This proposal was not accepted until the 21st of June; nothing was done upon it until the 7th, 10th, and 11th, when the defendant's clerk took possession of it:—Held, that the mere circumstance of apprising the vendor, who had long before delivered the timber, that the bankrupt was merely an agent, was not such an act as, between the defendant and the bankrupt, was necessary to determine the possession of the bankrupt.—Held, 2ndly, that as there was no contract complete before the 29th of May, for delivery of the bankrupt's timber in lieu of the defendant's own, it could not come within the protection of the 81st section. *Shaw v. Harvey*, 3 Law J. (n.s.) K.B. 106, s. c. 1 Ad. & E. 920.

A trader, by a bill of sale, which was dated the 5th of September 1832, assigned his furniture and other chattels to the defendant, upon trust, to permit him, the trader, to possess and take the profits of the said chattels till the 25th of March 1833, and then to re-assign them to the trader if the sum of 2,700*l.*, and certain subsequent loans therein mentioned, should be paid. But, if such sums were not then paid, that it should be competent to the defendant to sell such goods and chattels without the consent or concurrence of the trader, for the purpose of reimbursing himself. Upon the 31st of October 1832, a fiat issued against the trader. In trover by his assignees, to recover the value of the goods thus assigned:—Held, that the assignment was not protected by the 81st section of 6 Geo. 4, c. 16, as two calendar months had not elapsed between the conveyance and the date and issuing of the com-

mission; nor by the 82nd section, as the transaction was in the nature of a loan on a pledge, and could not be considered as the payment of an antecedent debt. *Canon v. Deneu*, 3 Law J. (n.s.) C.P. 65, s. c. 10 Bing. 292; 3 Mo. & Sc. 761.

(c) *Judgments and Executions.*

By 6 Geo. 4, c. 16, s. 81, all executions, &c. executed or levied more than two calendar months before the issuing of the commission, are valid. The defendant (the sheriff) seized the goods of W on the 13th of August, in execution, upon a judgment on a warrant of attorney at the suit of the plaintiff, at about eleven o'clock, and at about one, on the 13th of October, a commission of bankruptcy issued against W:—Held, that the Court would take notice of the fraction of a day, in putting a construction upon that part of the clause; and that, therefore, it was clear that more than two calendar months had elapsed:—Held, also, that the day of issuing the commission was to be included in the computation.

By the 108th section it is enacted, that no creditor, having security for his debt, shall receive upon such security more than a rateable part of such debt, except in respect of any execution or extent, served and levied by seizure upon any part of the property of such bankrupt, before the bankruptcy:—Held, that this clause is not sufficiently explicit to deprive a creditor of the protection given by the 81st section, but applies only to such executions as are levied within the two months of issuing the commission; that the execution creditor, therefore, in this case, was entitled to recover against the sheriff in an action for a false return, he having handed the proceeds of the sale over to the assignees, and returned *nulla bona* to the sheriff's *fi. fa.* *Godson v. Sanctuary*, 2 Law J. (n.s.) K.B. 19, s. c. 1 N. & M. 52; 4 B. & Ad. 255.

The statute 1 Will. 4, c. 7, s. 7, exempting judgments on cognovit and by default, confession, or *nil dicit*, in any action commenced adversely and without collusion, from the operation of section 108 of the Bankrupt Act, 6 Geo. 4, c. 16, does not extend to judgments on warrant of attorney, though given without collusion or intention of fraudulent preference. And a sheriff having seized and sold goods on an execution issued upon such judgment, and paying over the proceeds after notice of an act of bankruptcy committed by the defendant, is answerable to the assignees for money had and received. *Croftfield v. Stanley*, 4 B. & Ad. 87, s. c. 1 N. & M. 668.

(P) OF PARTNERS.

To support a joint commission of bankrupt, there must be separate acts of bankruptcy by each partner. A joint commission against two out of three partners is bad. *Allen v. Hartley*, 4 Doug. 20.

In 1820, W W advanced 24,000*l.* to J C S and W S, then carrying on trade as brewers; a deed was entered into by which a partnership stock was created, in which they all had a joint property. W W was not to have any definite proportion of the profits, but was, out of such profits, to receive 10*l.* per cent. on the sums so advanced; the business continued to be carried on under the style of the old firm, and his name never appeared to the world as a partner. The firm became bankrupt in 1826—and held, that W W was a partner in the concern, and that a



joint commission against the three, as such joint partners, might be supported; and that the creditors both of the old and the new firm were equally entitled to prove against the estate of the latter. *Ex parte Chuck re Starkie*, 1 Law J. (N.S.) Chanc. 197.

Certain goods were shipped in the name of A, the invoice stating them to have been bought by A from B, and A gave bills for the amount to B. By a private agreement, however, the goods were to be shipped at their joint risk of loss and profit, and B was to provide for half the bills; C discounted some of the bills for B, on the security of the return proceeds of the goods, B stating, that the return proceeds stood as security for the payment of the bills, which statement was borne out by the private agreement. All parties became bankrupt:—Held, that the assignees of C were entitled, as against the assignees of A, to so much of the return proceeds as would cover the amount of the bills discounted. *Ex parte Copeland re Mildred*, 3 Law J. (N.S.) Bankr. 15, s.c. 2 Mont. & A. 177; 3 D. & Ch. 199.

One of several partners, previous to his marriage, agreed with his intended wife's trustees, that he would assign to them a portion of his capital in business; to secure to them certain periodical payments of 500*l.* on the trust of his marriage settlement. In pursuance of this agreement, the partnership open an account in their books with the trustees, in which they place to the credit of the trustees the sum of 3,000*l.*, and debit their partner with the same sum, giving the trustees notice that they have transferred this sum from their partner's private account. Default having been made in the payments of 500*l.*, and the firm having become bankrupt:—Held, that this was an acknowledgment of a present debt from the firm to the trustees, the consideration for which was the intended marriage. *Ex parte Hill*, 1 Dea. 123.

On money, that has been lent to one partner upon bond, being afterwards applied to the purposes of the partnership, a very slight recognition by the creditor will be sufficient to entitle him to prove against the joint estate.—*Semble*, the Court of Review will hear evidence, on an appeal from the decision of the commissioner, that had not been heard before the commissioner; and the commissioner ought not, at any time before he has given his decision, to refuse to receive further testimony. *Ex parte Kedie re Houghton*, 1 Law J. (N.S.) Bankr. 87, s.c. 2 D. & Ch. 321.

If partners, being jointly indebted, give a joint and several bond, and a warrant of attorney to enter up judgment, under which joint judgment is entered, and the partners become bankrupt, the creditor cannot prove against the separate estate of one of the partners, the bond as a separate security being merged in the judgment. *Ex parte Christie re Barrow*, 1 Law J. (N.S.) Bankr. 103, s.c. 1 D. & Ch. 155; M. & B. 352.

A solvent partner cannot render the firm liable on a bill of exchange, drawn after an act of bankruptcy committed by a co-partner. The respondent is entitled to his costs out of the estate, on a successful petition to expunge, on grounds not taken before the commissioner. *Ex parte Ellis re Houghton*, 2 Law J. (N.S.) Bankr. 95, s.c. 2 D. & Ch. 555.

A furnished certain goods to B and C, who shipped

them for a foreign market, giving A bills for the amount, which he engaged to renew till the return proceeds came round: by a private agreement, A became a partner in this particular adventure with B and C; A procured the bills to be discounted; then A, B and C became bankrupt:—Held, that the billholders had a lien on the return proceeds. *Ex parte Prescott re Thompson*, 3 Law J. (N.S.) Bankr. 19, s.c. 1 Mont. & A. 316; 3 D. & Ch. 218.

A and B are in partnership; A retires, and B and C enter into partnership. D, a creditor of the firm of A and B, continues for many years to deal with B and C, without any settlement of the accounts taking place. On the bankruptcy of B and C, D is a creditor to a considerable amount, part of which was owing to him from A and B:—Held, that he could not, unless he had assented to take B and C as his debtors, prove for the whole amount against B and C. *Ex parte The Crown re Ross*, 4 Law J. (N.S.) Bankr. 88.

The bankrupt and defendants were members of a society formed for the purpose of building a certain number of houses; the expenses of the undertaking to be defrayed by monthly subscriptions of the members. The bankrupt had agreed to let to the company the ground on which the houses were to be built; the leases to be made to and executed by the defendants, as trustees of the society, who were to be indemnified by the members for any loss or damage they might sustain in consequence of carrying the trusts into execution:—Held, that, under such circumstances, the assignees of the bankrupt might sue the trustees, his co-partners, for breach of covenant in not paying rent. *Bedford v. Brutton*, 4 Law J. (N.S.) C.P. 97, s.c. 1 Bing. N.C. 399; 1 Sc. 245.

Where one of two partners becomes bankrupt, his solvent co-partner, who still continues to carry on the joint trade, may apply the joint fund to the discharge of partnership debts. Therefore, where, in such a case, the solvent partner paid into the hands of his and his partner's bankers a sum of money, to meet the payment of bills drawn, payable at their house, and the bankers applied the sums accordingly:—Held, that the assignees of the bankrupt could not recover from the latter the sums so paid, in an action for money had and received. *Woodbridge v. Swann*, 2 Law J. (N.S.) K.B. 132, s.c. 1 N. & M. 724; 4 B. & Ad. 633.

One retires from a firm; after that, a creditor presses the remaining two, who accept a bill for the debt, in the name of the three:—Held, the two are liable, and proof ordered against their estate. *Ex parte Leddiard re Coward*, 4 Law J. (N.S.) Bankr. 65.

Proof by joint estate for fraudulent abstraction, when admissible. *Ex parte Turner*, 1 Mont. & A. 357.

Proof cannot be made by the joint estate against the separate estate, except in the case of fraudulent abstraction from the joint funds by one of the partners; and not then, if there has been any waiver of the tortious act by the other partner, so as to reduce it to a matter of contract. *Ex parte Turner*, 4 D. & Ch. 169.

A solvent partner is entitled to retain the partnership books, when the other becomes bankrupt. *Ex parte Finch*, 1 D. & Ch. 274.

An application to consolidate the joint and sepa-

rate estates will not be granted, if one creditor dissents. *Ex parte Sheppard*, 3 D. & Ch. 190.

A, being a dormant partner with B, dissolves partnership, and B is declared indebted to A on balance: A sues B for balance, and receives cognovit for debt and costs; B becomes bankrupt:—Held, A is entitled to prove his debt against the estate, although some partnership debts are unpaid. *Ex parte Graysbrook*, 2 D. & Ch. 186.

A solvent partner may, after a secret act of bankruptcy committed by his co-partner, make the firm liable by accepting a bill for a previous liability. *Ex parte Robinson*, 1 Mont. & A. 18, s.c. 3 D. & Ch. 376.

A, B and C dissolve their partnership, by B retiring from the concern, and assigning all his shares in the partnership stock, debts, and effects to A and C, but no notice of such assignment was given, individually, to the debtors of the partnership. A and C continue to carry on the trade till the death of A. A fiat is then issued against B and C, as surviving partners of A, when some of the debts due to the firm of the three still remaining uncollected:—Held, that the joint creditors of the firm of the three could not prove against the separate estates of B and C; as the outstanding debts, due to the three, constituted joint property of that firm, existing at the time of the bankruptcy. *Ex parte Leaf*, 1 Dea. 176.

#### (Q) OF THE DIVIDEND.

Order made to divide unclaimed dividends among the other creditors. *Ex parte Donaldson*, 1 D. & Ch. 110.

Order nisi only in the first instance made for distribution of unclaimed dividends. *Ex parte Robinson*, 1 D. & Ch. 542.

Unclaimed dividends can only be ordered to be divided among all the creditors generally, and not among a particular class of creditors. *Ex parte Lackington*, 3 D. & Ch. 331.

Dividends on separate proofs, unclaimed for twenty-one years, ordered to be specially advertised; with liberty to the assignee, afterwards, to apply to place them to the account of the joint estate (the separate creditors having been paid in full); but costs to be paid by the assignee, he not having filed his accounts within the year and two months. *Ex parte Feddon re Bissez*, 1 Law J. (N.S.) Bankr. 116, s.c. 2 D. & Ch. 379.

The Court will order the distribution of unclaimed dividends only after a reference to the registrar. *In re Cooke*, 4 Law J. (N.S.) Bankr. 41.

How far commissioners, in dividing unclaimed dividends, are justified in setting apart fresh sums for the creditors whose unclaimed dividends are distributed. *Ex parte Moubray re Surtees*, 3 Law J. (N.S.) Bankr. 45, s.c. 1 Mont. & A. 300; 3 D. & Ch. 552.

On dividend being withheld, assignees ordered to pay it with 5l. per cent. interest from time of application to them for payment. *Ex parte Story*, 4 D. & Ch. 504.

The Court will not order the interest on unclaimed dividends to be distributed under the 110th section of the 6 Geo. 4, c. 16. *Ex parte Renshaw re Wild*, 3 Law J. (N.S.) Bankr. 112, s.c. 4 D. & Ch. 483.

Simple contract debts, under a commission prior to the passing of the 6 Geo. 4, c. 16, do not carry

interest, although the dividend be declared after the act came into operation. *Ex parte Phillips re Phillips*, 3 Law J. (N.S.) Bankr. 123, s.c. 1 Mont. & A. 674; 4 D. & Ch. 181.

A dividend having been declared twenty-eight years ago, and the amount invested, the creditor was now held entitled to the interest which had accumulated. *Ex parte Halford*, 2 Mont. & A. 289.

If an application for payment of a dividend is not made until after the Statute of Limitations has run, *quære*, if not lapsed. *Ex parte Burgess re Tyrrell*, 2 Law J. (N.S.) Bankr. 96, s.c. M. & B. 415.

*Semble*—On a petition presented for a dividend, the assignees, if they have any ground for disputing, ought to present a cross petition to expunge the proof. *Ex parte Brunskill re Bentley & Co.*, 4 Law J. (N.S.) Bankr. 48, s.c. 2 Mont. & A. 220; 4 D. & Ch. 442.

*Semble*—Although the commissioners have no right, in their order of dividend, to exempt an assignee from his liability to pay the dividend, yet, if the order be of long standing, the Court will not interfere. *Ex parte Dawson re Finden*, 4 Law J. (N.S.) Bankr. 42, s.c. 2 Mont. & A. 94; 4 D. & Ch. 130.

One of the assignees, having the sole charge of paying the dividends, pays the dividend of a creditor to a person who is not duly authorized to receive it. The two other assignees are equally responsible to the creditor for the amount of the dividend. *Ex parte Winnall*, 3 D. & Ch. 22.

A surviving assignee is liable for the payment of dividends, if his co-assignee ever admitted the proof of the debt, although the creditor has failed to apply for the dividends for many years, unless it can be proved that the creditor has received them, the onus of the proof of payment lying on the assignee; and this, notwithstanding there is no sufficient fund left of the bankrupt's estate to pay the creditor. *Ex parte Healy*, 1 D. & Ch. 361.

#### (R) OF THE BANKRUPT.

##### (a) Surrender.

The assignees may petition for a meeting to take the bankrupt's surrender, if the bankrupt consents. *Ex parte Ferrier re Laws*, 1 Law J. (N.S.) Bankr. 95.

An order to enlarge the time for the bankrupt's surrender is of course, if applied for six clear days before the day appointed for his surrender. *Ex parte Rose*, 1 D. & Ch. 37.

When bankrupt abroad, the time for his surrender will be enlarged. *Ex parte Dodds*, 1 D. & Ch. 76.

Where a bankrupt omits to surrender within the given time, the Court will, under some circumstances, appoint a fresh meeting to take his surrender. *Ex parte Jeffreys*, 2 D. & Ch. 86.

##### (b) Rights and Privileges.

[See ARREST, Privilege from; and see, *post*, CERTIFICATE, Effect of.]

Where a bankrupt applies to be discharged out of custody on the ground that he has obtained his certificate, if the plaintiff in the action disputes the trading, the Court will direct an issue to try the fact. *Yeo v. Allen*, 3 Doug. 214.

On a petition by the bankrupt to reverse the adjudication under 1 & 2 Will. 4, c. 56, s. 17, he is entitled to copies of depositions on the proceedings

under which he was declared bankrupt. *Ex parte Jackson re Jackson*, 2 Law J. (N.S.) Bankr. 91.

When a bankrupt, who has petitioned to reverse the adjudication under the 17th section, 1 & 2 Will. 4, c. 56, wishes to inspect the proceedings, he must file some affidavit in support of his petition, to shew the Court that there are sufficient grounds for granting the request. If during the time the case has been standing over, he brings his action at law, the Court will dismiss his petition. *In re Whalley*, 3 Law J. (N.S.) Bankr. 77.

An uncertificated bankrupt cannot petition that his assignees may be ordered to account, without alleging that his estate will produce a surplus, after paying 20s. in the pound. *Ex parte Ryley*, 4 D. & Ch. 50.

The want of a petitioning creditor's debt and act of bankruptcy are alone enough for an assignment of the bond without proof of personal malice against the bankrupt. *Ex parte Clarke re Clarke*, 2 Law J. (N.S.) Bankr. 4.

A bankrupt is protected from arrest, on an attachment for contempt for non-payment of money, on his return home from passing his last examination. *Ex parte Jeyes*, 3 D. & Ch. 764.

A bankrupt, who has obtained his certificate, loses his privilege as to costs. *Ex parte Lomas*, 4 D. & Ch. 240.

#### (c) Liabilities.

By the 75th section of the 6 Geo. 4, c. 16, any bankrupt entitled to any lease, or agreement for a lease, if the assignees decline the same, shall not be liable to pay any rent after the date of the commission, or to be sued for any subsequent non-performance of the covenants, &c. in case he deliver up the lease or agreement to the lessor, or such person agreeing to grant such lease, within fourteen days after he shall have notice, that the assignees shall have declined:—Held, not to apply to the case where an assignee became bankrupt, and delivered up the lease to the devisee of the lessor, who refused to accept it, so as to discharge the original lessees from their covenants. *Manning v. Flight*, 1 Law J. (N.S.) K.B. 95, s.c. 3 B. & Ad. 211.

In the case of the bankruptcy of a trustee, the Court will order him to execute any conveyance, without compelling his assignees to join. *Ex parte Painter re Asseretti*, 2 Law J. (N.S.) Bankr. 39, s.c. 2 D. & Ch. 584.

#### (d) Allowances.

The bankrupt's allowance does not come out of the dividends, in the nature of a drawback; but the estate must pay the dividend, and leave a surplus for the allowance. *Ex parte Petheridge re Petheridge*, 2 Law J. (N.S.) Bankr. 13, s.c. 2 D. & Ch. 137; M. & B. 161.

Where assignees pay away money in their hands without a dividend order, and without retaining a sum to pay the bankrupt his allowance, they will be personally liable for such allowance to the full extent of the assets they may have so paid away. *Ex parte Lomas re Lomas*, 3 Law J. (N.S.) Bankr. 76, s.c. 3 D. & Ch. 681.

The Court will not make an order as to the bankrupt, 1821—35.

rupt's allowance for maintenance, after the choice of assignees. *Ex parte Hall re Hall*, 3 Law J. (N.S.) Bankr. 91, s.c. 2 D. & Ch. 44; 1 M. & A. 450.

Under a joint and separate fiat, the allowance is to be calculated on the amount of his separate estate, and on his share of the joint estate; but not on the gross amount of the joint estate. *Ex parte Lomas re Lomas*, 3 Law J. (N.S.) Bankr. 99, s.c. 4 D. & Ch. 240.

A, B, and C are bankrupts. Their joint estates pay 9s. in the pound; the separate assets of A and B contribute sufficient to make a dividend of 16s. in the pound, but C's separate estate contributes nothing:—Held, nevertheless, he was entitled to allowance under 6 Geo. 4, c. 16, ss. 128, 129. *Ex parte Morris*, 1 D. & Ch. 526.

A partner is entitled to an allowance, although his separate estate does not contribute to the joint estate, so as to form the statutable amount for allowance. *Ex parte Morris*, Mont. 503.

One of two assignees admits in the audit paper, previous to a dividend, that a certain sum was reserved by the assignees, applicable to future claims; the bankrupt, on a petition for his allowance after the death of this assignee, is entitled to an inquiry, whether any part of that sum ever came to the hands of the surviving assignee. *Ex parte Combes*, 3 D. & Ch. 319.

Though the assignees, with the concurrence of the commissioners, have ordered an allowance for maintenance (under 6 Geo. 4, c. 16, s. 114,) till the bankrupt has passed his last examination, which order remains on the proceedings, yet if the assignees afterwards withhold the maintenance, on the ground of the final examination being adjourned *sine die*, the Court has no power to interfere, either as to the maintenance or the passing of the examination. *Ex parte Hall*, 4 D. & Ch. 530.

#### (e) Examination.

Bankrupt's examination. See *Ex parte Coombe re Colbourn*, 4 Law J. (N.S.) Bankr. 41.

The Court will not, after an adjournment *sine die*, order the commissioners to appoint a time, unless upon a charge of misconduct, or that the bankrupt can shew that serious injury will be sustained. Where there is no charge against commissioners, they need not appear. *Ex parte Perkins re Perkins*, 4 Law J. (N.S.) 82, s.c. 1 Mont. & A. 524.

Where the bankrupt, after attending the last meeting before the commissioners, inadvertently absented himself without passing his last examination, the Court, on his petition, ordered a fresh meeting for that purpose, on payment of costs. *Ex parte Dixon*, 1 D. & Ch. 361.

Quere—Whether after a bankrupt has passed his last examination, he can be examined as to concealment. *Ex parte Smith*, M. & B. 203, s.c. 2 D. & Ch. 230.

#### (f) Of the Surplus.

When there is a surplus upon the estate of three, which is indebted to two, the creditors of the three are entitled to interest before the surplus is carried to the estate of the two. *Ex parte Ogil*, Mont. 350.

(g) *Of Actions by and against a Bankrupt.*

[See DISCONTINUANCE: and see *ante* (I) Proof of Debts].

A bankrupt may sue as a trustee, though he is only *custui que trust* under the same instrument. *Webster v. Scales*, 4 Doug. 7.

An uncertificated bankrupt may maintain an action for work and labour done by him, his assignees not interfering. *Chippendale v. Tomlinson*, 4 Doug. 318.

A bankrupt, who had never surrendered, restrained by order from proceeding in actions against the assignees, and a purchaser under the commission, to try its validity, after long acquiescence and acts of co-operation in the proceedings consequent upon the commission, done by him or under his authority. *Ex parte Hornby*, M. & B. 1.

In general, an uncertificated bankrupt cannot file a bill against his assignees, for an account of their dealings under the bankruptcy; nor can the bankrupt obtain this relief indirectly, by charging fraud and collusion between the assignees and a third party, where the bill states no specific acts of fraud on the part of the assignees, and prays no relief against them on the ground of fraud. *Tarleton v. Hornby*, 1 Y. & C. 172.

The price of goods sold by an uncertificated bankrupt, may be recovered by him against the vendee, his assignees not interfering. After the bankruptcy of A, and before his certificate, B, one of his creditors, purchases goods from him. In an action brought by A, after obtaining his certificate, for the price of the goods, the old debt cannot be set off, being barred by the certificate. *Hayllar v. Sherwood*, 2 N. & M. 401.

Where parties have become bankrupt in France, but have been reinstated in their affairs by a concordat, it is not necessary in an action brought by them for money due to them before their bankruptcy, to prove that they have performed their part of the concordat, but they should shew, that this action is brought with the assent of the commissioners named therein. *Orr v. Broune*, 5 C. & P. 414. [Parke]

The promise by a bankrupt to revive a debt barred by his certificate, must be "clear, distinct, and unequivocal."

In an action for not replacing stock, a letter written by the defendant, in which he said, "you may rely on the dividends being paid regularly until liquidated," was held not sufficient evidence of a promise to replace the stock; and, as a lease had been deposited with the plaintiff, fully adequate to pay the amount of the dividends, it was not even a sufficiently clear promise to pay the dividends, so as to make the defendant liable to an action. *Hawes v. Marsh*, 1 Law J. (N.S.) K.B. 41.

## (8) OF THE CERTIFICATE.

(a) *Form.*

A joint certificate is, upon the death of one of the bankrupts, a separate certificate. *Ex parte Carter*, 1 Mont. & A. 115, s. c. 3 D. & Ch. 549.

(b) *Signature.*

[See, *ante* (L) Assignees, Choice of.]

The Court will not interfere to compel a solicitor's clerk to make affidavit, as to the signatures to a bankrupt's certificate, while his principal's costs for obtaining them are unpaid. *Ex parte Shore re Lucas*, 1 Law J. (N.S.) Bankr. 115, s. c. 1 D. & Ch. 509, M. & B. 268.

Where the signatures to the certificate are according to the spirit of the order, the Court will allow it. *Re Buckley and Others*, 4 Law J. (N.S.) Bankr. 2, s. c. 4 D. & Ch. 504.

The signature, by power of attorney, to a certificate, admitted, although the power was not strictly formal. *Ex parte Wilkinson*, M. & B. 257.

It seems that a sole executor who becomes bankrupt, may sign his own certificate. *Ex parte Lawrence*, 1 Mont. & A. 453.

It is no objection to the granting of the certificate, that the date of the signatures was attached by a third person, if it be so done before the creditor signs his name. *Ex parte Reynolds*, 1 D. & Ch. 459. Commissioners directed to sign a certificate, although the year was omitted to one of the signatures, when it was preceded and followed by dates subsequent to that of the last examination. *Ex parte Shoults*, 1 D. & Ch. 531.

A power of attorney from a creditor residing abroad to sign the bankrupt's certificate, is sufficient, authenticated by the attestation of a notary public, without any affidavit to verify the signature. *Ex parte Myers*, 2 D. & Ch. 409.

(c) *Staying.*

When affidavit may be sworn. See *Ex parte Taylor re Percival*, 4 Law J. (N.S.) Bankr. 4, s. c. 2 Mont. & A. 36; 4 D. & Ch. 125.

The rule, that, on a petition to stay the certificate, the bankrupt cannot waive the necessity of personal service two clear days before the petition day, does not, it seems, apply when a professional man is interposed. *Ex parte Glossop re Glossop*, 3 Law J. (N.S.) Bankr. 41, s. c. 4 D. & Ch. 217; 1 Mont. & A. 607.

A petition to stay a bankrupt's certificate, must be served personally, and if on the ground of concealment, must state that the goods concealed exceeded the value of 10*l*. *Ex parte Merry re Smith*, 2 Law J. (N.S.) Bankr. 75.

If a petition to stay a certificate presented before the long vacation, is not served, the Court will order service forthwith. *Anonymous*, 2 Law J. (N.S.) Bankr. 80.

A person petitioning to stay a bankrupt's certificate must, if he has the bankrupt in custody, release him before he can be heard, and the affidavits of the petitioner must not only be filed at the same time the petition is presented, but must state, in express terms, the matter relied upon—information and belief will not be sufficient. *Ex parte Green re Armistead*, 4 Law J. (N.S.) Bankr. 3, s. c. 2 Mont. & A. 31; 4 D. & Ch. 112.

*Semble*—that a creditor who has signed the certificate by attorney, cannot stop the certificate by subsequently withholding an affidavit verifying his signature to the power. *Ex parte Dunstan*, 1 Mont. & A. 619, s. c. 4 D. & Ch. 30.

The certificate cannot be stayed for misconduct before the fiat issued. *Ex parte Gordon*, 2 Mont. & A. 30.

If there be four assignees, and a petition to stay

the certificate be presented by three, stating themselves to be "three of the assignees," but the attestation is bad as to two, the petition may be heard as the petition of the one.

That the bankrupt has not given up some of his property, is no ground to stay the certificate.

An allegation that the bankrupt has not fully disclosed his estate, is not sufficient, in ordinary cases, to stay the certificate. In extreme cases the Court will order first an issue.

If a fiat be worked before one commissioner, and in his absence from London in vacation, the certificate be signed by another commissioner, who acts for the absent commissioner, the Court will refer the certificate back to be signed by the commissioner who had been absent. *Ex parte Burn*, 2 Mont. & A. 483, s. c. 1 D. 194.

The certificate will not be stayed on a petition alleging information and belief, though supported by an affidavit swearing to the fact positively. (Sir J. Cross diss.)

The certificate will be stayed to enable a creditor to prove, when the reason for his not proving was a belief that no dividend would be paid. *Ex parte Perring*, 2 Mont. & A. 486.

Where a petition is presented to stay certificate, and the petitioner then withdraws his opposition, an affidavit of no collusion is requisite. *Ex parte Cates*, 1 D. & C. 546.

A defective attestation is waived by an order on the petition.

The petition being presented by a person who is not a solicitor of the Court, is not an objection to the hearing.

A fraudulent misdescription of the trading is a ground for staying the certificate. *Ex parte Tanner*, M. & B. 391, s. c. 2 D. & Ch. 563.

A petition to stay the certificate, charging, that the bankrupt admitted that he had lost 25*l*. in one sitting, is demurrable; it ought positively to allege the fact, and that the money was lost in one day. *Ex parte Crouch*, 3 D. & Ch. 17.

As a general rule, a petition to stay certificate must be served on bankrupt two clear days before the day for which it is answered. But where a petition to stay certificate was answered for the 9th of December, and on the 7th the bankrupt's solicitor requested the petitioners to postpone the hearing of the petition for a week, and undertook to serve it on the bankrupt; *semble*, the bankrupt could not avail himself of the objection to service. *Ex parte Hetherington*, 4 D. & Ch. 218.

Where, on petition to stay certificate, petitioner does not appear, and petition is dismissed, certificate not ordered to go without the production of an affidavit that there is no collusion. *Ex parte Hetherington*, 4 D. & Ch. 224.

On petition to stay certificate, it must appear from the petition itself, that the party applying is a creditor; if it appear merely inferentially, that is sufficient.

If it merely so appear from the affidavits in support, that is sufficient, and no amendment of petition to stay certificate allowed.

A former partner, there being partnership debts unpaid, cannot petition to prove the balance of accounts; *a fortiori* not to stay the certificate.

On petition to prove and stay certificate, it is not

necessary to charge directly, what debt was tendered for proof to the commissioner, or when it was rejected. *Ex parte Robinson*, 4 D. & Ch. 499.

(d) Effect of.

[See ante (I), Proof of Debts.]

To a plea of bankruptcy, under 6 Geo. 4, c. 16, the plaintiff may shew in answer, that the certificate was obtained unfairly, and by fraud; although this provision for avoiding the certificate, which was contained in the 5 Geo. 2, c. 30, is not in terms repeated in the former statute. *Horne v. Ion*, 2 Law J. (n.s.) K.B. 153, s. c. 1 N. & M. 627; 4 B. & Ad. 78.

By the 6 Geo. 4, c. 16, if a party become a second time bankrupt, and do not on such second commission pay 1*5s*. in the pound, the certificate shall only protect his person from arrest and imprisonment; but his future estate and effects shall vest in the assignees under the said commission, who shall be entitled to seize the same, as they might have done property, of which the bankrupt was possessed at the time of issuing the commission.

*Semble*—that this section applies as well to a commission sued out before the passing of the act as after. Held, that at all events in an action for a debt proveable under such second commission, the bankrupt might plead his bankruptcy and certificate in bar. *Robertson v. Score*, 1 Law J. (n.s.) K.B. 124, s. c. 3 B. & Ad. 338.

A bankrupt's certificate is a discharge from costs, ordered to be paid by him, by an order of Nisi Prius, on the postponement at his instance of a cause, in which he was defendant, if the costs were taxed before the bankruptcy.

But the Court will not act upon the certificate, by ordering the bankrupt's discharge out of custody, until it has been inrolled. *Jacobs v. Phillips*, 3 Law J. (n.s.) Exch. 306, s. c. 1 C. M. & R. 195; 4 Tyr. 652.

Two persons joined as sureties for a third, in a bond to secure a sum of money and interest. Default was made in payment of the interest, but no application was made to the sureties for payment. One of the sureties afterwards became bankrupt, and obtained his certificate; and subsequently, the other surety was called upon and obliged to pay the principal sum and interest:—Held, that he might recover in an action for contribution, against his co-surety, notwithstanding the bankruptcy of the latter. *Clements v. Longley*, 2 Law J. (n.s.) K.B. 173, s. c. as *Clements v. Langley*, 2 N. & M. 269; 5 B. & Ad. 372.

A B accepted a bill; he became bankrupt, and it was proved against his estate by the holder, C D; it was afterwards taken up for the honour of the drawer, by E F, but the proof was neglected to be expunged; C D died, and his executor received the dividends, and became bankrupt twenty-seven years afterwards. The assignees of A B presented a petition to expunge the proof, and that the executor should refund the dividends:—Held, that the executor could not set up the Statute of Limitations, but he might set up his certificate as a bar. *Ex parte Bolton re Baillie*, 3 Law J. (n.s.) Bankr. 22, s. c. 1 Mont. & A. 60; 1 D. & Ch. 540.

A claim founded on a covenant to charge a particular debt upon a specific fund, in which the covenantor has no present interest, but merely an

assentancy, is not barred by the bankruptcy and certificate of the covenantor, before he acquires an actual interest in the fund. *Lyde v. Mynn*, 1 M. & K. 633.

A granted an annuity to B, and covenanted to charge any property that he might become possessed of at his wife's death, either under her will or otherwise, with the payment of the annuity. A became bankrupt, and afterwards obtained his certificate, and then his wife died, having under a power in her settlement bequeathed to him an annuity of 700*l.*; A was decreed to execute a proper deed to charge the annuity of 700*l.*, with payment of the annuity granted to B. *Lyde v. Mynn*, 4 Sim. 505.

Where a defendant gives a cognovit for debt and costs, as between attorney and client, and before judgment signed he becomes bankrupt, his certificate is a bar to the plaintiff's claim. *Metcalfe v. Watling*, 2 Dowl. P.C. 552.

Where a bankrupt is taken in execution after his certificate is signed, but before it is allowed, and deposits the amount of the debt with the sheriff, who thereupon releases him, the Court will not order the sheriff to return the money to the defendant. *Neally v. Eagleson*, 3 Doug. 408.

The statute 6 Geo. 4, c. 16, s. 127, which vests in assignees the future effects of a bankrupt, who had before been a bankrupt, or taken the benefit of an insolvent act, and had not paid 1*l.* in the pound under the subsequent commission, does not apply to a bankrupt, who had obtained his certificate under such subsequent commission, before that statute passed; and, therefore, where A, after being discharged under an insolvent act, had a commission of bankrupt issued against him, and obtained his certificate before the passing of 6 Geo. 4, c. 16, but did not pay 1*l.* in the pound, and he afterwards sued on a bond executed before his discharge under the insolvent act, but not inserted in his schedule, it was held, that his certificate did not bar the action. *Carew v. Edwards*, 4 B. & Ad. 351, s.c. 1 N. & M. 632.

An annuity granted by A to B was secured by a covenant by C, a surety, to pay the annuity in case A made default, and by a judgment for 2,100*l.*, entered up against A and C. The annuity remained unpaid from January 1823, A having left the country, and in February 1824 C became bankrupt, and afterwards obtained his certificate. C having died, B filed a bill to have the arrears of the annuity paid out of his real and personal estate:—Held, that neither the value of the annuity, nor the sum due on the judgment, was proveable under C's commission, and therefore, that his certificate was not a bar to the plaintiff's demand. *Johnson v. Compton*, 4 Sim. 37.

#### (T) ANNULLING A FIAT.

An order "to rescind and annul a fiat" is substituted for the "writ of supersedeas," by 1 & 2 Will. 4, c. 56, s. 12.

[See *Ex parte Flight in re Baleman*, 1 Law J. (N.S.) Bankr. 16, s.c. Mont. 515; 1 D. & Ch. 79, and *Ex parte Barker in re Parker*, 2 Law J. (N.S.) Bankr. 96.]

#### (a) Causes for.

If a joint fiat issues, and only one be adjudged

bankrupt, the fiat may be superseded. *Ex parte Clarke re Clarke*, 1 Law J. (N.S.) Bankr. 97, s.c. 1 D. & Ch. 544.

A commission issued against a minor will be superseded; but a strong case of hardship must be made out, to induce the Court to assign the bond. *Ex parte Hehir re Hehir*, 2 Law J. (N.S.) Bankr. 37.

A trading got up for the express purpose of the party's being made a bankrupt, will not support a fiat. *Ex parte Dart re Sandys*, 2 Law J. (N.S.) Bankr. 21, s.c. 2 D. & Ch. 543.

A commission issued merely to dissolve a partnership, is supersedeable. *Ex parte Christie re Christie*, 2 Law J. (N.S.) Bankr. 87, s.c. 2 D. & Ch. 465; M. & B. 314.

A fiat taken out for the purpose of dissolving a partnership, will be annulled. *Ex parte Grey re Grey*, 4 Law J. (N.S.) Bankr. 70, s.c. 1 D. 105; 2 Mont. & A. 283.

When a commission is concerted for any other purpose than the *bond fide* distribution of property, the Court will supersede. *Ex parte Taylor re Percival*, 4 Law J. (N.S.) Bankr. 4, s.c. 2 Mont. & A. 36; 4 D. & Ch. 125.

When a docket has been struck by an uncertificated bankrupt, the Court will order the fiat to be superseded, if his assignees claim the debt and refuse to adopt the commission. *Ex parte Sharnan re Sharnan*, 2 Law J. (N.S.) Bankr. 38.

Where a creditor comes to the Court to supersede a commission, on the ground of misdescription, he must shew that he has been misled by the variance. *Ex parte Mills re Coleman*, 3 Law J. (N.S.) Bankr. 74, s.c. 1 Mont. & A. 310; 3 D. & Ch. 606.

Where a fiat has been sued out, evidently for the purpose of defeating an expected judgment of remand in the Insolvent Debtors Court, the Court will order it to be annulled. *Ex parte Alexander re Waisley*, 1 Law J. (N.S.) Bankr. 79.

The Court will not supersede a commission of ten years' standing where the bankrupt has acquiesced, merely because he may have obtained a verdict in an action against the official assignee, after having failed several times before on his petition to the Court. *Ex parte Munk re Munk*, 3 Law J. (N.S.) Bankr. 94, s.c. 1 Mont. & A. 612; 2 D. & Ch. 120.

The Court will not supersede a second fiat issued after the lapse of twelve years, for the purpose of giving effect to the old commission, if the creditor has been lying by inactive during the time. *Ex parte Martin re Kenton*, 4 Law J. (N.S.) Bankr. 77, s.c. 2 Mont. & A. 293; 1 D. 44.

After the issuing of a fiat, the petitioning creditor heard and believed that the party, against whom it was issued, was a married woman. The Court would not, for this cause, on the petition of the petitioning creditor, order the fiat to be annulled, but merely suspended the prosecution of it. *Ex parte Harland*, 1 D. 75.

Where the petitioning creditor becomes bankrupt before the fourteen days for opening the fiat have elapsed, the Court will not supersede on the petition of another creditor, who is prepared to issue a new fiat. *Ex parte Smith*, 1 Mont. & A. 78, s.c. 3 D. & Ch. 304.

Two creditors persuaded a bankrupt to execute an assignment of his effects to them for the benefit of

his creditors, and then issue a fiat against him setting up this assignment as the act of bankruptcy. They then seize his furniture and stock, without taking any proceedings under the fiat. On application of a *bona fide* creditor, this fiat was ordered to be annulled, and a new one issued. *Ex parte Muchlow*, 3 D. & Ch. 25.

Where a creditor petitions to annul a fiat after the bankrupt has obtained his certificate, there must be a distinct allegation of fraud against the bankrupt in the petition; it is not sufficient to state fraud in the affidavit.

A creditor cannot petition to annul a fiat, who has lain by twelve months after the issuing of the fiat, without assigning some good reason for the delay. *Ex parte Wyatt*, 3 D. & Ch. 665.

The Court will not annul a fiat on the bankrupt's petition, though consented to by the petitioning creditor, on the ground that the bankrupt had made an arrangement for payment of the petitioning creditor's debt, without being satisfied that there were no other creditors of the bankrupt, or that, if there were any such, they consented to the application. *Ex parte Parr*, 1 D. 77.

(b) Practice upon.

[See ante (F), Official Assignee.]

Where a petition is presented to annul a fiat under the 133rd and 134th sections of the 6 Geo. 4, c. 16, it is necessary to serve the assignees. *Ex parte Race*, 4 Law J. (n.s.) Bankr. 66, a.c. 2 Mont. & A. 242.

The Court will not bind the bankrupt on his petition for a supersedeas, not to bring an action. *Ex parte Daly re Daly*, 3 Law J. (n.s.) Bankr. 76, a.c. 1 Mont. & A. 343; 3 D. & Ch. 728.

The Court are very unwilling to supersede on the petition of the assignees:—Petition ordered to stand over for a year. *Ex parte Wroe*, 2 Law J. (n.s.) Bankr. 69; and see 2 Law J. (n.s.) Bankr. 65.

If a person give a judgment, and then become a bankrupt, and there is a purchaser of lands under the commission, it will not be superseded on consent of creditors, till the purchaser is protected, by satisfaction being entered on the judgment. *Ex parte Latour re Latour*, 3 Law J. (n.s.) Bankr. 16, a.c. M. & B. 89.

Where a debt is alleged to be usurious, it will not support a petition to annul the fiat. *Ex parte Jarman re Theod*, 4 Law J. (n.s.) Bankr. 62, a.c. 2 Mont. & A. 119; 4 D. & Ch. 893.

Though the petitioning creditor has himself become bankrupt, the Court will not order the fiat issued by him to be superseded, and a new fiat to issue, before the expiration of the fourteen days. *Ex parte Smith*, 2 Law J. (n.s.) Bankr. 70.

A bankrupt must surrender before he can be heard upon his petition to supersede his commission; and if he have brought an action, in order to try its validity, the case must stand over until such action has been tried, unless he elect to abandon it. *Ex parte Drake re Drake*, 1 Law J. (n.s.) Bankr. 86, 114, a.c. Mont. 486; 2 D. & Ch. 91.

On a petition to supersede, the non-surrender of the bankrupt is a preliminary objection, and cannot be taken after the Court have given judgment. *Quære*—whether the office will pass an order to supersede, on the petition of a creditor,

when the bankrupt has not been served. *Ex parte Clarke re Withers*, 1 Law J. (n.s.) Bankr. 99, a.c. 1 D. & Ch. 548; M. & B. 266.

The Court will not enlarge the bankrupt's surrender, in order that he may get his fiat superseded without surrendering. *Ex parte Drake re Drake*, 2 Law J. (n.s.) Bankr. 1.

The Court will not supersede a commission without the previous surrender of the bankrupt. *In re Taylor*, 2 Law J. (n.s.) Bankr. 17.

A fiat will not be annulled on the application of a creditor, before the bankrupt has surrendered. [Cross, J. dissentiente.] *Ex parte Clarke re Withers*, 2 Law J. (n.s.) Bankr. 66, a.c. 2 D. & Ch. 194; M. & B. 379.

The Court will not allow a bankrupt to petition to supersede before he has surrendered, even where he is beyond the jurisdiction in a foreign land. *Ex parte Kirkman re Kirkman*, 3 Law J. (n.s.) Bankr. 81, a.c. 1 Mont. & A. 709; 3 D. & Ch. 460.

Where an action had been fairly tried, and there was a verdict against the commission, the Court superseded on the petition of the petitioning creditor, although the bankrupt was abroad, and had not surrendered. *Ex parte Foulger re Palmer*, 3 Law J. (n.s.) Bankr. 98, a.c. 1 Mont. & A. 467.

If there be a joint commission, and some of the bankrupts have surrendered, and others not, on a petition to supersede, with consent of all the creditors, the Court will only supersede as to those who have surrendered. *Anonymous*, 2 Law J. (n.s.) Bankr. 98, a.c. M. & B. 416.

If a joint fiat issue, under which some of the bankrupts have surrendered, and others not, it will be superseded, on consent, as to those who have surrendered:—*scilicet*, as to those who have not. *Ex parte Shepherd re Barker*, 2 Law J. (n.s.) Bankr. 78, a.c. M. & B. 416.

A petition to supersede a joint commission, on consent of creditors, cannot be entertained as to any one of the bankrupts, who has not surrendered. *Ex parte Knowles*, 3 D. & Ch. 191.

An order for a supersedeas having been made, an application to stay it, on the ground that an appeal was intended, dismissed, on the ground, that the order was not drawn up, nor the appeal presented. *Ex parte Harewood re Terry*, 2 Law J. (n.s.) Bankr. 84, a.c. 3 D. & Ch. 252.

On a supersedeas, with consent of all creditors, if one be out of the country, the amount of the debt must be deposited in the office, with interest, and a sum to cover the expenses of taking it out. *Ex parte Brecknell*, 3 Law J. (n.s.) Bankr. 29, a.c. 1 Mont. & A. 80.

Where all creditors consent to supersedeas except A, who is abroad, and B holds power of attorney from A, authorizing him to consent,—Held, B was entitled to consent; an attested copy of power ordered to be filed with the proceedings. *Ex parte Hamilton*, 2 D. & Ch. 189.

*Stumble*—The Court of Review will, if necessary, examine a bankrupt on his petition to supersede for want of an act of bankruptcy. *Ex parte Palmer re Palmer*, 1 Law J. (n.s.) Bankr. 75.

Supersedeas by consent. Petition by an agent, the bankrupt being abroad. *Anonymous*, 3 Law J. (n.s.) Bankr. 96.

The Court will not reverse a former order for a

supersedeas of some standing, upon evidence that was not before the Court at the time, unless upon the ground of fraud or surprise. *Ex parte Lavender re Lavender*, 4 Law J. (N.S.) Bankr. 17, s. c. 2 Mont. & A. 117; 4 D. & Ch. 497.

The Court will not dismiss a petition for a supersedeas, pending proceedings at law to try the validity of a commission. *Ex parte Lazarus re Charlton*, 1 Law J. (N.S.) Bankr. 75.

A supersedeas by consent of creditors must have the consent of all the assignees of a bankrupt creditor, although one may be beyond the jurisdiction. *Ex parte Leader re Leader*, 3 Law J. (N.S.) Bankr. 76, s. c. 1 Mont. & A. 244; 3 D. & Ch. 469.

It is not of course to supersede a second commission against an uncertificated bankrupt, on the application of the assignees under his first commission. *Ex parte Devas re Kenton*, 3 Law J. (N.S.) Bankr. 89, s. c. 1 Mont. & A. 420; 4 D. & Ch. 366.

The Court will not annul a separate fiat, to give effect to a subsequent joint one, on the ground that the only witness who could prove the act of bankruptcy is kept out of the way—nor will they for such cause, make an order for the inspection of the proceedings under the separate fiat, but will merely enlarge the time for opening the joint fiat. *Ex parte Burdekin*, 1 D. 57.

Receiving an allowance, is not acquiescing in the commission. *Ex parte Giles re Giles*, 1 Law J. (N.S.) Bankr. 91, s. c. 1 D. & Ch. 548; M. & B. 268.

Where a fiat has not been filed, the Court, on an *ex parte* application of another creditor, will not order it to be annulled, but merely that the creditor may issue a new fiat. *Ex parte Gerothwohl*, 4 D. & Ch. 48.

Section 17 of 1 & 2 Will. 4, c. 56, does not prevent a bankrupt from applying to supersede, though two months have elapsed from the date of the fiat. *Ex parte Palmer*, Mont. 497, s. c. 1 D. & Ch. 341.

If the sole assignee be a creditor, and sign the consent to a supersedeas, he need not be served with the petition. *Ex parte Ramsay*, 1 Mont. & A. 708.

The Court will supersede where all the creditors consent, and the bankrupt has paid 20s. in the pound, though his examination has been adjourned *sine die*. *Ex parte Gudge*, 1 Mont. & A. 341, s. c. 1 D. & Ch. 358.

In cases of supersedeas, the great seal has a substantive power, independent of that on appeal.

If, on a petition to supersede, the Lord Chancellor order a trial, which is in favour of the commission, the Court of Review cannot supersede on a petition for costs, and a cross-petition for a new trial, brought on by way of further directions. *Ex parte Noye*, 1 Mont. & A. 220, s. c. 3 D. & Ch. 263.

Consent of official assignee to supersedeas, upon account of creditors, not necessary. *Ex parte Barker re Parker*, 3 Law J. (N.S.) Bankr. 75, 96, s. c. M. & B. 412.

Affidavit of petitioning creditor may be read in support of petition to supersede. *Ex parte Jennings*, 1 D. & Ch. 400.

A petition to supersede, with consent of creditors, cannot be entertained, without the usual certificate of the commissioners, nor unless it is set aside in the proper fit hearing. *Ex parte Croker*, 3 D. & Ch. 44.

On a petition for a supersedeas, with consent of creditors, when one of the creditors could not be found, an order was made for the supersedeas, the petitioner undertaking to pay into court the amount of the debt of the outstanding creditor.

*Semble*—that a power of attorney to transact any business in the courts of law, authorizes the attorney to apply for a supersedeas. *Ex parte Crowther*, 4 D. & Ch. 31.

If a creditor petition to supersede, or that the assignees be removed, and the supersedeas is refused, but that the assignees are removed, upon the petitioner's counsel undertaking that the petitioner should prove—the creditor cannot appeal as to the supersedeas. *Ex parte Green*, M. & B. 90.

Order for supersedeas under the composition contract. See *Ex parte Osborne*, 1 D. & Ch. 37.

A bankrupt cannot petition to supersede a commission, on the ground of the insufficiency of the petitioning creditor's debt, when he has lain by two years without adopting any proceeding for that purpose. *Ex parte Hooper*, 1 D. & Ch. 117.

Supersedeas, with consent of nine-tenths, allowed, though the commissioner's certificate did not state what proportion the creditors assenting bore to those who proved. *Ex parte Hinton*, 2 Mont. & A. 361, s. c. 4 D. & Ch. 351.

On a petition by assignees to supersede a commission, the bankrupt's affidavit is admissible to shew that the commission was fraudulently concocted. *Ex parte Belwood*, 2 D. & Ch. 37.

On a petition by creditors to supersede, on the ground of fraudulent collusion between the petitioning creditor and the bankrupt, the bankrupt's affidavit detailing the particulars of the fraud is admissible in evidence. *Ex parte Armsby*, 3 D. & Ch. 10.

A single creditor, who petitions to supersede a commission on the ground of fraud and collusion, must also pray that a new fiat may issue; or, without petition to supersede, he may pray for the removal of the assignees, and for others to be chosen in their room. If his petition is merely to supersede, it will be dismissed with costs. *Ex parte Sham*, 1 D. & Ch. 260.

Before a motion is made that the petition of the bankrupt for a supersedeas shall be dismissed, on the ground of his being out of the jurisdiction of the Court, the respondent should serve the bankrupt's agent with notice of the motion, having previously obtained an order that service on the agent shall be good service. *Ex parte Drake*, 3 D. & Ch. 284.

Where the bankrupt knows he has committed an act of bankruptcy, his petition to supersede will be dismissed with costs. *Ex parte Thompson*, 2 Mont. & A. 41, s. c. 4 D. & Ch. 534.

On a petition for supersedeas with consent of creditors, where one of the creditors had died intestate:—Held, that the bankrupt should either have taken out a limited administration, for the purpose of assenting to the supersedeas, or (which would have been the better plan) apply to the Court to expunge the proof. *Ex parte Hall*, 3 D. & Ch. 449.

Service of petition to supersede by consent. *In re Eastcourt*, 1 D. & Ch. 458.

After a lapse of twenty years, and the death of the petitioning creditor and the bankrupt, the Court will not entertain a petition for a supersedeas, on



the ground of fraud. *Ex parte Granger*, 2 D. & Ch. 459.

Where a creditor gave a power of attorney in general terms, but without any express power to consent to a supersedeas, and the signature of the creditor himself was easily attainable:—Held, that his own signature ought to be procured. *In re Sampson*, 3 D. & Ch. 198.

Where a bankrupt is ready to pay all his creditors in full, and the only creditor whose consent is wanting to the supersedeas is abroad, the bankrupt may apply to pay the amount of that creditor's debt into court, in order to prevent any delay in obtaining the supersedeas. *Ex parte Hamilton*, 2 D. & Ch. 36.

Petition to supersede, on the ground of there being no petitioning creditor's debt; the deposition of the debt referring to an account which purported to be annexed, but which was not to be found among the proceedings, the respondents were ordered to pay the costs of the day, the Court having for this cause adjourned the hearing of the petition. *Ex parte Clarke*, 2 D. & Ch. 86.

The Court will not supersede a commission thirty years old, unless all creditors consent. *Ex parte Lupton*, 2 D. & Ch. 136.

Procedendo and rehearing, after order to annul the fiat. *In re Lavender*, 4 Law J. (N.S.) Bankr. 44, s.c. 2 Mont. & A. 103; 4 D. & Ch. 496.

The evidence of a creditor is not admissible to establish a trading, upon a *visd voce* examination, on a petition to annul a fiat for want of the requisites. *Ex parte Lavender re Lavender*, 3 Law J. (N.S.) Bankr. 120, s.c. 1 Mont. & A. 699; 4 D. & Ch. 486.

The commission and proceedings may be enrolled after supersedeas, in order to become evidence on an indictment for perjury. *Ex parte Thomas*, 2 Law J. (N.S.) Bankr. 70, s.c. 3 D. & Ch. 292.

Where there are not the requisites to support a fiat, the Chancellor will recommend to the commissioners to hear counsel against the adjudication,—and, if the bankruptcy be found, will stay the insertion of the advertisement in the *Gazette*, and supersede. *Ex parte Nokes*, 1 Mont. & A. 461.

A petitioner, to annul a fiat, will not be allowed copies of the depositions, before there is an office copy of the affidavit in support of the petition. *Ex parte Matthew*, 2 Mont. & A. 78.

What affidavit necessary of residence of creditors to annul town fiat and issue a country one. *Ex parte Leonard*, 2 Law J. (N.S.) Bankr. 17, s.c. 2 D. & Ch. 182.

When the commissioner appoints two meetings, under 1 & 2 Will. 4, c. 56, s. 20, the fiat cannot be annulled with consent of the creditors, under 6 Geo. 4, c. 16, ss. 113, 134, till after the second meeting. *Eu parte Boardman*, 2 Mont. & A. 209.

Special order made for the service of a petition to annul a fiat, where the party is not to be met with. *Ex parte Sell*, 2 D. & Ch. 333.

Where petition to supersede was presented to the L. C. before the 11th of January 1832, in order to save expense of new petition, service of motion on assignees that prayer of petition may be granted by Court of Review sufficient.

Where the time for opening a fiat expires by the voluntary act of the petitioning creditor, and it ap-

pears that it was issued under suspicious circumstances, namely, for effecting a compromise with the creditors, and not with a *bona fide* intention of working it; and a second fiat is issued by another creditor under Lord Loughborough's General Order, the Court will not supersede the second fiat, merely because it was issued by a creditor, who was a party to the intended compromise under the first, unless it is clearly for the advantage of the general creditors that the first should stand, and the second be superseded. *Ex parte Anger*, 2 D. & Ch. 67.

#### (U) SUITS IN EQUITY.

The Court will not lend its sanction to a compromise of a suit by the assignees, though the Master reports it would be for the benefit of all parties. *Ex parte Williams*, 1 Mont. & A. 689.

A, as an assignee of B, a bankrupt, gave an undertaking to C, who was the mortgagee of one farm, and was under a contract to purchase another farm, both the property of the bankrupt, and who had a distress upon the mortgaged premises, that, if the distress were withdrawn, he would pay to C the arrears then due, in respect of the mortgage, out of the effects on the premises. C withdrew the distress accordingly; and afterwards the bankruptcy was annulled before A had obtained possession of any part of the bankrupt's effects; whereupon C brought an action on the undertaking, and recovered judgment against A personally:—Held, on a bill filed by A against C, to which B was no party, that A could have no relief in equity against the judgment at law, and that he was not entitled, as against C, to claim re-payment of the sum thereby recovered out of the price which C had contracted to pay for the other farm. *Pell v. Stephens*, 2 M. & K. 334.

#### (W) ACTIONS AT LAW.

Defendant, a lessee for a term, underlet to N, and put him in possession under an agreement to grant a lease when N should have paid 1,200*l.*, which he was to do by instalments in three years, in the meantime paying rent at certain days to defendant, subject to distress for non-payment. Defendant received rent from N, but omitted to pay the superior landlord, who distrained on N for arrears due from the defendant. N having become bankrupt:—Held, that the damage incurred by this distress was a cause of action on which his assignees might sue. *Hancock v. Caffyn*, 1 Law J. (N.S.) C.P. 104, s.c. 8 Bing. 358; 1 Mo. & Sc. 521.

A, having hired a carriage of B, let it to C; C injured it by improper use while in his possession, and on its return to A, he sent it to B damaged, who repaired it with the assent of A; A became bankrupt, and B proved the amount due for repairs under his commission:—Held, that A's assignees had a right of action against the defendant, for breach of his implied contract to use the phaeton properly: but A's estate not having paid, nor being able to pay, any dividend—that they could recover nominal damages only for the breach of contract, the estate of the bankrupt not having been damaged. *Potter v. Forley*, 1 Law J. (N.S.) C.P. 170, s.c. 9 Bing. 93; 2 Mo. & Sc. 141.

To an action of covenant on a demise by a trustee, it is not a good defence that the *cestui que trust* became bankrupt, and that the defendants kept their covenants with his assignees. *Britten v. Britten*, 3 Law J. (N.S.) Exch. 181, a. c. 4 Tyr. 473.

In an action by an alleged bankrupt against his assignee, to contest the bankruptcy, it is not enough for the defendant to prove a trading, a petitioning creditor's debt, and an act of bankruptcy; he must also prove an assignment to some person or other.

By the 6 Geo. 4, c. 16, s. 96, it is enacted, that "no assignment of the personal estate of the bankrupt shall be received as evidence in any court of law or equity, unless the same shall have been first entered of record":—Held, that this only applies to cases where the assignment has been or can be entered of record; and, therefore, that where an assignment not entered of record had been lost, secondary evidence was admissible of its contents to prove the assignment. *Giles v. Smith*, 4 Law J. (N.S.) Exch. 17, a. c. 1 C. M. & R. 462; 5 Tyr. 15.

Where, on an application by a creditor to a trader, on the eve of bankruptcy, for payment, he offered goods if a customer could be procured for them, and the creditor procured the defendant, who bought the goods after an act of bankruptcy, and debited himself with the amount in an account between himself and the creditor:—Held, in an action of assumpsit by the assignees for the price of the goods, that the jury should have found whether this was a part of the contract of sale, or merely a direction as to the application of the payment, countermandable by the seller at any time; because, if it were a part of the contract of sale, the assignees, by bringing this action, had affirmed the contract, and were bound by the whole; if it were not, then the defendant could only defend himself by a *bona fide* payment, within the 6 Geo. 4, c. 16, s. 82, which this seemed not to be. The Court granted a new trial, to have this fact determined. *Bradbury v. Anderton*, 4 Law J. (N.S.) Exch. 21, a. c. 1 C. M. & R. 486; 5 Tyr. 152.

F, a merchant at Liverpool, used to consign goods to his agent at Bahia, in South America, for sale, and to draw bills upon the credit of, and against such consignments, in proportion to their amount, to be paid by the agent out of the proceeds. Some bills so drawn, and negotiated by the indorsements of a house in London with which F corresponded, were refused acceptance by the agent. The London house thereupon requested F to write to his agent at Bahia, with orders, "that in case he did not pay F's drafts, he should immediately hand over such property as he might have of F's, of an equivalent value to the bills not paid by him, to the agent of the London house at Bahia." F replied, that he would write to his agent, agreeably to these injunctions, directing him to hand over to the agent of the London house, "property of F in his hands, to cover the amount of bills that eventually might not be paid." Afterwards, and before the letter from F to his agent reached Bahia, F became bankrupt. F's agent subsequently handed over to the London house, goods consigned to him as above mentioned, to an amount less than that of the bills unpaid:—Held, that there was no legal or equitable assignment of those goods to the London house before the bankruptcy, and that on that event the property in them vested in the assignees.

In an action of trover brought by the assignees for the goods, in which the above facts were proved, the defendants also offered in evidence the letter written by F to his agent at Bahia, (after promising the London house to write, as above stated,) in which he ordered that party to hand over all the property which he held on F's account, to the agents of the London house.

*Quære*—Whether the letter was admissible; but held, that, if it were, the decision ought still to be the same. *Burn v. Carvalho*, 1 Ad. & E. 883, a. c. 4 N. & M. 889.

The defendants, bankers, discounted a bill for a person engaged in trade, the payment of which was secured by the written guarantee of a third person. The trader, a few days before the bill was due, being on the eve of bankruptcy, gave the party who was security a cheque upon the defendants for the amount of the bills, and they, having money of the bankrupt's in their hands to that amount, gave up the bill: immediately afterwards the trader became bankrupt. In an action by his assignees against the defendants to recover the amount, on the ground of the payment being a fraudulent preference,—Held, that such action was not maintainable, as the preference was not to the defendants, but to the third person, by whom the security was given, and against whom there was a remedy over. *Abbot v. Pomfret*, 4 Law J. (N.S.) C.P. 139, a. c. 1 Bing. N.C. 462; 1 Sc. 470.

The assignee of a bankrupt, by bringing "money had and received" against the sheriff, who had, under a *f. fa.*, seized the goods of the bankruptcy, and had, upon an indemnity, sold them, and paid over the proceeds to the execution creditor, waives only the damages for the tort, and is entitled to recover the proceeds of the sale. *Young v. Marshall*, 1 Law J. (N.S.) C.P. 18, a. c. 8 Bing. 43; 1 Mo. & Sc. 110.

#### (X) SUBSTITUTION OF TRUSTEE.

Substitution of a new trustee where the former one becomes bankrupt. *Ex parte Page*, 1 D. & Ch. 321.

Where the affidavit is sufficiently strong as to the respectability of the person sought to be appointed as a new trustee under the 79th section of the 6 Geo. 4, c. 16, the Court will appoint without a reference to the Master. *Ex parte Walton re Tomlinson*, 4 Law J. (N.S.) Bankr. 57, a. c. 2 Mont. & A. 242.

Where one of the parties is absent, a trustee cannot be appointed without a reference to the Master. *Ex parte Wisp re Sands*, 4 Law J. (N.S.) Bankr. 57, a. c. 2 Mont. & A. 214.

#### (Y) PLEADING.

Where to a declaration by assignees of a bankrupt for money had and received to their use as assignees, and also on an account stated with them as assignees, the defendant pleaded generally a set-off of a debt due from the bankrupt to him:—Held, that the plea was bad. *Groom v. Mooley*, 4 Law J. (N.S.) C.P. 274, a. c. 2 Bing. N.C. 188; 2 Sc. 171.

Assumpsit by plaintiffs as assignees of a bankrupt. Breach, non-payment to plaintiffs, assignees as aforesaid, omitting the "as":—Held, good, as

special demurrer. *Cobbett v. Cochrane*, 1 Law J. (N.S.) C.P. 6, s. c. 8 Bing. 16; 1 Mo. & Sc. 55.

In an action against the defendant by the assignees of a bankrupt for not accepting a certain bill of exchange for the payment of a certain sum, being the balance then due from the defendant to the bankrupt, and a plea of set-off:—Held, on demurrer, that the transaction should be considered as a mutual credit, and consequently that the plea of set-off was good under the 50th section of 6 Geo. 4, c. 16, although the action was in form unliquidated damages; no special damage having been laid; and the amount against which the set-off was claimed, being for a balance then due, and capable of being ascertained by computation.

Where the defendant pleads separate pleas of set-off to two counts of the declaration, and the plaintiff demurs to the right of set-off in the one count, and traverses the set-off in the other, the latter plea (that traversed) may be considered as not in existence; and the former (that demurred to), as if it existed alone. *Gibson v. Bell*, 4 Law J. (N.S.) C.P. 242, s. c. 1 Bing. N.C. 748; 1 Sc. 712.

#### (Z) EVIDENCE.

##### (a) In general.

In a suit by the assignees of an uncertificated bankrupt, for the recovery of property fraudulently delivered by him to the defendants, the plaintiffs read the examination of one of the defendants taken before the commissioners on the first day, but declined to read the examination taken on the second day:—Ruled, that the whole must be read. A plaintiff cannot read the cross-examination of one of the defendant's witnesses, if the defendant declines to read the examination in chief. The consent of the creditors of a bankrupt to the institution of a suit by his assignees, though filed amongst the proceedings in the bankruptcy, must be proved. The evidence of a bankrupt, which, in one respect, is in his own favour, but in another respect, against himself, is receivable. *Smith v. Biggs*, 5 Sim. 391.

If in trover by the assignee of a bankrupt the plaintiff's title as assignee be put in issue—the fiat of bankruptcy enrolled, the certificate of the appointment of the plaintiff as assignee enrolled, and the appointment itself (also enrolled), are sufficient proof that the plaintiff is assignee.

A written statement, made by the bankrupt before his bankruptcy, of his debts and credits, is evidence as shewing that he knew of his own insolvency. *Scott v. Thomas*, 6 C. & P. 611. [Parke]

##### (b) Notice to dispute.

In an action by the assignees of a bankrupt, the defendant if he means to dispute the petitioning creditor's debt, act of bankruptcy, &c. must give the notice required by the 90th section of the Bankrupt Act, 6 Geo. 4, c. 16; and a plea "that F was not duly declared a bankrupt," does not operate as such notice. *Moon v. Raphael*, 7 C. & P. 115. [Gaselee]

##### (c) Admissibility of Proceedings under the Fiat.

In case of the death of a witness deposing to the petitioning creditor's debt, trading, or act of bankruptcy, the assignees, or any party claiming under them, or claiming or defending in such cases as the bankrupt could have claimed or defended (except in

any proceeding pending at the time of the act), may read (in all civil courts) the depositions of such deceased witness, if duly entered of record. 2 & 3 Will. 4, c. 114, s. 7; 10 Law J. Stat. 282.

Fiat and other proceedings must be entered of record, and if they purport to be sealed with the seal of the court, they are evidence; ss. 8, 9, ib.

By the 92nd section of 6 Geo. 4, c. 16, it is enacted—"That the depositions taken before the commissioners shall be conclusive evidence of the matters therein respectively contained, in all actions at law or suits in equity, brought by the assignees for any debt or demand for which the bankrupt might have maintained any action or suit":—Held, that the true mode of construing the last words of the section was not by reference to the cause of action as stated on the record, but by reference to the facts,—whether, upon that state of facts, had not the bankruptcy intervened, the bankrupt could have maintained an action.

Where, therefore, in an action of trover brought by the assignees, the conversion was stated to be subsequent to the bankruptcy, but, upon the state of facts, it was clear that the bankrupt, had it not been for his bankruptcy, might have maintained trover:—Held, that the depositions (notice having been given to the assignees to dispute the act of bankruptcy and the petitioning creditor's debt) were conclusive evidence. *Kitchener v. Power*, 4 Law J. (N.S.) K.B. 190, s. c. 4 N. & M. 710; 3 Ad. & E. 282.

In an action by a bankrupt against his assignees, to try the validity of the commission, the depositions of deceased witnesses taken before the commissioners on the opening of the commission, and enrolled by the assignees according to 6 Geo. 4, c. 16, s. 96, are not evidence against the assignees. *Chambers v. Bernasconi*, 3 Law J. (N.S.) Exch. 378, s. c. 2 C. M. & R. 347; 4 Tyr. 58.

In a case within the 92nd section of the Bankrupt Act, 6 Geo. 4, c. 16, where the assignees went into evidence of the trading, in consequence of a notice to dispute, without adverting to the section or relying upon the depositions, and having failed to establish trading, were nonsuited, the Court refused to set the nonsuit aside. *Johnson v. Piper*, 2 N. & M. 672.

Depositions taken before commissioners of bankrupt, are conclusive evidence of the bankruptcy, under 6 Geo. 4, c. 16, s. 92, though the conversion for which the assignees proceed shall have taken place after the act of bankruptcy: for the bankrupt might have sustained an action up to the time of issuing a commission, and if after that event the assignees should recover, payments to them by the defendant would be protected by sec. 94, in case the commission should be afterwards superseded. *Swuerccroft v. Mahony*, 2 Tyr. 285.

The depositions are conclusive evidence under the 92nd section of 6 Geo. 4, c. 16, in a case where a bankrupt might have sued, if no bankruptcy had ensued, though the conversion which gave the right of action took place after the act of bankruptcy. *Fox v. Mahony*, 2 C. & J. 325, s. c. 2 Tyr. 285; 1 Law J. Exch. (N.S.) 106.

Where the bankruptcy of a party is stated in an allegation, in an indictment for a conspiracy, the assignment cannot be received as evidence in sup-

port of such allegation, unless it be proved by the subscribing witness. *Re v. Pope*, 5 C. & P. 208. [Tenterden]

(d) *Competency of Witnesses.*

The drawer of a bill accepted by the bankrupt, but which he had indorsed over, and which was not yet proved against the estate, swore to a deposition in support of the fiat, stating himself therein not to be a creditor:—Held, in the face of that statement, that his deposition could not be rejected on the ground of his being a creditor. But being subsequently examined *voir dire*, and admitting the facts:—Held, that as he might be called to pay the bill, and would have the option to prove against the estate, he was an interested party, and therefore not examinable. *Ex parte Lavender*, 4 D. & Ch. 487.

A trader compounded with his larger creditors, but paid his smaller creditors in full, and afterwards became bankrupt, but did not pay 15s. in the pound under his fiat:—Held, that he was not rendered an incompetent witness in an action by his assignees, by the 6 Geo. 4, c. 16, s. 127. *Roberts v. Harris*, 4 Law J. (n.s.) Exch. 325, s. c. 2 C. M. & R. 292.

(AA) COURT OF BANKRUPTCY.

Further powers given to Judges of Court of Bankruptcy, and regulations as to time of sitting of Judges and Commissioners. See 3 & 4 Will. 4, c. 47; 11 Law J. Stat. 106.

Provisions for removal of doubts relating to the jurisdiction of the Court of Review and Subdivision Courts. 5 & 6 Will. 4, c. 29; 13 Law J. Stat. 56.

Provisions for discharge of expenses of Court of Bankruptcy. See 5 & 6 Will. 4, c. 29; 13 Law J. Stat. 56.

His Majesty may, by warrant, authorize one or more Judges in bankruptcy to exercise the same powers as were before given to any three Judges; and may direct at what times the Court of Review, the Judges, and the Commissioners, shall hold their sittings. 3 & 4 Will. 4, c. 47, s. 7; 11 Law J. Stat. 106.

The Judges (except the Chief) may be directed by his Majesty to act in the Insolvent Debtors Court, with the same powers as the Commissioners of the Insolvent Debtors Court; and the Court of Review may order the attendance of the registrars upon them. 3 & 4 Will. 4, c. 47, ss. 1, 2, 6; 11 Law J. Stat. 106.

Records of former commissioners to be removed into and kept by the Court of Bankruptcy. 2 & 3 Will. 4, c. 114, s. 1; 10 Law J. Stat. 281. Commissions, fiats, and other matters, may be entered on record, upon the application of any interested party; *ib.*, ss. 4, 5, 6.

The Court is in future to consist of a Chief and two Judges. 5 & 6 Will. 4, c. 29, s. 21; 13 Law J. Stat. 56.

The Subdivision Courts may be formed by calling in a commissioner of the other subdivision court, in case of the non-attendance of a commissioner of the first. 5 & 6 Will. 4, c. 29, s. 23; 13 Law J. Stat. 56.

These Courts, and the Court of Review, may administer oaths on affidavit; *ib.*, s. 24; and are to be deemed to have been courts of record from the passing of 1 & 2 Will. 4, c. 56. See *ib.* s. 25.

[See 5 & 6 Will. 4, c. 29, ss. 1, 2, 20, 26; 13 Law J. Stat. 56, for provisions for the expenses of the Court of Bankruptcy.]

(a) *Jurisdiction, in general.*

[See *Ex parte Lowe re Aaron*, 1 Law J. (n.s.) Bankr. 9; *Ex parte Benson*, *Ex parte Lancaster Canal Company*, *Ex parte Hardy*, and *Ex parte Elsee*, 1 Law J. (n.s.) Bankr. 37.]

The Court of Review has no jurisdiction to hear a petition of appeal to the Lord Chancellor from an order of the Vice Chancellor; nor a petition for the rehearing of a petition of appeal already heard by the Lord Chancellor, nor a cross petition of appeal to the Lord Chancellor, complaining of a particular part of the order of the Vice Chancellor. But it has jurisdiction to hear a petition to the Lord Chancellor for confirming the Master's report, where the Lord Chancellor had made an order on a previous petition referring the matters therein to the Master; on a supplemental petition of appeal to the Lord Chancellor, from an order of the Vice-Chancellor, where such petition is upon new grounds, which were not brought forward by the original petition, or by the petition of appeal; or a petition to the Lord Chancellor, praying only consequential directions on one part of an order made by the Vice Chancellor, against which no petition of appeal had been presented. *Ex parte Benson*, *Lancaster Canal Company*, *Langston, Elsee*, 1 Law J. (n.s.) Bankr. 37, 38; s. c. 1 D. & Ch. 524; M. & B. 142.

The Lord Chancellor has no jurisdiction to hear an original petition in bankruptcy, since the 1 & 2 Will. 4, c. 56. *Ex parte Lowe*, 1 D. & Ch. 30.

Petition presented to the Lord Chancellor before 1 & 2 Will. 4, c. 56, must be transferred by the Lord Chancellor to the Court of Review, before that Court can hear it. *Ex parte Stokes*, 4 D. & Ch. 578.

The Court of Review has jurisdiction to hear a petition of appeal in bankruptcy from the Vice-Chancellor's decision to the Lord Chancellor, provided the party prefers a fresh petition, addressed to this Court, for the purpose of having such petition heard. *Ex parte Lowe*, 1 D. & Ch. 79, s. c. 1 Law J. (n.s.) Bankr. 9; but see *Ex parte Benson*.

*Quere*—Can the Court of Review entertain a petition of appeal from the rejection by the commissioners of a proof of debt on a question of fact? An objection that the Court of Review had no jurisdiction, cannot be taken on appeal, if not taken below. *Ex parte Turner*, 1 Mont. & A. 357.

*Quere*—whether the Court of Review can commit for an insufficient examination. *Ex parte Feaks*, M. & B. 215, s. c. 2 D. & Ch. 226.

The Court of Review has jurisdiction to entertain a petition from a bankrupt under commitment for not answering satisfactorily, in the absence of the warrant, and without a writ of *habeas corpus*.

*Quere*—whether the Court has the power to issue a writ of *habeas corpus*. *Ex parte Jones re Jones*, 4 Law J. (n.s.) Bankr. 9, s. c. 2 M. & A. 41; 4 D. & Ch. 536.

The Court of Review has power, under the 36th section of the 1 & 2 Will. 4, c. 56, to remove an official assignee without appointing another.

*Semble*—In commissions issued before that act came into operation, the appointment of an official

assignee is at the discretion of the commissioner. *Ex parte Ellis re Houghton*, 1 Law J. (N.S.) Bankr. 19, s. c. 1 D. & Ch. 209; M. & B. 116.

The Court has not jurisdiction to try a right to property purchased by a stranger to the commission, although that property was the bankrupt's, and sold by his assignee. *Ex parte Holder re Holder*, 3 Law J. (N.S.) Bankr. 78, s. c. 1 Mont. & A. 518.

*Semble*—this Court has no jurisdiction to order the commissioners to certify the consent of the creditors to a supersedeas, especially when he objects, because fees payable under 1 & 2 Will. 4, c. 56, ss. 45, 46, are not paid. *Ex parte Hawker*, 4 D. & Ch. 569.

After a special case has once been certified by the Chief Judge, the Court has no jurisdiction to disallow it. *Ex parte Hawley*, 1 D. & Ch. 656.

A, before his bankruptcy, agrees to take a lease of a cotton mill, and enters into possession. After his bankruptcy one of his assignees takes possession, and agrees to accept the lease, a draft of which was sent to the assignees, containing covenants personally binding on them during the whole of the term, and one, in particular, to prevent them from assigning without the licence of the lessor:—Held, that the assignees were not bound to accept of such a lease; and even if they were, that the Court of Review had no jurisdiction to compel a specific performance of the agreement. *Ex parte Lucas*, 3 D. & Ch. 144.

The Court of Review has no jurisdiction to dispense with the signature of the petitioner to a petition of appeal, under the 1 & 2 Will. 4, c. 56, s. 32; the Lord Chancellor being the proper authority to apply to for that purpose.

*Semble*—that the period of a month, limited by the statute for presenting the petition of appeal, cannot be extended. *Ex parte Robinson*, 2 D. & Ch. 583.

The Court will not order a claim to be struck out, or a proof expunged, because the creditor has property belonging to the bankrupt's estate in his possession; but it is a ground for restraining the payment of dividends; and the Court will, when the parties have been guilty of considerable delay in perfecting their proof, order it to be done within a certain time, especially if the property alleged to have been given as a fraudulent preference be not within the jurisdiction of the Court; at the same time, the Court cannot interfere to order the property to be given up. *Ex parte Dobson re Thompson*, 3 Law J. (N.S.) Bankr. 117, s. c. 1 Mont. & A. 666; 4 D. & Ch. 69.

The Court of Review can hear causes in private, if the nature of the case require secrecy. *Ex parte Chambers re Chambers*, 1 Law J. (N.S.) Bankr. 96, s. c. 2 D. & Ch. 372, 395.

*Quære*—whether the Court of Review, on an adjournment to them of the bankrupt's examination, have power to commit the bankrupt for refusing to answer a criminatory question.—Also, as to the influence which the examination of third persons should have on the committal of a bankrupt for not answering satisfactorily.

*Quære*—Can a party committed by the Court of Review have a *habeas corpus*? [Per Cross, J.] *In re Feaks*, 1 Law J. (N.S.) Bankr. 46.

The Court cannot order a sum to be paid to an

accountant, for his services in posting the bankrupt's books, between the time of act of bankruptcy and issuing the fiat. *Ex parte Burt re May*, 1 Law J. (N.S.) Bankr. 94, s. c. 1 D. & Ch. 543.

Where a petition prayed that the Court would reverse an order of the Lord Chancellor, and it was objected to for irregularity, on the ground that the Court of Review has no power to reverse such order,—the objection was overruled; for though the Court cannot rescind such order, it can intimate its opinion to the Lord Chancellor, who would act accordingly. *Ex parte Anger*, 2 D. & Ch. 67.

*Quære*—whether the Court have jurisdiction over the executor of an assignee. *Ex parte Turville*, 1 Mont. & A. 686, s. c. 3 D. & Ch. 346.

A creditor, resting upon a common law lien, without proving under the commission, previously to the Bankruptcy Court Act, appeared as a respondent, in opposition to a petition before the Vice-Chancellor, who ordered that the matter should be referred to the commissioners, to ascertain the rights of the several parties, and that the creditor should have his costs. The creditor attended the inquiry before the commissioners, but did not draw up the order of the Vice Chancellor. Held, that this was not enough to bring him within the jurisdiction of the Court.

Held, also, that filing an affidavit is not a waiver of any objection to the jurisdiction. *Ex parte Reid*, 1 D. & Ch. 250.

A, in France, employs B in England to sell wines on commission, as well as to purchase other wines on A's account in London, for which purpose he furnishes him with letters of credit. The wines were generally bought and sold by B in his own name. Part of the wines consigned by A were in the dock-warehouses standing in B's name, and part formed one indiscriminate stock in B's cellar. A closes the connexion with B, and requires him to deliver up all the wines, but B neglects to comply with this requisition, and shortly afterwards becomes bankrupt:—Held, 1. That the Court had jurisdiction to order the assignees of B to deliver up these wines to A. 2. That it was not a case of reputed ownership. 3. That A might sue the purchasers of the wines in the name of B or his assignees. But, 4. That no order could be made for the payment to A of any monies, the produce of the wines, if mixed with the other monies of B at the time of his bankruptcy. *Ex parte Moldant*, 3 D. & Ch. 351.

The Subdivision Court cannot commit on an adjourned examination, after merely asking "do you abide by your former answer?" The party must be re-examined. *Ex parte Bardwell*, 1 Mont. & A. 193.

It is not competent for the Subdivision Court to commit a person who is brought before them, for not answering to the satisfaction of the commissioners, under the 1 & 2 Will. 4, c. 56, s. 7, unless they take the examination themselves:—asking the party if he abided by his former answers, will not be sufficient.

A recital in the warrant, "that the party was suspected of obtaining part of the bankrupt's property, by means of colourable and fictitious sales, &c.":—Held, not objectionable.

The warrant must set forth such specification of questions and answers, as shall suffice to shew to

the Court, before which the matter is brought, what were the grounds of the disapprobation felt by the commissioners; but they are not bound to point out any particular answers, as those which failed to satisfy them.

*Semble*—It is not too late to object to a question on the score of its illegality, when brought up upon *habeas*, although the party did not demur at the time. (See *contra*, *Ex parte Vogel*, 2 B. & Ald. 219.)

Costs given to the prisoner out of the estate. *In re Venables ex parte Bardwell*, 3 Law J. (N.S.) Bankr. 30.

The expunging of the proof of a debt by the Subdivision Court is not within the meaning of the 30th section of the 1 & 2 Will. 4, c. 56, so as to preclude an appeal on a matter of evidence.—*Semble*, the Court will not consider itself bound, in all cases, to hear a case on the affidavits, before it goes to a *voir dire* examination. *Ex parte Baldwin re Smith*, 3 Law J. (N.S.) Bankr. 80, s.c. 1 Mont. & A. 615.

#### (b) Injunction.

The Court will grant an order to stay an action at common law, brought by the bankrupt, where the proceedings are vexatious. *Ex parte Davy re Chambers*, 3 Law J. (N.S.) Bankr. 57, s.c. 1 Mont. & A. 283; 4 D. & Ch. 322.

Where an action is brought by the assignees for the recovery of a trifling sum, the Court of Review will restrain them from proceeding by an injunction. *Ex parte Booth re Kew*, 4 Law J. (N.S.) Bankr. 43, s.c. 2 Mont. & A. 93; 4 D. & Ch. 211.

Perpetual injunction granted, after long acquiescence on the part of the bankrupt, to restrain bankrupt from continuing an action, and from any other proceedings to invalidate the commission. *Ex parte White re Brittain*, 4 Law J. (N.S.) Bankr. 50, s.c. 2 Mont. & A. 104; 4 D. & Ch. 279.

#### (c) Specific Performance.

When a sale takes place under an order of the Court, the Court has jurisdiction to decree specific performance. *Ex parte Sidebotham re Barrington*, 3 Law J. (N.S.) Bankr. 122, s.c. 1 Mont. & A. 655; 3 D. & Ch. 818.

The Court of Review has jurisdiction to decree specific performance of an agreement to purchase mortgaged premises, sold before the commissioners under Lord Loughborough's general order. *Ex parte Barrington*, 2 Mont. & A. 245, s.c. 4 D. & Ch. 461.

Where a party is consunt of the fact, that property is sold under the order of the commissioners, the Court will decree specific performance, although the printed particulars of sale do not state it.—*Semble*, the order of sale by the commissioners is the order of the Court. *Ex parte Sidebotham re Barrington*, 4 Law J. (N.S.) Bankr. 27, s.c. 2 Mont. & A. 146.

If the intended lessor and lessee both become bankrupt, and the assignees agree to take a lease, it seems the Court has no jurisdiction to enforce a specific performance between the parties. *Ex parte Lucas re Oldham*, 3 Law J. (N.S.) Bankr. 66, s.c. 1 Mont. & A. 93; 3 D. & Ch. 144.

#### (d) Practice in general.

(*See* *Ex parte Timbrell*, Mont. 606; *Ex parte Dadds*, ib.; *Ex parte Ricard*, ib. 607; *Hall*, ib. 608;

*Wood*, 509; *Graybourne*, ib.; *Walker*, 510; *North*, 511; *Matthews*, 512; *Moody*, ib.; *Appling*, ib.; *Whitfield*, 513; *Smith*, 514; *Williams*, ib.; *Rolfe*, 515; *Anon.*, 517; *White*, ib.; *Griffith*, ib.; *Green*, 518; *Edden*, ib.; *Lawley*, 519; *Meath*, 520; *Donaldson*, ib.)

[And see *Ex parte Phipson*, 1 Law J. (N.S.) Bankr. 16; *Ex parte Wright*, 17; and *In re Wieden*, ib., as to extent of time.]

*Quere*—First, can the Court of Review order the substitution of one debt for another, pending an action, without notice to the plaintiff in the action? Second, is the order of the Court of Review proved, by the initials of the registrar, and the words "By the Court;" not being under seal? *Airton v. Davis*, 2 Law J. (N.S.) C.P. 89.

Money will not be ordered into court where the party is out of the jurisdiction, on a statement that it was intended to appeal. *Ex parte Davison re Maberley*, 2 Law J. (N.S.) Bankr. 69, s.c. 3 D. & Ch. 447.

An appeal to the Lord Chancellor from the Court of Review does not lie, where the point determined is a mere matter of fact; but only where it involves a matter of law or equity, or is connected with the refusal or admission of evidence. Therefore, where the question is merely, whether a party is or is not a trader, this is not the subject of an appeal.

It is not discretionary in the Court of Review to grant a special case where a party is entitled to appeal; but he has a right to it if his facts are properly stated.

An appeal pending is not a sufficient ground for staying proceedings, more especially when it is plain that the appeal is brought for the purpose of delay. *Ex parte Hinton*, 2 D. & Ch. 407.

The Great Seal will not make an order, that an appeal from the Court of Review shall be brought on by petition instead of special case, merely on the ground that the matters of law and fact were of complicated nature, or that the affidavits were voluminous. *Ex parte Anon.*, 1 D. 75.

The production of exhibits cannot be insisted upon as of course, before the hearing. *Ex parte Ainsley re Lord*, 2 Law J. (N.S.) Bankr. 16, s.c. 3 D. & Ch. 10.

Re-hearing a petition—see *Ex parte Belcher re Maberley*, 2 Law J. (N.S.) Bankr. 73, s.c. 2 D. & Ch. 587; 1 Mont. & A. 478.

Applications to postpone the hearing of petitions in the paper. *Ex parte Howard re Howard*, 3 Law J. (N.S.) Bankr. 8.

Notice must be given of a motion to advance a petition for hearing. *Ex parte Todd re Todd*, 2 Law J. (N.S.) Bankr. 18, s.c. 3 D. & Ch. 57.

Substitution of service. See *In re Charles Percival*, 3 Law J. (N.S.) Bankr. 94.

Affidavit in support of a petition to substitute service, must state that the party intended to be served "keeps out of the way to avoid service." *Ex parte Jackson re Foster*, 4 Law J. (N.S.) Bankr. 16.

The petition must be served after it is amended, although the party added be merely added *pro forma*. *Ex parte Head re Laurence*, 4 Law J. (N.S.) Bankr. 2.

A petition will not be answered *nunc pro tunc* when affidavits have been sworn. *Ex parte Peaks re Bignold*, 3 Law J. (N.S.) Bankr. 46, s.c. 1 Mont. & A. 309; 3 D. & Ch. 551.

If one of two assignees present a petition, the other must be served.

If a petition stand over for want of parties, the costs of the day are not of course. *Ex parte Thompson re Wilks*, 2 Law J. (n.s.) Bankr. 47, s. c. 1 Mont. & A. 312.

The Court refused to make an order, that service of a petition against an attorney, for an order to pay certain costs for which he had been declared liable, by leaving a copy at his chambers, should be deemed good service. *In re Sandys*, 3 D. & Ch. 34.

Substituted service of petition on respondent's solicitors. *Ex parte Cox*, 2 D. & Ch. 191.

When a petition stands over by arrangement, an affidavit of service is not necessary. *Ex parte Ward*, 4 Law J. (n.s.) Bankr. 76, s. c. 2 Mont. & A. 391; 1 D. 86.

When a petition is not served within the proper time it must be re-answered.

If the time has not elapsed, it may be enlarged.

A petition to supersede need not be personally served on the assignees. *Ex parte Hanks*, 2 Mont. & A. 383.

Where the bankrupt is one of two executors, the petition of a party interested under the will must be served on the other executor, as well as on the bankrupt and the assignees. *Ex parte Cutting*, 2 D. & Ch. 3.

Order to amend, conditionally, that a party should be served, and the petition to be heard in fourteen days. Default having been made in these conditions, the petition was dismissed with costs. *Ex parte Green*, 2 D. & Ch. 85.

If a petitioning creditor is assignee and equitable mortgagee, the petition for a sale must be served on the bankrupt and a creditor. *In re Parker*, M. & B. 394.

Affidavit of service of petition ought to be in court. *Ex parte Palmer*, 1 D. & Ch. 490.

Where a petition is ordered to stand over, to enable the petitioner to be prepared with an affidavit of service, the respondent must have notice of the day when the petition is brought on.

A petition answered for a particular day should be placed at the head of the paper of that day. *Ex parte Mucklow*, 3 D. & Ch. 25.

Petition not served cannot be advanced. *Ex parte Harding*, 1 Mont. & A. 115.

Where an order for substituting service on the solicitor to the assignees has been obtained before the Vice Chancellor, and an order *nunc pro tunc* obtained, the Court of Review will permit the order to be completed. *In re Roberts*, 2 Law J. (n.s.) Bankr. 64.

On a petition to supersede a joint commission as to one, the other bankrupt must be served. *Quære*, whether personal service on the petitioning creditor is necessary. *Ex parte Moreland re Moreland*, 2 Law J. (n.s.) Bankr. 99, s. c. 3 D. & Ch. 248.

The method of transferring a petition from the Lord Chancellor's paper, to be heard before the Court of Review, is by motion *ex parte*, and serving the order upon the respondents. *Ex parte Okill*, 1 Law J. (n.s.) Bankr. 79.

Upon a petition under 1 & 2 Will. 4, s. 17, to reverse the adjudication, if assignees are elected when the petition is heard, they may adduce fresh evidence in support of the fiat. If not so elected,

and the petitioning creditor is alone respondent, *quære*. *Ex parte Jackson re Jackson*, 2 Law J. (n.s.) Bankr. 91, s. c. 2 D. & Ch. 601; M. & B. 394.

There is no rule in bankruptcy, that any time is a bar to a petition for a rehearing. *Ex parte Greenwood re Baillie*, 3 Law J. (n.s.) Bankr. 6, s. c. 1 Mont. & A. 65; 3 D. & Ch. 398.

If a petition, for delivery up of property seized by the messenger, be ordered to stand over on the ground of its being a fishing petition, till an indictment against the petitioner has been tried, the petitioner will not be restrained from bringing an action for recovery of the property. *In re Heath*, 2 Law J. (n.s.) Bankr. 45.

Petition of several distinct creditors having a common object, not multifarious. *Ex parte Grazebrook re Naylor*, 2 Law J. (n.s.) Bankr. 18.

If there be a joint affidavit of A and B, an alteration may be made in that part to which B deposes (before B swears) after A has sworn.

A petition is not multifarious because the prayer asks many things.

*Quære*—whether multifariousness is a preliminary objection. *Ex parte Watson*, 2 Law J. (n.s.) Bankr. 82.

The Court will use its discretion, where the petition is multifarious, if the parties are not damaged by being joined; and, where affidavits are sworn before the filing of the petition, will suffer it to stand over for them to be re-sworn. *Ex parte Brown re Lloyd*, 3 Law J. (n.s.) Bankr. 6, s. c. 3 D. & Ch. 496.

Petition by creditors to expunge proofs and to remove assignees, not multifarious; but removal of assignees being refused, petition becomes multifarious. *Ex parte Grazebrook*, 2 D. & Ch. 186.

If a petition is ordered to stand over, without prejudice to the petitioner's proceeding at law, and the petitioner commence an action, the Court will not compel him to elect. *Ex parte Heath*, M. & B. 183.

Where notice is given to the respondent of a motion for leave to amend the petition, and such permission is granted after the respondent appears to oppose it, the respondent will not be entitled to the costs of the day. *Ex parte Green*, 2 D. & Ch. 42.

A petition to confirm a report stood in the paper before a petition excepting to it. The counsel for the first petition has a right to begin, by stating the facts of his petition, before the counsel for the second petition proceeds to state and argue the exceptions. *Ex parte Morley*, 3 D. & Ch. 509.

Application for petition to stand over should be made the day before the petition appears in the paper. *Ex parte Telford*, 2 Mont. & A. 389.

A petition for keeping separate accounts, which might be done under the general order, dismissed with costs. *Ex parte Green*, 1 D. & Ch. 382.

Period of eight days, for which a petition was answered, allowed to be enlarged. *Ex parte Beardsworth*, 1 D. & Ch. 369.

Where a petition is in the paper for hearing on Monday, and the respondent only files his affidavit on the previous Saturday, the petitioner is entitled to an order for time to answer them. *Ex parte Gladdish*, 2 D. & Ch. 330.

Although six months is the time limited by the

practice of the Court for presenting a petition for rehearing—*semble*, that under special circumstances it may be dispensed with.

The rule, that no petition for rehearing is allowed for costs only, does not apply (*comme semble*) to a petition for rehearing, on the ground of an erroneous decision on the merits, although the material effect of such decision may be to render the party liable for costs. *Ex parte White*, 2 D. & Ch. 334.

Notice must be given of a motion to postpone the hearing of a petition unless the motion is made when the petition is called on. *Ex parte Grazebrook*, 3 D. & Ch. 199.

On a petition to reverse the adjudication, copies of the depositions will not be granted. *Ex parte Smith*, 2 Mont. & A. 75, s. c. 3 D. & Ch. 181.

A petition to stay the certificate, and to prove, was presented:—Held, first, it need not state that the petitioner is a creditor; secondly, it need not state when the debt was rejected; thirdly, it need not state what debt was rejected. *Ex parte Robinson*, 1 Mont. & A. 705.

On an application to adjourn the hearing of a petition, for the purpose of answering affidavits filed in opposition, the Court will first hear the petition and affidavit read. *Ex parte Crouch*, 3 D. & Ch. 17.

A petition is not necessarily dismissed with costs, because a previous petition for the same object has been also dismissed, if the dismissal of the prior petition was on a mere matter of form. *Ex parte Hooper*, 1 D. & Ch. 117.

A petition not to stand over to answer affidavits when there is laches. *Ex parte Sidebottom*, 2 Mont. & A. 79.

In a case of emergency, a petition will be answered *instanter*. *In re Matthews*, 1 D. & Ch. 35.

Where original petition is filed, and affidavits put in, and then petition is amended by adding the name of another party as respondent, those affidavits cannot be read against him. *Ex parte Mascarenas*, 1 D. & Ch. 507.

To support an objection to the hearing of a petition, on the ground of the costs not having been paid by the petitioner, as directed by a former order, there must have been a personal demand of the costs.

Where a party petitions, *quâd* creditor, an objection to the validity of his debt is not a preliminary objection, although he is bound to prove that he is legally a creditor. *Ex parte Wyatt*, 3 D. & Ch. 666.

*Semble*—the examination of a third party, taken before the petition was filed, may not be read, although notice of an intention to read such examination has been given to the other party. *Ex parte Dobson*, 3 Law J. (n.s.) Bankr. 117, s. c. 1 Mont. & A. 666; 4 D. & Ch. 69.

Recommendation to commissioners to hear counsel against the adjudication.

An order cannot be rescinded on motion. *Ex parte Walker*, 2 Mont. & A. 267, s. c. 1 Dowl. 88.

(General order may be dispensed with under circumstances in discretion of Court.—(Cross, J. absent.) *Ex parte Reynolds*, 1 D. & Ch. 459.

Notice must be given to the other side of an application to discharge an order. *Ex parte Lowe*, 1 D. & Ch. 43.

*Semble* that when a petitioner obtains a conditional order of the Court, he is bound to prosecute

such order, under the peril of paying costs to the other party. *Ex parte Austen*, 2 D. & Ch. 384.

A special order had been obtained for an agent to the petitioner, who was abroad, to sign the petition on her behalf:—Held, that this might be done under the General Order of 12th of August 1809; and the special order was therefore discharged with costs. *Ex parte Moore*, 2 D. & Ch. 369.

A party is not entitled to an order on his petition, on the default of the respondent's appearance, if he is not prepared with an affidavit of the service of the petition, notwithstanding the respondent has given an undertaking to appear. *Ex parte Kirkaldy*, 4 D. & Ch. 52.

The Court will not vary the minutes of a former order, which has been pronounced more than three months, except on a petition for rehearing. *Ex parte Wilson*, 4 D. & Ch. 156.

A previous order of the Vice Chancellor, which had been omitted to be drawn up, ordered to be entered *nunc pro tunc*, if the Vice Chancellor should think fit. *Ex parte Lewis*, 3 D. & Ch. 198.

Order in absence of parties made on production of affidavit of service. Affidavit drawn informally, but amended. Order *nunc pro tunc*, provided service was originally good. *In re Roberts*, 1 D. & Ch. 555.

After an order to pay within a specified time, the next order is to pay within four days or stand committed; this is of course at the office; but, if circumstances render an application to the Court necessary, notice must be given to the other side. *Ex parte Solomons*, 1 Mont. & A. 269, s. c. 3 D. & Ch. 77.

Whatever ground there may be for the discharge of a party, who is arrested on an attachment for not paying costs pursuant to an order—previous notice of the application must be given to the other side. *Ex parte White*, 1 D. & Ch. 39.

Substantial variations in order cannot be effected by motion, but only on petition to rehear. *Ex parte Soper*, 4 D. & Ch. 569.

New practice suggested, on pronouncing an order of the Court. *Ex parte Francis*, 2 D. & Ch. 90.

Appeal not sustainable where order not drawn up. *Ex parte Jenkins re Nokes*, 1 Law J. (n.s.) Bankr. 36, s. c. Mont. 513; 1 D. & Ch. 222.

The application to vary the minutes of an order may be by motion, in any case where the judgment of the Court has been misapprehended; but if the application be to vary the judgment upon the merits, a petition for a rehearing must be presented. *Ex parte Soper re Salter*, 4 Law J. (n.s.) Bankr. 45, s. c. 2 Mont. & A. 55; 4 D. & Ch. 275.

After an order for payment of money, the course is to proceed for an attachment, &c., by petition, not by motion.

Practice on the subject generally. *Ex parte Solomons re Maberley*, 2 Law J. (n.s.) Bankr. 67.

Where an order is taken in the absence of the opponent, who does not appear, the order will not be opened, or amended, or the petition be reheard, &c., unless the party state a case on affidavits, which induces the Court to think the order made cannot be sustained. *Ex parte Somerskill re Wilkes*, 2 Law J. (n.s.) Bankr. 79.

In general, an order made upon petition in bankruptcy cannot be discharged on motion.



Whether an order in bankruptcy, obtained on petition, can be discharged for irregularity by motion—*quere*. *Ex parte Walker*, 4 Law J. (N.S.) Chanc. 192.

The application for the four-day order, founded upon a certificate from the registrar, for non-compliance with an order of the Court, must be made upon petition, and the certificate must bear date of the day on which the application is made. *Ex parte Myers re Sudell*, 4 Law J. (N.S.) Bankr. 41, s. c. 2 Mont. & A. 87; 4 D. & Ch. 579.

Filing affidavits. *Ex parte Fry re Stinchcombe*, 1 Law J. (N.S.) Bankr. 81, s. c. Mont. 519; 1 D. & Ch. 488; M. & B. 265; and see *Ex parte Bailey*, 4 Law J. (N.S.) Bankr. 50.

Filing affidavits to stay certificate. *Ex parte Bell re Smith*, 1 Law J. (N.S.) Bankr. 81, s. c. 1 D. & Ch. 496.

No application can be made in the matter of a petition, before an office copy is taken of the affidavit filed in support of it. *Anon.*, 4 D. & Ch. 141.

As to referring affidavits for impertinence only. *In re Lord*, 2 Law J. (N.S.) Bankr. 3.

Affidavits not referred for impertinence till hearing of petition. *Ex parte Arnsby*, 2 D. & Ch. 119.

Affidavits referred for scandal on motion of course. *Ex parte Hetherington*, 4 D. & Ch. 217.

A reference for scandal in an affidavit will be granted, even after the petition has been heard; but not a reference for impertinence. *Ex parte Williamson*, 2 D. & Ch. 414.

Contrary to *Ex parte Pelham* (Mont. 211), held, that any party may apply to refer affidavits for scandal, and that the application need not be by the party scandalized. *Ex parte Hetherington*, 4 D. & Ch. 218.

An affidavit, after being filed, cannot be withdrawn, so as to prevent the other side from making use of it, on the hearing of the petition. *Ex parte Labrey*, 3 D. & Ch. 232.

Notice must be given of a motion for time to answer affidavits, unless the motion is made when the petition is called on. *Ex parte Binns*, 3 D. & Ch. 189.

Where affidavits in support of a petition are very voluminous, the Court will give respondent time to answer them, upon payment of costs, although the petition is in the paper for hearing, and twelve days have elapsed since the affidavits were filed. *Ex parte Williamson*, 2 D. & Ch. 317.

Affidavits filed before petition filed, bad, unless notice given of reading them, which notice must be verified. *Ex parte Palmer*, 1 D. & Ch. 490.

It is no objection that an affidavit is sworn before a Master in Chancery. *Ex parte Hetherington*, 4 D. & Ch. 221.

A cross petition by the bankrupt for allowance of the certificate, will not be advanced on motion of course, pending the reference for scandal, of affidavits filed in answer to the petition to stay the certificate, on the ground, that the latter petition was improperly served. *Ex parte Hetherington*, 4 D. & Ch. 217.

The affidavit on a motion for substituted service must state, that the party wilfully keeps out of the way to avoid service, and is not to be found. *Ex parte Blandy*, 2 Mont. & A. 24, s. c. 4 D. & Ch. 518.

Where documents are referred to in an affidavit,

it does not give the other side an absolute right to their production, but it is a matter for the discretion of the Court. Motion for this purpose, before hearing petition, refused with costs. *Ex parte Arnsby*, 2 D. & Ch. 192.

Production of affidavits, filed in answer to a petition. *In re Whalley*, 3 Law J. (N.S.) Bankr. 93.

On a reference to an officer of the Court for scandal, exceptions cannot be taken to his report in the office, but only in court, after the report has been made. *In re Williamson*, 1 Law J. (N.S.) Bankr. 95, s. c. 2 D. & Ch. 382; M. & B. 267.

Motion to confirm report as to scandal in affidavits is a motion of course. *Ex parte Hetherington*, 4 D. & Ch. 223.

A party objecting to the Master's report should either present a petition to except to it, or give notice to the other side of the nature of the objection. *Ex parte Millard*, 3 D. & Ch. 248.

A petition to except to a report is heard before a petition to confirm it, notwithstanding the latter petition stands first in the paper. The petition must specify the exceptions. The Master should not draw conclusions of law, but leave the legal result to the Court. *Ex parte Cox*, 3 D. & Ch. 11.

On the hearing of exceptions to the Master's report, those affidavits only in support of or against the original petition can be read, which were used in evidence before the Master. *Ex parte Batten*, 2 D. & Ch. 290.

As to *vidu* voce examination—see 2 Law J. (N.S.) Bankr. 3; and *Ex parte Arnsby*, ib. 17.

Principles and practice as to *vidu* voce examinations. See *Ex parte Jarman re Theed*, 4 Law J. (N.S.) Bankr. 52, s. c. 2 Mont. & A. 119; 4 D. & Ch. 393.

*Semble*—the respondent may make an affidavit in court, or be sworn *vidu* voce in court, as to the fact of having been served with a petition. *Ex parte Tull re Davis*, 3 Law J. (N.S.) Bankr. 13.

When the Court is not satisfied as to the facts sworn to in affidavits, it will order the deponent to be examined *vidu* voce. *Ex parte Howell*, 1 D. & Ch. 358.

Court will not order *vidu* voce examination in the first instance before hearing. *Anonymous*, 2 D. & Ch. 140; s. r. *Ex parte Arnsby*, 2 D. & Ch. 120.

Upon *prima facie* case, *vidu* voce examination ordered, and advertisement of adjudication postponed. *Ex parte Lavender*, 4 D. & Ch. 486.

In the ordinary practice of hearing a petition on affidavit, it is irregular for a counsel to examine a witness *vidu* voce, without any previous order of the Court obtained for that purpose. *Ex parte Baldock*, 2 D. & Ch. 60.

In general, the Court will not grant a *vidu* voce examination after hearing a petition on affidavits; but this rule is not inflexible. The party is not estopped by not applying before the hearing. *Ex parte Thompson*, 2 Mont. & A. 40, s. c. 4 D. & Ch. 534.

An application to examine *vidu* voce should be made before the petition is heard on affidavit. *Ex parte Baldwin*, 1 Mont. & A. 617.

If both parties agree, a *vidu* voce examination may be had of course. If affidavits have been filed on both sides, the Court will read them in the first instance.

If a *vidu* voce examination be desired by the petitioner, he should state facts on his petition to shew the necessity, and make a preliminary application.

If both parties agree, a *vidu* voce examination is

of course; if they do not, the party asking must shew cause. *Ex parte Dugard*, 2 Mont. & A. 27, s. c. 4 D. & Ch. 521.

If on a *vidæ voce* examination witnesses are ordered out of court, the petitioner, being a witness, has a right to remain in court. *Ex parte Dugard*, 2 Mont. & A. 84, 4 D. & Ch. 524.

Where petitioner filed no affidavits in support, but two days before hearing served notice to examine witnesses on respondent twenty miles from London, the Court refused the application of respondent to postpone hearing, so as to procure witnesses in answer, till after petitioner's witnesses were examined. *Ex parte Lavender*, 4 D. & Ch. 466.

Upon an application for an order to examine the parties to a petition as witnesses on the trial of an issue, the Lord Chancellor declined to make such order. *In re Christie*, 1 D. & Ch. 290.

Where a party, on the hearing of a petition, makes use of an affidavit to prove his case, the Court will not, because the affidavit does not go far enough for his purpose, adjourn the hearing of the petition to a future day, to enable him to examine the deponent *vidæ voce*, unless the other party consents to such adjournment; for the deponent ought to have been in attendance, if it was likely that his personal examination would be necessary. *Ex parte Dickenson*, 2 D. & Ch. 520.

Counsel may cross-examine a person whose affidavit has been read, provided he has been ordered to attend for the purpose of being examined *vidæ voce*: and the reading an affidavit is on the same footing with an examination in chief. *Ex parte Clarke re Sewerdrop*, 1 Law J. (N.S.) Bankr. 77, s. c. Mont. 508; 1 D. & Ch. 525.

A reference to the commissioners to report whether a pecuniary arrangement by the assignees would be beneficial to the estate. *Ex parte Bradstock*, 2 Mont. & A. 490.

The assignees having made an arrangement concerning the payment of the creditors' debts, a reference was ordered to the commissioners whether it were beneficial. *Ex parte Hyslop*, 2 Mont. & A. 289.

The Court will refer it to the commissioners to inquire whether an arrangement between the assignees and creditors is beneficial. *Ex parte Kirby*, 2 Mont. & A. 142, s. c. 4 D. & Ch. 400.

The Court will not order resolutions passed at a meeting of creditors to be carried into effect, without referring it to the commissioners to certify whether it would be for the benefit of the estate. *Ex parte Farmer*, 1 D. & Ch. 110.

Where the joint and separate creditors, at a meeting duly convened for that purpose, agree to consolidate the two estates, the Court will refer it to the commissioners to inquire whether such consolidation is for the general benefit; but will not, upon such a resolution alone, bind the interest of the absent creditors of both classes. *Ex parte Part*, 2 D. & Ch. 1.

If the commissioners certify that a consolidation will be beneficial, the assignees need not be served. *Ex parte Smith*, 2 Mont. & A. 60.

The Court will not sanction a sale of the bankrupt's property by private contract, without a previous reference to the commissioners. *Ex parte Geding*, 1 D. & Ch. 323.

Contrary to the old practice, the Court will not,

in general, refer it to the commissioner to ascertain the existence of an equitable mortgage, but will themselves decide the question. *Ex parte Smith*, 1 D. & Ch. 441.

When a matter may be referred to a Judge—see *Ex parte Jeffery*, 1 D. & Ch. 206.

Notice of an intention to read certain parts of the proceedings, prevents other parts being read. *Ex parte Langley*, Mont. 358.

When all is regular, the four-day order to pay, &c., or stand committed, is of course at the office. *Ex parte Smith*, 2 Mont. & A. 213.

A mortgage, given on the eve of bankruptcy, for a very old debt, is so suspicious, that the Court will not interfere. *Ex parte Dewdney*, 2 Mont. & A. 72, s. c. 4 D. & Ch. 181.

*Quare*—as to the signature of a special case, on appeal, by one of the Judges of the Court of Review. *Ex parte Hawley*, 3 D. & Ch. 234.

Opening the case by counsel—see *Ex parte Cunningham re Maberley*, 2 Law J. (N.S.) Bankr. 75, s. c. 3 D. & Ch. 73.

Defective docket-papers, sent back to be altered, were held to stand before other papers, presented before the first were returned. *Ex parte Stewart*, 1 Law J. (N.S.) Bankr. 8, s. c. 1 D. & Ch. 10.

The bankrupt's examination cannot be read as evidence against a third party, who had no power of cross-examining him. Notice of reading also necessary. *Ex parte Arnsby*, 2 D. & Ch. 212.

The Court will not interfere between two adverse claimants, one claiming as equitable mortgage, and the other under a prior lease, made by the bankrupt of the same property, when the estate of the bankrupt has no interest in the question. *Ex parte Royds*, 3 D. & Ch. 294.

Petitioning creditor's bill ordered to be taxed by an officer of the Court, when objectionable charges have been allowed by the commissioners. *Ex parte Hattersley*, 2 D. & Ch. 373.

A petitioner claiming a portion of the bankrupt's property has no right to call for the production of a case stated by the assignees for counsel's opinion, for the purpose of shewing that the bankrupt has prevaricated in his statement. *Ex parte Collier*, 4 D. & Ch. 364.

A notice to produce the proceedings must be served on the assignees, not on the bankrupt. *Ex parte Daly*, 4 D. & Ch. 364.

An action ordered, to try whether partners were indebted to the customer. *Ex parte Bolland*, 1 Mont. & A. 570.

Where a creditor alleges there has been a fraudulent preference, the Court will, on his petition, send the case for inquiry before the commissioners, the creditor undertaking to pay the costs of such inquiry. *Ex parte Billings*, 1 D. & Ch. 112.

The Court will only interfere to order the sale of equitable mortgages in cases where there is no dispute. *Ex parte Attwood*, 2 Mont. & A. 24.

Special case sent from commissioner must be brought on upon petition. *Ex parte Johnston*, 1 Mont. & A. 622, s. c. 3 D. & Ch. 433.

Where the interest of the joint creditors appears *prima facie* adverse to that of the separate creditors, the Court will, on the application of the latter, appoint an inspector to take care of their interests. *Ex parte Dawson*, 3 D. & Ch. 12.

Where a warrant is issued against a bankrupt for non-compliance with an order of the Court, and the warrant is lost, the Court will renew the warrant, or grant a copy of it, as a matter of course. *Ex parte Giles*, 3 D. & Ch. 620.

Where property pledged by the bankrupt with a creditor is claimed by a third person, the creditor may enter a claim on the proceedings for the whole of his debt, till the legal right to the property is determined. *Ex parte Williams*, 4 D. & Ch. 180.

Upon an appeal in bankruptcy, the appellant is entitled to begin. *Ex parte Belcher*, M. & B. 286, s. c. 3 D. & Ch. 87.

The rule as to hearing matters on further directions from the Court of Chancery is, that the cause may be transferred by motion: if it is merely for costs reserved, it may be brought on by way of motion; but not if it involves any other question as to further directions—*Quære*, as to service on the solicitor. *Ex parte Shadbolt re Fox*, 1 Law J. (N.S.) Bankr. 82, s. c. 2 D. & Ch. 286.

On an application by a bankrupt to reverse a fiat, where he alleges there is a deficiency in some of the requisites upon the proceedings, the Court will, if he has applied instantaneously, and before the choice of assignees, examine the proceedings, and state to the bankrupt's counsel whether there is a good petitioning creditor's debt, act of bankruptcy, &c. *Ex parte Fletcher re Fletcher*, 1 Law J. (N.S.) Bankr. 89.

If the parties appear and consent to an adjournment, no further service is necessary. *Ex parte Giles re Giles*, 1 Law J. (N.S.) Bankr. 98, s. c. 1 D. & Ch. 548; M. & B. 268.

The Court will not admit of the evidence of the bankrupt, to prove usury after the death of the creditor, whose executor is seeking to prove. *Ex parte Gwynn re Rice*, 1 Law J. (N.S.) Bankr. 73, s. c. 2 D. & Ch. 12.

On an appeal from the Court of Review, on a special case, the Chancellor will not at the hearing permit the appellant to present a petition for liberty to proceed "otherwise," for the purpose of rectifying an error in the settlement of the special case. The determination of the Judge is final as to the settlement of it. *Ex parte Lowe*, 1 Mont. & A. 189.

An order of the Lord Chancellor made in a suit brought by the assignees, was, on their application, ordered to be registered in the Court of Bankruptcy. *Ex parte Williams*, 4 D. & Ch. 110.

Rule as to serving purchaser on an application to set aside a sale by assignees. *Ex parte Shepley*, Mont. 353.

The Court will not order the registrar to attend with the proceedings, at the trial of an action, on behalf of a party who is a stranger to the commission. *Ex parte Monk*, 3 D. & Ch. 233.

The Court will not consolidate joint and separate estates, unless every creditor consents. *Anonymus*, 2 Law J. (N.S.) Bankr. 83.

A case in which the Court ordered property belonging to a stranger to the commission to be delivered up to him on his petition. *Ex parte Eden re Jackson*, 1 Law J. (N.S.) Bankr. 85, s. c. Mont. 506.

The Court will not allow the inspection of proceedings, where the bankrupt has not applied promptly to have his commission superseded. *Ex parte Giles re Giles*, 1 Law J. (N.S.) Bankr. 89.

Digest, 1831—35.

## (BB) SECRETARY OF BANKRUPTS.

The Lord Chancellor empowered to order monies to be transferred from account of Secretary of Bankrupts to account of Secretary of Bankrupts Compensation, and *vice versa*. 2 & 3 Will. 4. c. 114, s. 10; 10 Law J. Stat. 282;—and see 5 & 6 Will. 4, c. 29; 13 Law J. Stat. 56.

The Secretary of Bankrupts is no officer of the Court of Review, but of the Lord Chancellor. *In re Fly*, 1 D. & Ch. 249.

The Court of Review has no direct power over the Secretary of Bankrupts. *Anon.* 1 D. & Ch. 359.

## (CC) COSTS.

[See *ante* (I), Proof of Debts, in general; *Ex parte Reay*, 3 D. & Ch. 175; and (T), Annulling a Fiat, Practice on.]

The Court of Review may make orders as to taxing costs. 3 & 4 Will. 4, c. 47, s. 8; 11 Law J. Stat. 107.

Costs may be given by the Court, although not prayed. *Ex parte Taylor re Percival*, 4 Law J. (N.S.) Bankr. 4, s. c. 2 Mont. & A. 38; 4 D. & Ch. 125.

No leave to except to the deputy registrar's report taxing a bill of costs.

Rules as to items to be disallowed on taxation. *Ex parte Crockwell re Crockwell*, 1 Law J. (N.S.) Bankr. 97, s. c. 1 D. & Ch. 546; 1 D. & A. 379.

An application after the first sittings in Easter term, for security for costs, against assignees proceeding with an action brought by a bankrupt, is not too late, although the fiat issued in the previous Michaelmas term, and the notice of trial has been given before Easter term, for the first sittings in that term. *Mason v. Polhill*, 2 Law J. (N.S.) Exch. 233, s. c. 1 C. & M. 620; 3 Tyr. 596; 2 Dowl. P.C. 61.

If an assignee be elected and appointed without his consent, and never acts, the costs of his removal come out of the estate. *Ex parte Easdale re Waters*, 2 Law J. (N.S.) Bankr. 4.

An affidavit, although not read, if alleged to be impertinent, will be included in the taxation by the registrar, unless excluded by the order. *Ex parte Bonington re Bonington*, 4 Law J. (N.S.) Bankr. 57, s. c. 2 Mont. & A. 72.

The costs of settling a special case of appeal to the Lord Chancellor are part of the costs of that appeal, and the Court of Review, on motion, will enforce them. *Ex parte Hawley re Richards*, 4 Law J. (N.S.) Bankr. 17, s. c. 4 D. & Ch. 572; 2 Mont. & A. 59.

Taxing bills of costs—see *Ex parte Carter re Boldero*, 2 Law J. (N.S.) Bankr. 74, s. c. 2 D. & Ch. 620.

The Court has a right, under the general jurisdiction in bankruptcy, to order a bill of costs to be taxed by its own officer. *Ex parte Cuttle re Payne*, 3 Law J. (N.S.) Bankr. 112.

The solicitor or agent who files an affidavit, is the party responsible for the costs of irrelevant or impertinent matter. *Wake re Booth*, 2 Law J. (N.S.) Bankr. 38, s. c. 3 D. & Ch. 246; M. & B. 259.

There cannot be a rehearing as to costs only.

The expenses of working a commission, are costs within this rule. *Ex parte Burnall re Bennett*, 2 Law J. (N.S.) Bankr. 65, s. c. 1 Mont. & A. 38; 2 D. & Ch. 640.

An application to have the costs of a suit in Chancery allowed the assignees out of the estate, must be made in the first instance to the commissioner. *Ex parte Gibson re Phillips*, 3 Law J. (N.S.) Bankr. 72, s. c. 1 Mont. & A. 479.

When the commissioners have exercised their judgment with respect to a proof of debt, and have refused to admit it, the successful petitioner against their decision is not entitled to costs, it being a general rule that costs cannot be so given, when commissioners exercise their jurisdiction. *Ex parte Millington*, 1 Mont. & A. 114, s. c. 3 D. & Ch. 298.

The commissioners having improperly rejected a proof because the claim was merged in a felony, the petitioner was allowed costs out of the estate. *Ex parte Birks*, 2 Mont. & A. 208.

Where the justice of the case requires it, costs will be given against the decision of the commissioner. *Ex parte Brooks re Moore*, 4 Law J. (N.S.) Bankr. 97, s. c. 2 Mont. & A. 78; 4 D. & Ch. 209.

If a petition is allowed to stand over, for the purpose of serving a necessary party, it is not of course to grant the costs of the day. *Ex parte Thompson re Wilks*, 3 Law J. (N.S.) Bankr. 97, s. c. 3 D. & Ch. 612.

There is a difference as to costs, where the party seeks to enforce an order, and where he merely defends the order of the commissioner: in the first case, he may be liable to costs, but not in the second. *Ex parte Benham*, 4 Law J. (N.S.) Bankr. 65, s. c. 1 D. 26; 2 Mont. & A. 272.

When a petition stands over by consent, it is not necessary, in order to secure to the respondent the costs of the day, upon the petitioner failing to appear, that there should be an affidavit of service. *Ex parte Ward re Tone*, 4 Law J. (N.S.) Bankr. 76.

The Court will tax a solicitor's bill some years after it has been paid, when its amount is considerable, and refer the taxation to one of its own officers. *Ex parte Way re Rogers*, 1 Law J. (N.S.) Bankr. 101.

The application for security for costs is *strictissimi juris*, and any proceeding had in the matter is a waiver of the right to demand them. *Ex parte Tull re Davis*, 3 Law J. (N.S.) Bankr. 30, s. c. 1 D. & A. 80; 3 D. & Ch. 503.

The service of a petition to dismiss a petition for taxation of costs need not be personal. *Secus* the order for payment of the costs. *Ex parte Stephens*, *Ex parte Thompson*, 2 Mont. & A. 482.

The Court cannot proceed towards commitment of party for non-payment of costs, on the usual seven days order of the Vice Chancellor. *Ex parte Ferris*, 1 D. & Ch. 498.

A motion may be made that the registrar may review his certificate of taxation of costs. A petition may be necessary to oppose or amend it.

Non-payment of the taxed costs into court not a preliminary objection to the motion. *Ex parte Richardson*, 1 Mont. & A. 377, s. c. 3 D. & Ch. 736.

On an abandoned notice of a motion, the application for costs and affidavit of service may be on a future day. *Ex parte Stone*, 2 Mont. & A. 503.

On petition presented to the Lord Chancellor before 11th January 1832, to supersede, an action at law was directed to try validity of commission, costs reserved. Verdict in favour of petitioner. A new petition was thereupon presented to the Court of Review and granted:—Held, petitioner was entitled to costs of both petitions, and that the Court of Review had no jurisdiction in question, where the petitioning creditor could set off the debt really due to him against those costs. *Ex parte Billhards*, *Ex parte Edwards*, and *Ex parte Marks*, overruled. *Ex parte Thomas*, 1 D. & Ch. 443.

In cases of scandal, the costs are as between solicitor and client. *Ex parte Porter*, 2 Mont. & A. 220.

A employs B a solicitor, to strike a docket against C, which is done, but afterwards is abandoned. Subsequently A employs D to strike a docket, which is regularly followed up:—Held, that A is not entitled to have B's costs taxed under the commission. *Ex parte Neal*, 1 D. & Ch. 486.

Though the appearance of a party is wholly unnecessary, yet if he is served with notice of an intended application to the Court, he is entitled to his costs of appearance; but if he make affidavits which are unnecessary, he must pay the costs occasioned thereby. *Ex parte Reid*, 1 D. & Ch. 322.

On a petition for the substitution of a debt, in lieu of the petitioning creditor's debt, under the 6 Geo. 4, c. 16, s. 18, the costs of the proceedings must be paid by the petitioning creditor, and not out of the bankrupt's estate. *Ex parte Hayne*, 4 D. & Ch. 403.

If on an application to substitute a petitioning creditor's debt by any other creditor, it appears that the original debt was proved under a mistake in law, and was reduced on legal grounds, and without fraud on the part of the original petitioning creditor, the costs shall come out of the estate. But, *secus* if the application to substitute is by the original petitioning creditor, though he comes to substitute even under such circumstances in *autre droit*. *Ex parte Rogers*, 4 D. & Ch. 637.

On the usual petition of an equitable mortgagee for a sale, and leave to bid, the costs come out of the estate, though the assignees do not consent. *Secus*, on an independent petition to bid alone. *Ex parte Berkeley*, 2 Mont. & A. 54, s. c. 4 D. & Ch. 572.

When an order is made on the hearing of a petition, that a party shall pay the costs, this includes the costs of an affidavit filed by the other party, although it was not read on the hearing of the petition. *Ex parte Sidebotham*, 4 D. & Ch. 141.

An order made for taxation and one-sixth taxed off. Solicitor applying to confirm and giving notice to petitioner, must pay costs of petitioner's appearance on such application, and also costs of petition and of taxation. *Ex parte Nutting*, 1 D. & Ch. 561.

A creditor tenders a proof for 3,500*l.*, which the commissioners reject *in toto*; and, after presenting a petition against their decision, an order is made by consent, that he shall prove for 500*l.* The Court would not grant him costs out of the estate; but ordered each party to pay his own costs. *Ex parte Waterhouse*, 3 D. & Ch. 108.

A, B, C, & D contract a debt with W for goods supplied to them on their joint account. A, B, & C become bankrupt, and W proves the amount of his debt under their commission, stating in his deposition that A, B & C only (without noticing D) were jointly indebted to him; but he afterwards sues and recovers the amount of his debt against D, the solvent partner:—Held, that in consequence of the informality of his proof, W must pay the costs of the application of the assignee to expunge it. *Ex parte Adams*, 3 D. & Ch. 623.

A memorandum in writing drawn up entirely by the clerk of an equitable mortgagee, and which was not signed by the bankrupt, is not sufficient to exempt the mortgagee from paying the costs of the petition for the sale. *Ex parte Emmerton*, 3 D. & Ch. 654.

If a bill filed by assignees be dismissed with costs, the Lord Chancellor has no jurisdiction to order the costs to be retained by the assignees out of the bankrupt's estate. *Turner v. Hibbert*, 1 Mont. & A. 243.

An equitable mortgagee is not entitled to the costs of defending an extent in aid, or to be excused from paying a deposit. *Ex parte Stephens*, 2 Mont. & A. 31.

Letters sent subsequent to the deposit, are a sufficient memorandum to entitle to costs on a petition for sale of an equitable mortgagee. *Ex parte Reynolds*, 2 Mont. & A. 104, s. c. 4 D. & Ch. 278.

On a petition to surrender, where there is no wilful default, costs come out of the estate. *Ex parte Smith*, 2 Mont. & A. 382.

An order of committal for non-payment of costs, under which the party is committed, will not be suspended on the ground of an appeal, unless the costs are paid into court. *Ex parte Fox*, 2 Mont. & A. 18, s. c. 4 D. & Ch. 503.

Where bills of exchange, proved under a fiat, have been lost by the creditor, and he therefore cannot produce them, for the purpose of receiving his dividends, and an application to this Court becomes necessary to receive them, the creditor must pay the costs of the application. *Ex parte Trust*, 3 D. & Ch. 760.

On an application by two creditors to the commissioners to expunge a proof, under the 6 Geo. 4, c. 16, s. 60, the commissioners have a discretionary power to adjudge to the creditor whose proof is sought to be expunged, such costs as he may think reasonable, including the costs of the meetings as well as those of the creditor. And though the commissioners may have allowed rather too much to the creditor, this will not make the order bad, for the whole allowance, but the objecting parties may have the costs taxed. *Ex parte Kirkaldy*, 4 D. & Ch. 52.

Petition in paper of day; motion made, on notice, that it might stand over to amend, by adding a party respondent. Party moving must pay costs of all parties served with notice; but, petition not being called on, without costs of the day. *Ex parte Story*, 4 D. & Ch. 504.

The costs of proceedings in this court, under a London fiat, are to be referred to the deputy registrar for taxation; the duty of the commissioners being merely to tax the petitioning creditor's costs and the costs of the assignees. *Ex parte Reay*, 2 D. & Ch. 586.

Costs will not be given against a bankrupt upon petition to annul fiat. *Ex parte Heath*, Mont. & B. 116.

An attachment for non-payment of costs is of course after disregard of the four-day order; but, unless *ex necessitate*, will not be issued in vacation. *Ex parte Hunt*, 2 Mont. & A. 13, s. c. 4 D. & Ch. 503.

The Court will not grant the four-day order, for the purpose of compelling the payment of costs, without personal service of the petition on the party sought to be brought into contempt. *Ex parte Bougfield re Barlow*, 1 Law J. (N.S.) Bankr. 46.

If the Court allow a proof on the testimony of witnesses alleged, but not proved, to have been tendered for examination before the commissioners, the petitioner must pay costs. *Semble, contra*, if proved to have been tendered.

Petitioner may adduce fresh evidence, not before commissioners, but the consequence usually will be, he must pay costs.—Per Cross, J. *Ex parte Price re Price*, 3 Law J. (N.S.) Bankr. 2, s. c. 1 Mont. & A. 51; 3 D. & Ch. 489.

It is a matter of course for any creditor, who has proved to the amount of 20*l.*, to apply within a reasonable time, under the 14th section of 6 Geo. 4, c. 16, for a retaxation of any bill of the solicitor to the commission; but not where a period of three years has been suffered to elapse of such bill.

But where the creditor applies to the general jurisdiction of the Court, and points out objectionable items, the Court will then refer the bill to its proper office, to review the former taxation.

Where, however, a bill has been already taxed by the proper officer of the Court in which the business has been done, the Court of Review will not in such case disturb the taxation.

What are objectionable items in the solicitor's bill for business connected with the meetings of the commissioners. *Ex parte Christy*, 4 D. & Ch. 414.

The Court will not, on motion, entertain the question of the reasonableness of certain items in a bill of costs. If those items are taxed off by the registrar, in pursuance of the usual practice, the special exceptions should have been mentioned at the hearing. *Semble*, the fee to counsel for settling a petition, is reasonable, and should be mentioned. *In re Gray*, 4 Law J. (N.S.) Bankr. 76.

Costs given to a prisoner committed for not answering satisfactorily out of the bankrupt's estate. *In re Venables*, 3 Law J. (N.S.) Bankr. 30.

#### (DD) OF THE SOLICITOR.

[See (G) Of the Provisional Assignee.]

The attestation of the solicitor to a petition is as a guarantee that the petition is proper, not a security for costs. *Ex parte Cadby*, Mont. 352.

The attestation must be to the name of the petitioner and not to the petition. *Ex parte Cracklow*, Mont. 353.

Solicitor allowed to sign petition for petitioner under circumstances. Order not to be drawn up, but attached to petition. *Ex parte Alexander*, 1 D. & Ch. 582.

Attestation thus, "Witness, J L, solicitor for the petitioner," J L being the country attorney, and petition presented by agent in town:—Held, informal. *Quare tamen. Ex parte Rose*, 1 D. & Ch. 554. *Semble*—that such strictness is not now required as formerly, with respect to the attestation of a

petition by the solicitor. *Ex parte White*, 3 D. & Ch. 386.

Signing petition by solicitor. *In re Hicks*, 4 Law J. (N.S.) Bankr. 76.

Costs of an improper petition, ordered to be paid personally by the solicitor to the petitioner. *Ex parte Williamson re Llewellyn*, 3 Law J. (N.S.) Bankr. 48, s. c. M. & B. 266.

Rule, that solicitor to flat cannot purchase the bankrupt's property. *Ex parte Columbine*, 2 Law J. (N.S.) Bankr. 75, and *Ex parte Fairliars Delves*, ib. 76.

Solicitor to the commission may not bid at the sale of the bankrupt's property. *Ex parte Towns re Browne*, 4 Law J. (N.S.) Bankr. 2, s. c. 2 Mont. & A. 29; 4 D. & Ch. 519.

The Court will not depart from the general rule, that the solicitor to the commission shall not be allowed to purchase any part of the bankrupt's property. *Ex parte Farley*, 3 D. & Ch. 110.

Solicitor allowed to take affidavits off the file to attend action therewith, undertaking to return them in the same state. *Ex parte Whalley*, 1 Mont. & A. 634, s. c. 3 Law J. (N.S.) Bankr. 93.

After a solicitor's bill has been long paid, it cannot be taxed without special reasons. *Ex parte Hutchinson*, 2 Mont. & A. 35, s. c. 3 D. & Ch. 329; 4 D. & Ch. 530.

Although the solicitor's bill has been paid, yet it will be ordered to be taxed, on application of the assignees, without any special reasons being assigned for the taxation. *Ex parte Pickering*, 2 D. & Ch. 387.

A petition to tax a solicitor's bill must be served on the opposite party. *Ex parte Griffith*, 1 D. & Ch. 41.

Upon a petition by a creditor under 6 Geo. 4, c. 16, s. 14, to retax a solicitor's bill, it is not necessary to serve the assignees. *Ex parte Payne*, Mont. 455.

The Court of Review has jurisdiction to order the amount of the solicitor's bill subsequent to the choice of assignees, to be paid, although the parties may have a remedy at law. *Ex parte Coates re Wooding*, 3 Law J. (N.S.) Bankr. 62, s. c. 1 Mont. & A. 328; 4 D. & Ch. 626.

Where the assignees have been guilty of negligence in not filing a solicitor's bill, a creditor may petition to have it taxed, although it has been paid. *Ex parte Castle re Payne*, 3 Law J. (N.S.) Bankr. 121, s. c. M. & B. 665.

Independently of the provisions in the acts of parliament, the Court of Review has a general jurisdiction to refer the bill of any solicitor of that court for taxation.

Where the amount of a bill appears, on the face of it, to be excessive, objectionable items need not be pointed out, on an application by a creditor to have it taxed. *Ex parte Copeland*, 4 D. & Ch. 86.

A bankrupt may, after his commission has been superseded, get the solicitor's bill taxed, by an officer of the court, under the general jurisdiction in bankruptcy. *Ex parte Que re Que*, 1 Law J. (N.S.) Bankr. 45.

Where a solicitor adds to a bill for conveyancing, any items taxable in bankruptcy, the Court will order the bill to be taxed. *Ex parte Cass re Rivers*, 4 Law J. (N.S.) Bankr. 39, s. c. 2 Mont. & A. 170; 4 D. & Ch. 273.

Solicitor's bills, though allowed by commissioners, and paid by assignees, ordered to be taxed, where

objectionable items pointed out. *Ex parte Jourdain*, 3 D. & Ch. 637.

When an order has been made for the taxation of the solicitor's bill of costs, *semble*, that a subsequent petition for the costs of the taxation cannot be heard, until the Master has made his certificate, nor unless the original petition is also set down in the paper. *Ex parte Elsee*, 2 D. & Ch. 332.

It is no objection to a petition to tax the solicitor's bill, that it contains allegations reflecting on the conduct of the solicitor; for, if such allegations are improper, they may be referred for scandal. *Ex parte Wells*, 1 D. 69.

Upon an application that the solicitor may be directed to pay the costs of taxation, more than a sixth part having been taken off his bill, the Court will not enter into the particulars of the items of the bill. *Ex parte Millington*, 1 D. 114.

If a solicitor refuses to deliver the proceedings to the assignee, the order is of course with costs. *Ex parte Crouse*, M. & B. 90.

If the two assignees sign a joint order on the solicitor to deliver up the proceedings, the Court will enforce it, though one subsequently virtually countermand the order. *Ex parte Grazebrook*, 2 Mont. & A. 53.

Order made on the solicitor to deliver up the proceedings, and pay over monies to the assignees. *Ex parte Hudson*, 2 D. & Ch. 607.

Where the majority of the assignees wish the proceedings to be in the hands of a particular solicitor, the order is of course for their delivery accordingly, unless gross misconduct be charged, and a cross petition for removal, or an injunction. *Ex parte Halford*, 2 Mont. & A. 52, s. c. 4 D. & Ch. 271.

The solicitor is bound to deliver up the proceedings to a fresh solicitor appointed by the surviving assignee, without waiting until a fresh assignee is chosen in the room of the one who is dead. *Ex parte Ackroyd*, 3 D. & Ch. 21.

The admission of a solicitor under peculiar circumstances, ordered to be enrolled *nunc pro tunc*. *Anonymous, ex parte*, 3 D. & Ch. 417.

Where it was sworn that an attorney had no place of residence in this country, an order *nisi* for his being struck off the roll was permitted to be served at his last place of residence. *Ex parte Mark*, 4 D. & Ch. 26.

Though the rule of another court for striking an attorney off the roll be produced, *semble*, an order *nisi* only can be obtained in this court in the first instance. *Ex parte Mark*, 4 D. & Ch. 482.

Assignees, on the representation of the solicitor to the commission, that he is authorized to receive it as agent, pay over a dividend to such solicitor; it turns out he had no such authority. Upon petition of creditor for payment to him of the dividend, charging that no authority was given to that solicitor: — Held, that being solicitor to the commission, he might be made respondent as well as the assignees, and that a joint order might be made against them all for its payment. *Ex parte Story*, 4 D. & Ch. 504.

A solicitor who gets money into his possession in character of a receiver, is not entitled to retain it as a set-off to a sum owed to him on a private account between him and the assignee. *Ex parte Walsh re Cannings*, 2 Law J. (N.S.) Bankr. 39.

*Quere*—If a solicitor receive money from a bankrupt before his bankruptcy, does his being a solicitor of the court give jurisdiction to order him to pay it over to the assignees, he not having interfered in the fiat?

The Court will not make such an order, while an action to try the validity of the fiat is pending. *Ex parte Hicks re Smith*, 2 Law J. (N.S.) Bankr. 48, s.c. 2 D. & Ch. 573; M. & B. 256.

Although the solicitor to the assignee is liable to the assignee for the amount of a dividend belonging to another, which he has retained upon a false pretence, the Court will order him to account on the petition of the creditor, against him and the assignee, and suspend that part of the order as regards the money so improperly retained, until the solicitor has accounted.

*Semle*—Had a case of agency been made out, the Court would not have interfered. *Ex parte Story re Johnson*, 4 Law J. (N.S.) Bankr. 11, s.c. 2 Mont. & A. 54.

The following is a personal undertaking by the solicitor: "On behalf of P, I do hereby give you notice, that that commission is superseded, &c., and on such behalf as aforesaid, I give you further notice, that I am ready, and hereby offer to allow and pay the costs of," &c. *Ex parte Bentley re Bentley*, 2 Law J. (N.S.) Bankr. 39, s.c. 2 D. & Ch. 578.

The Statute of Limitations will not protect the solicitor to a commission, who has misapplied money belonging to the estate; but the Court will not exercise its jurisdiction over him, on the application of a solvent assignee, who has been guilty of laches. *Ex parte Gould re Robertson*, 4 Law J. (N.S.) Bankr. 7, s.c. 2 Mont. & A. 48; 4 D. & Ch. 547.

The solicitor for an execution creditor must not act as a commissioner under a commission against the debtor. *Ex parte Shum re Roe*, 1 Law J. (N.S.) Bankr. 44, s.c. Mont. 454; 1 D. & Ch. 260.

Duty of the solicitor to the commission, as to summoning a quorum commissioner, and liability of the solicitor in case such commissioner attends, and is not permitted to act. *Ex parte Douglas*, 4 Law J. (N.S.) Bankr. 45, s.c. 2 Mont. & A. 218.

#### (EE) BANKRUPT IN SCOTLAND.

The adjudication under the Scotch Bankrupt Act, 54 Geo. 3, c. 137, operates as diligence for the creditors of the ancestor, so that it is unnecessary for them to take any proceeding under the statute of 1661, to give them a preference over the creditors of the bankrupt heir. *Bennet v. M'Lachlan*, 4 Bligh, N.S. 529.

A bankrupt is made a defendant to an action with the trustee under the sequestration, and a decree pronounced against him in his absence. He is afterwards allowed to come in without the trustee, and lodge defences to the action; after which, the pursuers apply and obtain from the Court an order, that he give security for the expenses of process before he shall be further heard:—Held, that the order in that advanced stage of the proceedings is not well founded, and it is accordingly reversed. *Taylor v. Fairlie*, 1 C. & F. 355.

## BAIL.

[See ARREST—BANKRUPT—PRACTICE.]

### 1. OF THE AFFIDAVIT TO HOLD TO BAIL.

- (A) BY WHOM.
- (B) BEFORE WHOM.
- (C) FORM AND REQUISITES OF.

### 2. BAIL TO THE SHERIFF.

- (A) IN WHAT COUNTY.
- (B) OF THE BAIL-BOND.
- (C) RIGHTS OF THE BAIL.

### 3. OF COMMON BAIL.

### 4. BAIL ABOVE.

- (A) PAYMENT OF MONEY INTO COURT IN LIEU OF.
- (B) WHO MAY AND MAY NOT BE BAIL.
- (C) PUTTING IN.
- (D) NOTICE OF BAIL AND OF JUSTIFICATION.
- (E) JUSTIFYING AND OPPOSING.
- (F) ALLOWANCE OF.
- (G) COSTS.
- (H) CHANGING.
- (I) LIABILITY OF.
- (K) PROCEEDINGS AGAINST BAIL.
- (L) RENDERING AND ENTERING AN EXONERATION.
- (M) DISCHARGE OF, BY OTHER MEANS THAN RENDER.

### 5. IN ERROR.—[See ERROR.]

### 6. IN CRIMINAL PROCEEDINGS.

### 1. OF THE AFFIDAVIT TO HOLD TO BAIL.

[See FOREIGN LAW—INITIALS—PAYMENT OF MONEY INTO AND OUT OF COURT—PRACTICE, Process.]

#### (A) BY WHOM.

An affidavit of debt made by a person who described himself as agent and collector to the plaintiff, an hotel-keepers,—held, sufficient. *Short v. Campbell*, 3 Dowl. P.C. 487.

#### (B) BEFORE WHOM.

An affidavit of debt, sworn before the signer of the bills of Middlesex, before the 2 Will. 4, c. 39, was in force, will not authorize the issue of a writ of *capias* since that act came into operation. *Beck v. Young*, 2 Dowl. P.C. 462.

An affidavit sworn before the deputy signer of the bills of Middlesex before the Uniformity Process Act came into operation, was held sufficient to warrant an arrest upon a *capias* issued after the passing of that act. *Beck v. Young*, 3 Dowl. P.C. 280.

An affidavit of debt sworn to before a commissioner, need not be intitled in any court. *Urguhart v. Dick*, 3 Dowl. P.C. 17.

An affidavit of debt was made before, and filed by, the deputy flazer of Sussex (who also acted in a similar capacity for Cornwall), upon which a *capias* issued into Sussex, which was returned *non est inventus*. An *alias* was then issued into Cornwall (the *præcipe* upon which such *alias* was founded

referring to the former writ), without any affidavit being made before the officer for Cornwall, or any office copy being left with him, upon which the defendant was arrested:—Held, that such proceeding was regular, and that the *alias* might be properly issued into Cornwall without making a second affidavit before the officer of that county, or lodging with him an office copy of that which was made before the officer for Sussex. *Coppin v. Potter*, 3 Law J. (n.s.) C.P. 153, s.c. 10 Bing. 440; 4 Mo. & Sc. 272.

#### (C) FORM AND REQUISITES OF.

[See TRESPASS, Replication and Rejoinder.]

The place of abode of an attorney's clerk, making an affidavit of debt, is correctly described as the office of his employer. *Alexander v. Milton*, 1 Law J. (n.s.) Exch. 148, s.c. 2 C. & J. 424; 2 Tyr. 495; 1 Dowl. P.C. 570.

An affidavit to hold to bail stated, that the defendant was indebted, &c. on a bill drawn and accepted by the defendant, &c., payable at a day now past, &c., without expressly stating that the bill was unpaid or dishonoured:—Held sufficient. *Phillips v. Turner*, 1 C. M. & R. 597, s.c. 5 Tyr. 196.

An affidavit of debt claiming interest must shew that it accrued pursuant to agreement. An affidavit of debt, bad as to part, is insufficient. *Drake and others v. Harding*, 4 Dowl. P.C. 34.

An affidavit of debt, defective as to part, is defective as to the whole. *Raggett v. Guy*, 3 Dowl. P.C. 554.

Where an affidavit to hold to bail for several causes of action, is defective as to some of them, it will be bad *in toto*, so as to entitle the defendant to be discharged out of custody on filing common bail. *Baker v. Wills*, 1 C. & M. 238, s.c. 3 Tyr. 182; 1 Dowl. P.C. 631.

In an action by the indorsee against the drawer of a bill of exchange, the affidavit of debt alleged that the defendant was indebted to the plaintiff on the bill which was overdue, and that the money was still due and owing, but omitted to aver either presentment or notice:—Held, bad. *Simpson v. Dick*, 3 Dowl. P.C. 731.

An affidavit to hold to bail on a note payable by instalments, should shew them to be due, and it will not be sufficient to state that the said sum has not been paid. *Hart v. Myerrie*, 3 Tyr. 238.

If A arrest B as drawer and acceptor of bills of exchange, and the affidavit of debt state the debt to be due by B, as drawer and acceptor of several bills of exchange, such affidavit of debt is bad, and B will be discharged from custody, on his entering a common appearance. *Mollet v. Lewis*, 2 Law J. (n.s.) C.P. 58.

If a party hold another to bail for principal and interest due on a bill of exchange, the affidavit of debt not specifying how much is due as principal, and how much as interest, is defective, and the writ issued on such affidavit will be set aside. *Latraill v. Hoefner*, 3 Law J. (n.s.) C.P. 71, s.c. 10 Bing. 334; 3 Mo. & Sc. 800.

In an affidavit to hold to bail by an indorsee against the drawer, the default of the acceptor must be shewn. *Cross v. Morgan*, 1 Dowl. P.C. 122.

An affidavit of debt, by the indorsee against the drawer of a bill of exchange, need not state the presentment to and default of the acceptor, or that the

drawer had notice thereof; it is sufficient to state, that the bill "has become due, and is wholly unpaid." *Weedon v. Medley*, 3 Law J. (n.s.) Exch. 338, s.c. 2 Dowl. P.C. 689.

An affidavit of debt by the indorsee against the indorser of a promissory note or bill of exchange, must allege a default by the maker or acceptor. *Clay v. Potter*, 2 Law J. (n.s.) Exch. 76.

*Semble*—that an affidavit of debt by the indorsee against the drawer of a bill of exchange, must state that the bill has been dishonoured by the acceptor.

Bail below cannot take an objection to the sufficiency of the affidavit of debt, after the expiration of the time for putting in special bail. *Tucker v. Colgate*, 1 Law J. (n.s.) Exch. 174, s.c. 2 C. & J. 489; 2 Tyr. 496; 1 Dowl. P.C. 574.

Affidavit to hold the drawer of a bill, or indorser of a note, to bail, should state that the acceptor or maker had not paid the amount. *Smith v. Escudier*, 3 Tyr. 219.

In an action by the indorsee against the drawer, the affidavit of debt should allege the default of the acceptor. *Banting v. Jacks*, 1 Dowl. P.C. 445.

An affidavit to hold to bail on a bill of exchange, need not specify the sum for which the bill was drawn. *Hanley v. Morgan*, 1 Law J. Exch. 79, s.c. 2 C. & J. 331; 1 Dowl. P.C. 322.

An affidavit of debt on a bill of exchange must specify the amount for which the bill was drawn. *Brooke v. Coleman*, 2 Law J. (n.s.) Exch. 218, s.c. 1 C. & M. 621; 3 Tyr. 593; 2 Dowl. P.C. 7.

In an affidavit on a bill of exchange, it is necessary to state the amount of the bill. *Westmacott v. Cook*, 2 Dowl. P.C. 519.

If the affidavit of debt on a bill of exchange does not state the amount, the bail-bond will be set aside with costs. *Molineux v. Dorman*, 3 Dowl. P.C. 663.

An affidavit of debt against the acceptor of a bill of exchange, stating that the bill was "duly indorsed" to the plaintiff, is insufficient, as the words "duly indorsed" are words of inference only. *Lewis v. Gompertz*, 1 Law J. (n.s.) Exch. 114, s.c. 2 C. & J. 352; 2 Tyr. 496; 1 Dowl. P.C. 352.

In an action by an indorsee against the acceptor of a bill of exchange, the affidavit of debt must state by whom the bill was indorsed to the plaintiff; it is not sufficient to state that the bill was duly indorsed to him. *Woolley v. Escudier*, 2 Mo. & Sc. 392.

An affidavit of debt on an award ought to state the fact of the submission to, and the making of the award, and that the money was due at a day now past. *Anonymous*, 1 Dowl. P.C. 5.

An affidavit of debt on a covenant to pay money, stating that the defendant is indebted to the plaintiff in the sum, upon a covenant for the payment of it at a day now past, is good. *Lambert v. Wray*, 1 C. M. & R. 576, s.c. 5 Tyr. 195.

An affidavit of debt that the defendant is indebted upon and by virtue of a mortgage deed in the sum of 500*l.*, by which the defendant covenanted to pay that sum at a certain day now past, is sufficient, without averring that the money was not paid at the appointed day. *Masters v. Billing*, 3 Dowl. P.C. 761.

In an action by husband and wife against husband and wife, the affidavit to hold to bail stated the defendants to be indebted "for goods sold and



delivered by the plaintiffs to the defendant's wife," not stating the transaction to have taken place before their respective marriages. The defendant having failed in an attempt to justify bail, moved to set aside the bail-bond, on the ground of the above irregularity. The Court discharged the rule on terms. *Morgan v. Davies*, 1 Sc. 93.

*Semble*—that if in an affidavit of debt for principal and interest, a sum and date are mentioned, from which interest can be computed, it is not essential that the amount of interest claimed should be specifically mentioned. *Rogers v. Godbold*, 3 Dowl. P.C. 106.

An affidavit of debt for 500*l.* for money lent and interest thereon, and on an account stated, without noticing a contract for interest:—Held, sufficient. *Pickman v. Collis*, 3 Dowl. P.C. 429.

An affidavit of debt made by assignees of a bankrupt claiming a certain sum for money lent, paid, &c., by the bankrupt, to and for the use, and at the request of the defendant, "and for interest thereon agreed to be paid" by the defendant, is sufficient. *Harrison v. Turner*, 4 Dowl. P.C. 72.

An affidavit of debt for money lent, and interest thereon, is bad.

*Quere*—Whether, since the statute 3 & 4 Will. 4 c. 42, a defendant who has been arrested under a wrong name, can take advantage of the misnomer, by obtaining his discharge on motion. *Callum v. Leeson*, 3 Law J. (N.S.) Exch. 93, s. c. 2 C. & M. 406; 4 Tyr. 266.

An affidavit of debt for money paid and advanced, &c., and "for interest due and owing, and agreed to be paid" by the defendant, is good, although it does not specify the sum due for principal, and the sum for interest. *Hutchinson v. Hargrave*, 4 Law J. (N.S.) C.P. 47, s. c. 1 Bing. N.C. 369; 1 Sc. 209.

An affidavit of debt claiming interest is sufficient, though it neither states the amount of the principal, nor the time when it began to run. *White v. Sowerby*, 3 Dowl. P.C. 584.

An affidavit to hold to bail "for money paid, laid out, and expended to and for the use of the defendant," is bad, for not stating that the money paid, &c. was so paid, &c. "at the request" of the defendant. *Marshall v. Davison*, 2 Tyr. 315.

An affidavit of debt for the price of goods guaranteed by the defendant, without shewing on what terms, or that the time for payment has expired,—held, bad. *Angus v. Robillaird*, 2 Dowl. P.C. 90.

An application to discharge a prisoner out of custody of the sheriff, for a defect in the affidavit of debt, is not within R. 33, H. T. 2 Will. 4.

An affidavit of debt for money lent, must state to whom, as well as by whom, it was lent. *Smith v. Stephens*, 2 Law J. (N.S.) Exch. 9; 3 Tyr. 219.

An application to discharge a defendant out of custody for a defect in the affidavit to hold to bail, is too late after bail above has been put in. *Reeves v. Hucker*, 1 Law J. (N.S.) Exch. 67, s. c. 2 C. & J. 75; 2 Tyr. 161.

An affidavit of debt on articles of agreement should state the consideration. *Walker v. Gregory*, 1 Dowl. P.C. 24.

The affidavit of debt on a bond, must shew that the number of defaults in payment amounts to 20*l.* *Chambers v. Ward*, 1 Dowl. P.C. 139.

An affidavit of debt for goods sold and delivered to, and for money paid and laid out for S, the wife of the defendant, before his intermarriage with her, held, insufficient. *Gray v. Shepherd*, 3 Dowl. P.C. 442.

Affidavit of debt by third person, the defendant is justly indebted to the plaintiff in certain sums, and that the deponent is more strongly and better assured that the said sums of money are due, by means of deponent's having transmitted to him, and placed in his custody certain documents—Held, sufficient. *Brown v. Phepoe*, 3 Doug. 370.

An affidavit of debt founded on an agreement by defendant, to pay to the plaintiff a sum of money, in full, for his share of costs and expenses, should shew either that the plaintiff has borne those costs and expenses, or that he alone, and not the defendant, is liable in respect thereof.

Thus, where an affidavit of debt stated, that the plaintiff was indebted to the defendant, by virtue of an agreement, whereby the plaintiff agreed to procure a lease of certain premises to be granted to the defendant, and the defendant agreed, upon request, to pay to the plaintiff the sum of 25*l.* in full, for his share of the costs and expenses occasioned by the preparing and carrying into effect of such lease, and that such lease should be prepared by the plaintiff's solicitor; and further deposing, that the plaintiff caused such lease to be granted, which said lease was prepared by the plaintiff's solicitor, and that the defendant did accept the same, upon the terms and conditions aforesaid;—it was held, that the affidavit was insufficient, in omitting to state, that the plaintiff alone had employed or paid the solicitor, or had incurred the expenses of preparing the lease. *Townsend v. Burns*, 1 Law J. (N.S.) Exch. 194, s. c. 2 C. & J. 468.

Affidavit to hold to bail for 50*l.* for money had and received to plaintiff's use, and money lent by plaintiff, without distinguishing how much is due on one account, and how much on the other:—Held, sufficient. *Hague v. Levi*, 9 Bing. 695, s. c. 2 M. & Sc. 729.

Where an affidavit of debt was sworn by an administrator, a Frenchman, and the jurat did not state that the interpreter understood the French and English language, and the plaintiff's attorney acted as interpreter; and the process described the plaintiff as suing in his own right, and the affidavit stated the debt to be due in his representative character; and on search at the Prerogative Office, Doctors' Commons, but at no other ecclesiastical office, no letters of administration appeared to have been granted of the estate of the deceased to any one; but the jurat stated that the affidavit had been read over and explained to the deponent in the French language, and that the interpreter was sworn upon his interpretation:—Held, that the affidavit was sufficient, and the Court therefore refused to discharge the defendant out of custody on filing common bail. *Marzetti v. Comte de Jauffroy*, 1 Dowl. P.C. 41.

Where the affidavit of debt is in the character of executor, and the process general, the Court will not direct the bail-bond to be delivered up to be cancelled on the ground of a variance. *Italy v. Italy*, 1 Law J. (N.S.) Exch. 96, s. c. 2 C. & J. 330; 2 Tyr. 214; 1 Dowl. P.C. 310.

## 2. BAIL TO THE SHERIFF.

## (A) IN WHAT COUNTY.

A defendant arrested upon an *alias copias*, must put in bail in the county wherein he is arrested. *Rees v. the Sheriff of Essex*, 3 Mo. & Sc. 870.

## (B) OF THE BAIL-BOND.

[See, *ante*, Affidavit to hold to Bail—PLEADING, Plea—PRACTICE, Indorsement on Process.]

An undertaking for a bail-bond given by an attorney to the sheriff, being a mere nullity, an application by the defendant, a feme covert, to set it aside and enter a common appearance, was discharged with costs. *Lewis v. Knight*, 1 Law J. (n.s.) C.P. 90, s. c. 8 Bing. 271; 1 Mo. & Sc. 353.

Bailable process against two, one is arrested, who, with two others, enters into the usual bail-bond to the sheriff, conditioned for the appearance of the party arrested alone. The condition not being fulfilled, the plaintiff in the action takes an assignment of, and sues upon, the bond:—Held, upon general demurrer, that this was not such a variance between the writ and bail-bond as to vitiate the latter. *Grottick v. Phillips*, 2 Law J. (n.s.) C.P. 121, s. c. 9 Bing. 721; 3 Mo. & Sc. 132, 135.

Proceedings on a bail-bond will not be stayed, at the instance of the bail, unless both bail join in the usual affidavit, denying collusion with the defendant. *Dowson v. Cull*, 1 Law J. (n.s.) Exch. 258, s. c. 2 C. & J. 671.

An affidavit to stay proceedings on the bail-bond, on behalf of the defendant, although he is an infant, must state that he has a good defence "upon the merits." *Hallet v. Aubrey & Stone*, 2 Law J. (n.s.) Exch. 149, s. c. 1 Dowl. P.C. 688.

Where a defendant put in bail, who justified by affidavit, but omitted to give four days' notice of justification, pursuant to rule 1, Reg. Gen. Trinity, 1831, and the plaintiff had proceeded on the bail-bond, the Court refused to stay proceedings, upon an application made within twenty days after justification. *Goddard v. Jarvis*, 1 Law J. (n.s.) C.P. 168, s. c. 9 Bing. 88; 2 Mo. & Sc. 169.

This Court will stay proceedings on a bail-bond without an affidavit, stating on whose behalf the application is made, or that the defendant has a good defence on the merits. *Bourne v. Walker*, 3 Law J. (n.s.) Exch. 15, s. c. 2 C. & M. 838; 4 Tyr. 121.

Where the bail apply to stay proceedings on the bail-bond, their affidavit must be conformable to the rule in the Court of King's Bench, Mich. term, 59 Geo. 2; and, therefore, where it stated that the application was made for their own indemnity, instead of *only*, it was held to be insufficient. *Call v. Thelwall*, 4 Law J. (n.s.) Exch. 145, s. c. 1 C. M. & R. 780; 5 Tyr. 231.

The fact that, at the time of an arrest upon a bill of exchange, the bill had been indorsed over in part payment of a debt to other persons, and was in their possession, does not entitle the defendant to have the bail-bond delivered up to be cancelled, if those persons held the bill only as trustees or agents, and were ready, when required, to give it up to the plaintiff for the purposes of the suit. *Stones v. Butt*, 3 Law J. (n.s.) Exch. 135, s. c. 2 C. & M. 416.

Proceedings on a bail-bond will be set aside as irregular, on an affidavit by bail below, stating

merely that the assignment was made, after they had rendered the principal. *Nunn v. Kelly*, 1 Law J. (n.s.) Exch. 257.

The statute, 4 Ann. c. 16, s. 20, does not require that the two witnesses, in whose presence the assignment of the bail-bond is to be attested by the officer by whom it is made, should subscribe at the time of the attestation: and *quare*, whether they need subscribe at all. *Phillips v. Barlow*, 4 Law J. (n.s.) C.P. 138, s. c. 1 Bing. N.C. 433; 1 Sc. 322.

A bail-bond given to the sheriff, on an arrest under a writ of attachment out of the Court of Chancery, is not assignable by the statute 4 & 5 Anne, c. 16, s. 20. *Meller v. Palfreyman*, 2 Law J. (n.s.) K.B. 49, s. c. 1 N. & M. 696; 4 B. & Ad. 146.

After forfeiture and assignment of a bail-bond, time given to the principal, which does not prejudice the bail, is no discharge of the sureties in the bail-bond. *Woomam v. Pryce*, 2 Law J. (n.s.) Exch. 115, s. c. 1 C. & M. 352; 3 Tyr. 375.

"No proper affidavit of debt made and filed," is not a good plea to a declaration in debt by the assignee of a bail-bond. *Hume v. Liversedge*, 2 Law J. (n.s.) Exch. 104, s. c. 1 C. & M. 332; 3 Tyr. 257; 1 Dowl. P.C. 660.

It is sufficient, under the stat. 4 & 5 Anne, c. 16, s. 36, if the assignment of a bail-bond by the sheriff be executed in the presence of two witnesses, and it need not be attested by them as subscribing witnesses. *Phillips v. Barlow*, 6 C. & P. 781.

Where the defendant neglects to put in and perfect bail, and the plaintiff omits to declare within two terms after the return of the writ, he is not out of court, but may take an assignment of the bail-bond. *Carmichael v. Chandler*, 3 Doug. 436.

Where, after an action has been commenced on a bail-bond, proceedings are stayed, and the bail-bond ordered to stand as security, and afterwards a verdict is recovered against the principal, and subsequently principal and bail become bankrupts, and the bail obtain their certificates—the Court, if the bankruptcy is not disputed on the affidavits, will stay the proceedings in the action against the bail on motion.

Where a rule to deliver up the bail-bond to be cancelled, and to enter an *exoneratur*, was obtained by bail, on the ground that they had become bankrupt, and proceedings were ordered to be stayed, the Court refused the costs of shewing cause against the rule to the plaintiff, on the ground that he should have informed the bail that he objected to the terms of the rule, and would agree to a stay of proceedings. *Slatter v. Scott*, 3 Law J. (n.s.) Exch. 150, s. c. 2 C. & M. 475; 4 Tyr. 372.

Where a writ issued against a person of the name of Cocken in the name of Cocker, and it did not appear that he was known so well by one name as by the other—held, that the writ was illegal. And, he having executed a bail-bond in his name of Cocken, reciting, that he had been arrested by the name of Cocker—held, that the bond was invalid.

The plaintiff, in an action on the bail-bond, alleged, that a writ of *capias* issued against the defendant Cocken by the name of Cocker. This was traversed:—Held, that it being proved that the writ did issue against Cocker, and that the defendant was the person intended, the issue ought to have been found for the plaintiff. *Finch v. Cocken*,

4 Law J. (N.S.) Exch. 128, a.c. 2 C. M. & R. 196.

If a defendant having two christian names, is arrested on process describing him by one at full length, and the initial of the other, it is a ground for cancelling the bail-bond. *Ogden v. Barker*, 1 Dowl. P.C. 125.

Notice of render having been given to the plaintiff's attorney, he notwithstanding took an assignment of the bail-bond and commenced proceedings, as no notice of bail had been given, and no entry of the render could be found upon searching the books:—Held, that the proceedings were irregular. *Short v. Doyle*, 4 Dowl. P.C. 202.

After a rule had been obtained for cancelling a bail-bond for a defect in the affidavit to hold to bail, the plaintiff offered to consent to a Judge's order to the same effect, the costs to be costs in the cause, and no action to be brought:—Held, that notwithstanding this offer the defendant was entitled to have his rule made absolute with costs. *Clark v. Crockford*, 3 Dowl. P.C. 693.

Where two or three parties to a bail-bond were sued jointly,—held to be no irregularity. *Knowles v. Johnson*, 2 Dowl. P.C. 653.

Where the principal and bail both became bankrupt, the Court ordered them to be relieved on motion without pleading, though the bail-bond had been ordered to stand as a security. In such case the bail must swear they have obtained their certificates. *Streeter v. Scott*, 2 Dowl. P.C. 362.

Where regular proceedings have been commenced upon a bail-bond, and the defendant has rendered after the time for perfecting bail above, the Court will order the bail-bond to stand as a security under rule 5 Reg. Gen. H.T. 2 Will. 4. *Hodge v. Hopkins*, 1 Dowl. P.C. 431.

*Semble*—that where costs have been incurred by the delay of the defendant in objecting to a defect in the affidavit of debt, the Court will not order the bail-bond to be delivered up to be cancelled, although the defect be in some degree one in substance and not in form. *Morgan v. Bayliss*, 3 Dowl. P.C. 117.

Where a bail-bond is cancelled, the plaintiff is not bound to accept an appearance by the defendant, though the entry of it was mentioned as a condition in the rule nisi. *Ferring v. Turner*, 3 Dowl. P.C. 16.

Where a debtor applied to take the benefit of the Insolvent Act, and one of his creditors, an attorney, by threats of opposition, obtained from him promissory notes for the amount of his debt, and the creditor afterwards indorsed one of them to a *bond fide* holder, without notice of the circumstances under which it had been obtained, and the debtor was afterwards arrested on the note, and he gave a bail-bond, the Court directed the bail-bond to be delivered up to be cancelled on filing common bail. *Kay v. Masters*, 5 Dowl. P.C. 86.

An attorney ought not to prepare a bail-bond for a larger sum than is requisite, according to the practice of the Court. *Wingrave v. Godmond*, 6 C. & P. 66. [Tindal]

If a plaintiff, after making an affidavit of debt, receive part of the debt, and the debt is thereby reduced to an amount insufficient to warrant an arrest, and the defendant is notwithstanding afterwards arrested for the whole debt, the bail-bond

will be ordered to be set aside with costs. *Short v. Cunningham*, 1 Dowl. P.C. 662.

If the *ac etiam* omit the words "on promises," the defendant can be holden to bail to the amount of 40l. only. *Semble*, if he has been holden to bail in a greater amount than 40l., the Court will reduce the recognizance to that sum. *Anonymous*, 1 Dowl. P.C. 155.

A bail-bond, dated the day on which an arrest took place, and shewn to have borne that date on that day, though not executed till the next, was conditioned that the defendant should, within eight days from the date thereof inclusive of the day of such date, cause special bail to be filed in the Exchequer in a certain action, &c., according to the form and practice of the said Court:—Held, in penal actions on 23 Hen. 6, c. 8, for refusing to take bail, that a bail bond with such a condition did substantially comply with the Uniformity of Process Act, 2 Will. 4, c. 39, which by the form in schedule No. 4, requires a defendant, within eight days after executing a *capias* on him, to cause special bail to be put in in the action, at the hazard of the plaintiff's proceeding against the sheriff or on the bail-bond. *Evans v. Mossley*, 3 Law J. (N.S.) Exch. 132, a.c. 2 C. & M. 490; 4 Tyr. 169; 2 Dowl. P.C. 364.

The Uniformity of Process Act, 2 Will. 4, c. 39, sch. No. 4, repeals section 24th of the first general rule of Hilary term, 2 Will. 4; and, therefore, if a party held to bail on a *capias* do not put in special bail within eight days after execution of the process upon him, including the day of such execution, the plaintiff, immediately on the expiration of that time, may put the bail-bond in suit. *Hilary v. Rowles*, 5 B. & Ad. 460.

### (C) RIGHTS OF THE BAIL.

If one of the bail below consents to time being given to the defendant to perfect bail above, his act is binding upon both. *Howard v. Bradberry*, 3 Dowl. P.C. 92.

### 3. OF COMMON BAIL.

Where a defendant has been arrested in an action of trover by a Judge's order, the Court will not enter into the question of merits for the purpose of discharging him, on filing common bail. *Brackenbury v. Needham*, 1 Dowl. P.C. 439.

### 4. BAIL ABOVE.

#### (A) PAYMENT OF MONEY INTO COURT IN LIEU OF.

[See PAYMENT OF MONEY INTO COURT.]

Where money has been deposited in court, instead of putting in and perfecting special bail, pursuant to statutes 43 Geo. 3, c. 46, and 7 & 8 Geo. 4, c. 71, s. 2, and the plaintiff obtains a verdict, he cannot issue execution for the whole sum recovered, but is bound to take the sum deposited out of court, and to limit his execution to the surplus only. *Hewes v. Pyke*, 1 Law J. (N.S.) Exch. 120, a.c. 2 C. & J. 359; 2 Tyr. 313; 1 Dowl. P.C. 322.

*Semble*—that the officer of the court is not entitled to poundage on money paid into court in lieu of special bail, pursuant to 7 & 8 Geo. 4, c. 71.

Where a portion of the money so paid in is detained by the officer as poundage, an application to

take the same out of court must be founded either on an affidavit of circumstances or the Judge's order for payment out of court, and notice of the application should be given to the Treasury. *Haynes v. Nairn*, 2 Law J. (n.s.) Exch. 217.

Where the friend of a party arrested makes a deposit of his own money on the defendant's behalf, in lieu of bail, and the sum is afterwards paid into court to abide the event of the suit, and the defendant then renders, the owner of the money may have it restored to him on motion, under statute 7 & 8 Geo. 4, c. 71, s. 3, if the defendant appears in court and assents. For this purpose the tender is equivalent to putting in and perfecting special bail. *Douglas v. Stanbrough*, 3 Ad. & E. 316.

If a defendant has deposited money in lieu of bail, which the sheriff pays into court, he is entitled to take it out on justifying bail in due time.

If the affidavit, on which such a motion is made, states bail to have been justified, the Court will presume that it has been justified in due time, unless the contrary be shown by the plaintiff. *Young v. Maitby*, 3 Dowl. P.C. 604.

Where money has been paid into court in lieu of bail, the plaintiff, on moving to have it paid out to him, is entitled to the costs of the application. *Freeman v. Paganini*, 4 Mo. & Sc. 165.

Where money is paid into court, under the 7 & 8 Geo. 4, c. 71, in lieu of bail, application to take it out must be made before issue joined. *Hanwell v. Ware*, 2 Dowl. P.C. 165; *s. v. Ferral v. Alexander*, 1 Dowl. P.C. 122.

#### (B) WHO MAY AND MAY NOT BE BAIL.

A lodger, in England, possessed of a house in Scotland, cannot justify as bail. *Anonymous*, 1 Dowl. P.C. 61.

The domestic servant of a foreign ambassador cannot become bail. *Lock's Bail*, 1 Dowl. P.C. 124.

The acceptor of a dishonoured bill of exchange is not competent to become bail in an action against the drawer. *Anonymous*, 1 Dowl. P.C. 183.

A leaseholder, not a housekeeper or a freeholder, cannot justify as bail. *Smith's Bail*, 1 Dowl. P.C. 1.

#### (C) PUTTING IN.

The 14th section of the 2 Will. 4, c. 39, Uniformity of Process Act, in conjunction with the form given of the writ of *capias*, in schedule No. 4, which requires the defendant, within eight days after the execution of the writ, inclusive of the day of such execution, to cause special bail to be put in, and the rule of Easter term, 49 Geo. 3, controul the 14th rule of Hilary term, 2 Will. 4, which directs, that in case of country bail the bail-piece shall be transmitted and filed within eight days, unless the defendant reside more than forty miles from London, and, in that case, within fifteen days after the taking thereof.

Therefore, where defendant, residing more than forty miles from London, put in special bail within eight days, but did not give notice as required by the rule of Easter term, 49 Geo. 3, until afterwards, and the plaintiff took an assignment of the bail-bond upon motion to set aside the proceedings,—Held, that bail was not properly put in, but the Court made the rule absolute, upon terms, as the defendant was misled by the discrepancy between

the rule of Hilary term, 1832, and the statute 2 Will. 4, c. 39. *Grant v. Gibbs*, 4 Law J. (n.s.) C.P. 150, a.c. 1 Sc. 390.

Where bail was put in this form:—"Ely by Cole," the former not being an attorney of this court, though the latter was, the proceedings were held to be informal; but time was given to amend. *Marden's Bail*, 3 Dowl. P.C. 654.

#### (D) NOTICE OF BAIL AND OF JUSTIFICATION.

If notice of country bail is given, who are to justify pursuant to the old practice, the four days' notice required by 1 Reg. Gen. T. T. 1 Will. 4, need not be given. *Hardbottle v. Clark*, 4 Dowl. P.C. 12.

The rules of Trinity term, 1 Will. 4, as to bail, apply equally to town and country bail. *Anonymous*, 1 Mo. & Sc. 296.

4 Reg. Gen. T. T. 1 Will. 4, which entitles defendants to have the recognizance entered into, under Rule 3, if no exception be entered by the plaintiff, out of court, without further justification, does not apply to the case of a prisoner. *Webb's Bail*, 1 Dowl. P.C. 446.

The rules of T. T. 1 Will. 4, requiring four days' notice of bail, do not apply to the case of a prisoner. *King's Bail*, 1 Dowl. P.C. 509.

Where the defendant is a prisoner, a notice of putting in and justifying bail at the same time must state, that the defendant is a prisoner. *Crichton's Bail*, 1 C. & M. 335, s.c. 1 Dowl. P.C. 609.

A two days' notice of justification, by a prisoner, accompanied by an affidavit, according to the rule of Trinity term, 1 Will. 4, is bad, unless it expresseth that he is a prisoner. *Bullen's Bail*, 3 Dowl. P.C. 422; *s. v. Fuller's Bail*, 5 Tyr. 491.

A notice of bail by a prisoner need not state, that he is a prisoner, if it be signed by him as "the defendant in custody." *Frith's Bail*, 3 Law J. (n.s.) Exch. 36.

Before the new rule, T. T. 1 Will. 4, a prisoner might put in and justify bail at the same time, upon a two days' notice of putting in and justifying.

Such right is not affected by the new rule, "that a defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose;" as this is an enabling, and not a disabling rule. *Davies v. Gray*, 1 Law J. (n.s.) Exch. 80, a.c. 2 C. & J. 309; 2 Tyr. 277.

A notice of bail need not state, that the bail have resided during the last six months at the place of residence mentioned therein. *Warre's Bail*, 1 Law J. (n.s.) Exch. 65, a.c. 2 C. & J. 54; 2 Tyr. 158.

A notice of bail put in merely for the purpose of rendering the defendant, is not necessary. *Wilson v. Griffin*, 1 Law J. (n.s.) Exch. 217, a.c. 2 C. & J. 683.

Where an attorney of the court allows another attorney to use his name, the notice of bail must be signed in the name of the former. *Chadwick v. Hoagh*, 4 Law J. (n.s.) Exch. 156, a.c. 2 C. M. & R. 164.

Where the notice of bail omitted to describe the bail as householders or freeholders:—Held, that under the rule of Trinity 1831, the plaintiff was not authorized to take an assignment of the bail-bond; but that the objection should be taken when the bail come up to justify. *Bell v. Foster*, 1 Law J. (n.s.) C.P. 69, a.c. 3 Bing. 334; 1 Mo. & Sc. 518.

Bail having had two residences within six months,

must be described of both, *Grant v. Smeets*, 3 Law J. (n.s.) Exch. 212.

If a bail have two places of residence, it is only necessary under Reg. Gen. T. T. 1 Will. 4, to give one of them in the notice. *Anonymous*, 1 Dowl. P.C. 159; s. p. *Fortescue's Bail*, 2 Dowl. P.C. 641.

The residence of a bail is sufficiently described by stating it to be at a place well known, as a village, without mentioning any street in it. *Smith's Bail*, 1 Dowl. P.C. 499.

The name of a township without the name of a street stated to be in a certain parish, named in the notice of bail is sufficient. *Lanyon's Bail*, 3 Dowl. P.C. 85.

The objection to a notice of bail, that the number of the street is not stated, must be taken in the first instance, and it is waived by obtaining time to inquire, unless it is sworn that the bail's residence cannot be found. *Pester's Bail*, 2 Dowl. P.C. 586.

A notice of bail did not state the numbers of the houses where the bail resided; upon which ground, the bail having been found and being sufficient, the plaintiff had the costs of his appearance to oppose. *Janis v. Smith*, 2 C. & J. 634.

Consequence of omitting the number of the house of a bail residing in a place where the houses are numbered. See *Muir v. Smith*, 2 Tyr. 742.

A notice of justification, which stated that the bail had resided for the last six months at the parish of W, without stating the street, &c., held bad. *Hammell's Bail*, 3 Dowl. P.C. 425.

It is not necessary that a bail should sleep in the house described in the notice of bail as his residence. *Thomson's Bail*, 1 Dowl. P.C. 497.

A notice of justification, stating that the bail has, "within the last six months, resided," &c., is not sufficient under Reg. Gen. T. T. 1 Will. 4, s. 2. *Jackson's Bail*, 1 Dowl. P.C. 438.

A notice of bail, setting forth that the bail has resided "within" the last six months at the place therein mentioned, is good, if accompanied by an affidavit, stating, according to the form prescribed by rule T. T. 1 Will. 4, that the bail has resided there for the last six months. *Ward's Bail*, 2 Law J. (n.s.) Exch. 8, s. c. 1 C. & M. 28; 3 Tyr. 208.

Under rule 2, T. T. 1 Will. 4, the actual, and not the constructive residence of the bail, must be stated. *Thomson v. Smith*, 1 Dowl. P.C. 340.

It is sufficient, under the rules of T. T. 1 Will. 4, to state the residence of the bail for the last six months in the notice of bail, without repeating it in the notice of justification. *Higgs's Bail*, 1 Dowl. P.C. 124.

A notice of bail, omitting to state the residence of the bail "for the last six months," is an irregularity of which the Court will take notice, though the bail be unopposed. *Sywood v. Dogherty*, 1 Sc. 79, s. c. 3 Dowl. P.C. 116.

An informality in the notice of bail, in omitting to mention where the bail have resided within the last six months, and whether they are housekeepers or freeholders, does not entitle the plaintiff to treat the notice as a nullity. *Re v. the Sheriff of Middlesex*, 2 Law J. (n.s.) Exch. 234, s. c. 1 C. & M. 482; 3 Tyr. 440; 2 Dowl. P.C. 5.

To describe bail as "jewellers," when they are merely clerks in a jeweller's shop, is a misdescription. *Hamlet's Bail*, 1 Dowl. P.C. 501.

One of the bail, carrying on the business of a Scotch ale agent, was described in the notice of bail as a "gentleman":—Held, a substantial misdescription. *Flemming's Bail*, 1 C. & M. 111, s. c. 1 Dowl. P.C. 641.

"Manufacturer" is a bad description of bail. *Fearnley's Bail*, 1 Dowl. P.C. 40; see also, as to the description of bail, *Anonymous*, 2 Law J. (n.s.) Exch. 7, where bail was rejected on a misapplication of the term "gentleman" as a description. See, post (E), Justifying and opposing, *Wood v. Ray*.

By the rules of T. T. 1 Will. 4, it is only necessary in the notice of bail to state the residence of bail for the last six months, without going on to state that the bail has resided there for that period; but it must state the bail to be a housekeeper, or a freeholder, although accompanied by the affidavit under rule 3, T. T. 1 Will. 4. *Anonymous*, 1 Dowl. P.C. 160.

Omission in the notice of bail to describe the bail as housekeepers, and freeholders, does not, under the rule of Trinity term, 1831, authorize the plaintiff to take an assignment of the bail-bond. The objection should be made when the bail come up. *Bell v. Foster*, 1 Dowl. P.C. 271.

1 Reg. Gen. T. T. 1 Will. 4, as to giving four days' notice of justification, only applies where the bail justify at time of putting in. *Jones's Bail*, 2 Dowl. P.C. 159.

The plaintiff has no right to treat a notice of bail as a nullity, for omitting to follow the usual form, by stating that "the bail piece has been filed with the filacer."

In future, the notice of bail, in this court, in a town cause, need not contain such statement. *Wigley v. Edwards*, 3 Law J. (n.s.) Exch. 10, s. c. 2 C. & M. 320; 4 Tyr. 235.

After a deposit for costs of former notices of bail, it is too late to object that the notice on which bail come up to justify has been given by a different attorney, without an order to change the attorney. *Whell v. Lockett*, 2 Law J. (n.s.) Exch. 23.

Where plaintiff gave a notice of exception to bail, and the defendant gave a notice of justification,—held, that the defendant was bound to justify, though, in fact, no exception was entered in the bail-book. *Wait v. Hammell*, 4 Law J. (n.s.) Exch. 80, s. c. 3 Dowl. P.C. 425.

Added bail may justify on a two days' notice; as rule 1, Trinity term, 1 Will. 4, which requires four days' notice of justifying bail, at the same time at which they are put in, only applies where no bail have originally been put in.

Where, after such a notice, the order to change the bail has not been made until the morning of justification, the Court will give time to inquire into the sufficiency of the bail, but not the costs of the day, in appearing to oppose. *Perry's Bail*, 1 Law J. (n.s.) Exch. 149, s. c. 2 C. & J. 475.

Time allowed to give a fresh notice of putting in and justifying bail, where the notice to put in and justify on Wednesday was not served before eleven o'clock on the preceding Saturday. *Jenkins v. Malkby*, 1 Law J. (n.s.) Exch. 69, s. c. 2 C. & J. 124.

Bail not allowed to justify, though in the case of a prisoner, where notice of justification was served between the Thursday next before, and the Wed-

nesday next after Easter Day. *Jolliffe v. Pullen*, 4 Law J. (N.S.) C.P. 189, s. c. 1 Sc. 538.

A notice to justify at eleven, all parties appearing at ten:—Held, sufficient.

An affidavit of notice of justification, which omitted to state where the bail resided for the last six months, and also whether they were householders or freeholders,—held, not to be cured by the affidavit of justification according to the old rules, though it contained those requisites, and time to amend was refused, the bail having been put in too late, and also the costs of opposition. *Beal's Bail*, 3 Dowl. P.C. 708.

Notice of justification of bail, where further time has been obtained, must be given before three o'clock on the day the order is made. *Newton's Bail*, 4 Dowl. P.C. 270.

Where a defendant omits to give notice of justification, as required by 1 Reg. Gen. T. T. 1 Will. 4, the plaintiff has twenty days to except, as under the old practice. *Goddard v. Jervis*, 1 Dowl. P.C. 278.

#### (E) JUSTIFYING AND OPPOSING.

Although bail are unopposed, the Court will not allow them to justify, if it has been satisfied in a previous case that they are unfit. *Laporte's Bail*, 3 Dowl. P.C. 110.

As to justifying bail, who had made an affidavit, under Reg. Gen. T. T. 1 Will. 4, but omitted to state they were housekeepers. *Martin v. Gell*, 2 Tyr. 166.

One who has taken the benefit of the Insolvent Act, and not paid all his creditors, cannot justify. *Clarke's Bail*, 2 Law J. (N.S.) Exch. 7.

One who had been lately paying a debt of 6s. 6d. by instalments of 6d. was rejected. *Paul's Bail*, 2 Law J. (N.S.) Exch. 8.

A copyright in a published work is a species of property, in respect of which bail may justify. *Anon.* 2 Law J. (N.S.) Exch. 8.

Keeping a brothel is not of itself a ground for rejecting bail. *Gouge's Bail*, 3 Dowl. P.C. 320.

Keeping a gambling-house is not a ground for rejecting bail; and, if allowed, it is not a ground for refusing the defendant costs of justification, under rule 8, Reg. Gen. T. T. 1 Will. 4. *Anonymous*, 1 Dowl. P.C. 160.

A bail who expects the attorney for the defendant to indemnify him, though he has received no undertaking to that effect, cannot justify. *Anonymous*, 1 Dowl. P.C. 1.

Where proceedings have been taken on the bail-bond, before the bail come up to justify, the payment of those costs cannot be insisted on as a preliminary objection. *Wilson's Bail*, 1 Dowl. P.C. 614.

Rule 8 of Trinity term, 1 Will. 4, applies to country as well as town bail. *Grant's Bail*, 1 C. M. & R. 598, s. c. 4 Tyr. 227.

Where one of the bail put in for prisoner justifies, time must be granted for justifying another; if neither justified, it would not have been necessary. *Fry's Bail*, 2 Dowl. P.C. 442.

In an action against several, it is no objection to the notice of justification that it states, that the bail will justify for three, bail for two only having been put in. *Penning's Bail*, 1 Dowl. P.C. 2.

Where a poor defendant was arrested for 700l. the Court granted a rule to justify three bail instead of one. *Lucas v. Edwards*, 1 Dowl. P.C. 80.

A defendant had leave to add another bail, on condition of making an affidavit of merits, which he did, but pleaded a plea by which the merits could not come in question. This was held not to be a virtual breach of the condition. *Rees v. Kingston*, 3 Dowl. P.C. 158.

Although bail have justified without opposition, they will not be allowed to pass, if the notice of bail does not state their place of residence, pursuant to rule 2, T. T. 1 Will. 4. The Court, however, will give leave to amend the notice. *Welsh v. Lynwood*, 4 Law J. (N.S.) C.P. 61, s. c. 1 Bing. N.C. 258.

The proviso in section 11 of stat. 2 Will. 4, c. 39, as to the interval between the 10th of August and the 24th of October, applies only to the filing or delivering of declarations and pleadings after declaration; and, therefore, a defendant arrested in that interval must put in and justify bail in the same manner as during any other part of the vacation. *Rees v. the Sheriff of Middlesex*, 3 Law J. (N.S.) Exch. 59, s. c. 2 C. & M. 333; 4 Tyr. 60.

An affidavit of justification of country bail, stating that they are "possessed of" property to the requisite amount, is insufficient, as rule 19, Hil. term, 2 Will. 4, requires that the affidavit shall state that they are "worth" that amount. *Rogers v. Jones*, 3 Law J. (N.S.) Exch. 100, s. c. 1 C. & M. 323; 3 Tyr. 256; 1 Dowl. P.C. 704.

An affidavit of justification of bail, which does not state of what the deponent's property consists, as well as the amount of all sums for which he is bail, as set forth therein, as also the amount required to be sworn to as bail in the action, according to the form directed by rule 3, T. T. 1 Will. 4, and also where such property is situated, is insufficient.

But time given, on a justification of country bail, to amend such affidavit, on payment of costs by the defendant, and putting the plaintiff in the same situation thereon as if the affidavit had been correct, and the bail allowed in the first instance. *Darling v. Hutchinson*, 1 Law J. (N.S.) Exch. 150, s. c. 2 Tyr. 491; 2 C. & J. 487.

An affidavit of justification, stating that bail are "possessed" of, instead of "worth," the requisite amount, is insufficient. *Simpson's Bail*, 2 Law J. (N.S.) Exch. 7, s. c. 1 Dowl. P.C. 605.

The affidavit of sufficiency made by bail, pursuant to the rules of Trinity term, must state the bail to be "worth," and not "possessed of," the required sum. *Harrison's Bail*, 2 Dowl. P.C. 198.

An affidavit of justification of bail, which merely states the bail "possessed" instead of "worth," not allowed to be amended. *Naylor's Bail*, 3 Dowl. P.C. 452.

An affidavit of justification stated the deponent to be possessed of a certain sum "over and all above his just debts:"—Held, sufficient. *Housley v. Boyd*, 1 Sc. 698.

"He's" is sufficient, in an affidavit of justification, instead of "he is." *Lanyon's Bail*, 3 Dowl. P.C. 85.

Where a bail swears, under rule 3, T. T. 1 Will. 4, "that he is not bail for any," without adding "other person," it is sufficient. *Smith's Bail*, 1 Dowl. P.C. 614.

Bail must swear themselves "housekeepers,"—swearing themselves "householders" is not sufficient. *Anonymous*, 1 Dowl. P.C. 127.

Country bail, stating himself to be a housekeeper at a place named, but not that he was resident there, allowed without costs. *Bailey v. Heald*, 5 Tyr. 231.

The affidavit of justification must agree with the form; it is not sufficient that it is equivalent. *Okill's Bail*, 2 Dowl. P.C. 19.

"Gentleman" is a good description of a clerk in the Post Office.—[And see *ante*, Notice of Bail, 2 Law J. (N.S.) Exch. 7.]

The place where the affidavit of justification was sworn need not be mentioned. *Wood v. Ray*, 2 Dowl. P.C. 692.

If a bail justify by affidavit, in pursuance of the new rules of Trinity term, 1 Will. 4, the notice must be accompanied either by the original affidavit or by a copy, purporting to be a copy. *West v. Williams*, 1 Dowl. P.C. 162.

An affidavit of justification must state where the property of the bail is situate. *Anonymous*, 1 Law J. (N.S.) Exch. 148.

An affidavit of justification, which stated that the property of the bail consisted of household furniture, was held not to be sufficient, without stating where the property was. *Cooper's Bail*, 3 Dowl. P.C. 692.

It is not enough, in the affidavit of sufficiency, according to the rules of T. T. 1 Will. 4, that the bail should describe himself as possessed of "money in the funds," without stating in what fund it is. *Anonymous*, 1 Dowl. P.C. 159.

Though the form of the affidavit to be made by bail according to the new rules of T. T. 1 Will. 4, is several, it may be made jointly. *Anonymous*, 1 Dowl. P.C. 115.

An affidavit by country bail, purporting to be according to the rules of T. T. 1 Will. 4, and not containing all its requisites, is good, if it be sufficient according to the old rules. *Anonymous*, 1 Dowl. P.C. 115.

It is sufficient for a bail to swear to property over and above "what will pay his just debts;" "debts," without describing them as "book debts," is sufficient; "yeoman" is a good description of a bail. *Lanyon's Bail*, 3 Dowl. P.C. 85.

#### (F) ALLOWANCE OF.

Where a bail has misdescribed his place of residence on justification, but has been allowed to pass, the Court will not set aside the rule for the allowance of the bail, but he may be indicted for perjury. *Regiefeld v. Stephens*, 2 Dowl. P.C. 438.

#### (G) COSTS.

Costs of justification will sometimes be refused, although the bail have passed. *Thompson's Bail*, 1 Dowl. P.C. 497.

Where there is a defect in the notice of bail, and further time is given to inquire as to them, and they ultimately justify, the defendant is not entitled to the costs of justification. *Anonymous*, 1 Dowl. P.C. 126.

The plaintiff's costs of inquiries after sufficiency of bail are costs in the cause. *Paine v. Munton*, 2 Tyr. 162.

If a plaintiff alarm bail who have been put in, and thus prevent them from justifying, the Court will compel him to pay the costs of putting them in. *Gwynne v. Fuller*, 1 Dowl. P.C. 444.

Costs of opposition, on technical grounds, are not allowed. *Hanwell's Bail*, 3 Dowl. P.C. 425.

In order to obtain costs in justifying bail, an application should be made at the time of justification. *Freem v. Best*, 2 Dowl. P.C. 590.

Rule of court, T. T. 1 Will. 4, directs, that if the notice of bail shall be accompanied by an affidavit of each of the bail, and if the plaintiff afterwards except to the bail, he shall, if they are allowed, pay the costs of justification:—Held, where the plaintiff was served with notice of bail, and with a copy of the affidavit of the bail, which did not purport on the face of it to be a copy, or state where the original was filed, and he afterwards excepted to them, that he was not bound, on the bail being allowed, to pay the costs of justification. *West v. Williams*, 3 B. & Ad. 345.

Costs of bringing bail up to justify allowed, where they have given notice of putting in and justifying at the same time, accompanied by an affidavit of justification, and after exception attend to justify, and are not opposed. *Bowman v. Russell*, 2 Tyr. 744.

Bail coming up a second time to justify, must pay or deposit the costs of a former unsuccessful attempt; and where costs are payable, the defendant's being in prison will not excuse him from payment. *Passmore's Bail*, 3 Dowl. P.C. 214.

The costs for opposing bail, who have complied with rule 3, T. T. 1 Will. 4, but are rejected, are granted as a matter of course to the plaintiff, unless some very strong ground is shewn, on the part of the defendant, for putting in bail who could not justify. *Evans's Bail*, 1 Dowl. P.C. 384.

Where the property, of which the bail describes himself possessed in his affidavit, according to the third rule of T. T. 1 Will. 4, is insufficient, the Court will not allow him to justify, without payment by the defendant of the costs of opposition, although possessed of sufficient other property. *Jackson's Bail*, 1 Dowl. P.C. 172.

Where bail were rejected, on the ground of a defect in the affidavit of justification, in omitting to describe the bail as housekeepers or freeholders, the Court refused to allow the plaintiff the costs of his opposition, or of the opposition to a former justification, on the ground of a defective notice. *Kibble v. Thorburn*, 2 Mo. & Sc. 359.

An affidavit of justification of bail stated, that the bail was a housekeeper at S., but did not state that he resided there:—Held, that this was a sufficient deviation from the form given by the rule of T. T. 1 Will. 4, to deprive the defendant of the costs of justification. *Heald's Bail*, 3 Dowl. P.C. 423.

If time to justify bail be granted, the defendant must pay the plaintiff's costs of attending to oppose. If the copy of the affidavit of sufficiency served on the plaintiff do not purport to be a copy, or do not state the names of the parties and the sums in the actions in which they are already bail, or the names of the occupants and numbers of the houses stated by the bail to be in their possession, these defects are not grounds for rejecting the bail, but for disallowing the defendant his costs of justification. *De Bode's Bail*, 1 Dowl. P.C. 368.

When bail cannot justify in respect of the property described in the affidavit of justification, but are allowed to pass, on justifying for other property, the plaintiff is entitled to the costs of the opposition. *Hemming v. Blake*, 1 Dowl. P.C. 179.

Where a bail, having made the affidavit required by rule 3, T. T. 1 Will. 4, justifies after exception, although the plaintiff does not appear to oppose, the defendant is still entitled to the costs of the justification. *Johnson's Bail*, 1 Dowl. P.C. 514.

Where the affidavit of the bail put in at chambers is defective, but a correct one is put in, in court, on the day of justification, the defendant shall not pay or receive the costs. *Popjoy v. Saunders*, 4 Law J. (N.S.) Exch. 1, s. c. 1 C. M. & R. 594; 5 Tyr. 196.

Where the affidavit of justification of bail set forth their residence and property, but did not state where the property was situate, according to the form in the rule 7, 1 Will. 4:—Held, that the defendant was not entitled to the costs of justification. *Hodgson v. Cooper*, 4 Law J. (N.S.) Exch. 177, s. c. 1 C. M. & R. 43.

#### (H) CHANGING.

The rule of 5 Reg. Gen. T. T. 1 Will. 4, as to changing bail, does not apply to the case of a prisoner. *Bird's Bail*, 2 Dowl. P.C. 583.

The fifth rule of T. T. 1 Will. 4, which prohibits the changing of bail without leave of the Court or a Judge, applies to the case of bail put in by the sheriff, for the purpose of rendering the defendant. *Rex v. the Sheriff of Middlesex*, 4 Mo. & Sc. 247.

An affidavit, that the party did not procure sufficient bail, because he expected to settle the cause, is not a sufficient reason to entitle him to change his bail. *Orchard v. Glover*, 9 Bing. 818, s. c. 2 Mo. & Sc. 396.

Bail allowed to be changed, by reason of the defendant's attorney not having had time to obtain the names of good bail, on payment of costs of changing the bail, and putting the plaintiff in the same situation as if the bail had been good in the first instance. *White v. Minn*, 1 Law J. (N.S.) Exch. 33, s. c. 2 C. & J. 54.

#### (I) LIABILITY OF.

If the principal die after the return of the *ca. sa.* and before it is filed, the bail are fixed. *Field v. Lodge*, 3 Doug. 410.

Where a defendant is held to bail in an action of tort, the bail are only liable, as for damages, to the extent of sum in which he is held to bail, though more be given by the jury, but they are liable beyond that sum to the full taxed costs: *Peterkin v. Sampson*, 4 Doug. 17.

If two persons enter into a recognizance as bail for any certain sum, e. g. 100*l.*, the responsibility of both together is limited to such sum. The plaintiff cannot claim such sum from each individually, though his costs may far exceed the amount. *Vansandau v. Nash*, 3 Law J. (N.S.) C.P. 58, s. c. 10 Bing. 329; 3 Mo. & Sc. 334.

#### (K) PROCEEDINGS AGAINST BAIL.

[See PRACTICE, Common Law; Proceedings, when set aside.]

Judgment cannot be signed on a *sci. fa.* against bail resident out of the county of Middlesex, unless they have received notice of the proceedings, or attempts have been made to give such a notice. *Wimall v. Cook*, 2 Dowl. P.C. 178.

Though two writs of *sci. fa.* on a judgment have been issued previously to the rule of H. 2 Will. 4, which requires notice to be given to the bail, still

judgment cannot be signed, on such writs of *sci. fa.* without complying with that rule; and giving a rule for appearance is not sufficient. *Kennedy v. Lord Oxford*, 1 Dowl. P.C. 613.

If a defendant consents that a plaintiff shall have judgment as of a term previous to the trial, in proceeding against the bail, the *ca. sa.* may be tested as of the previous term. *Hooenden v. Crowther*, 1 Dowl. P.C. 170.

In a case arising before the new rules H. T. 2 Will. 4, this Court stayed proceedings in an action on a recognizance of bail, (where the action against the original defendant was by bill,) on payment of double the sum sworn to, and costs of the action against the bail. *Blaney v. Holt and Pardell*, 5 B. & Ad. 241, s. c. 3 N. & M. 539.

Where several attempts were made to summon a defendant on a *sci. fa.* returnable on the 28th of April, and eight days had elapsed after the return of the writ, an application on the 5th of November to sign judgment was held too late, without summoning the defendant again. *Wood v. Mosely*, 1 Dowl. P.C. 518.

The rule H. T. 2 Will. 4, s. 81, as to *sci. fa.* applies to the case of both principal and bail. *Jackson v. Elam*, 1 Dowl. P.C. 515.

A *sci. fa.* should lie four juridical days in the sheriff's office. *Fraser v. Miller*, 1 Dowl. P.C. 141.

In all proceedings by *scire facias*, Sunday is not to be reckoned. *Anonymous*, 1 Dowl. P.C. 142.

Holy Thursday not being a juridical day, cannot be reckoned as one of the four clear days for a *sci. fa.* against bail to lie in the office. *Scott v. Larkins*, 1 Dowl. P.C. 202.

A *sci. fa.* against bail may be tested after the return day of the *ca. sa.* against the principal. The four days during which a *sci. fa.* against bail must lie in the sheriff's office need not be in term. *Sandland v. Claridge*, 1 C. & M. 672, s. c. 3 Tyr. 804; 2 Dowl. P.C. 115.

Proceedings against bail are irregular, if the defendant has procured the *ca. sa.* against the principal to be returned *non est inventus*, knowing that the defendant is in custody of the sheriff, although by a different name. *Briggs v. Richardson*, 2 Dowl. P.C. 158.

The Court will not allow judgment to be signed for non-appearance to a *sci. fa.* against bail, unless it is shewn that the bail have been summoned, or that efforts, and what efforts, have been made to summon them. *Higgins v. Wilkes*, 1 Dowl. P.C. 447.

Since the Uniformity of Process Act, it is irregular for a *sci. fa.* to recite the action as commenced "by bill," if it has been commenced by summons.

It is irregular in *sci. fa.* to state the bail to have been put in on a day previous to the issuing of the writ.

It is an immaterial objection to a *sci. fa.*, that it is tested on the 3rd of November, and returnable on the 15th of November "next coming." *Peacock v. Day*, 3 Dowl. P.C. 291.

In *scire facias* against bail, the summons may be served at any time before the rising of the Court on the return day; and therefore, service of the summons after eight o'clock on the evening before the return day, is no irregularity. *Lewis v. Pine*, 2 Law J. (N.S.) Exch. 294, s. c. 1 C. & M. 771; 3 Tyr. 867; 2 Dowl. P.C. 133.

The Court will not give leave to sign judgment,



for non-appearance to a *scire facias* against bail, on a summons of one who is resident in Middlesex, unless the other, who does not reside in that county, has had notice of the proceeding. *Newton v. Maxwell*, 1 Law J. (N.S.) Exch. 230, a. c. 2 C. & J. 215; 1 Dowl. P.C. 315.

An executor is not entitled to a rule absolute in the first instance for a *scire facias*, under statute 8 & 9 Will. 3, c. 11, s. 6, on an interlocutory judgment more than twenty years old. *Brown v. Evans*, 1 Law J. (N.S.) Exch. 168.

(L) RENDERING AND ENTERING AN EXONERATUR.

A defendant having been arrested in the country, and bailed, was declared a bankrupt, and allowed until after the time for rendering him to pass his final examination; the Court enlarged the time to render until four days after the final examination of the bankrupt, but required an affidavit that it would be inconvenient for the commissioners to attend at the county gaol or in London, to take the bankrupt's final examination. *Harris v. Alcock*, 2 C. & J. 486, a. c. 2 Tyr. 448; 1 Law J. (N.S.) Exch. 112; 1 Dowl. P.C. 658.

This Court will enlarge the time for rendering a defendant who has become bankrupt, at the instance of the bail, as well in the case of a town as a country fiat. *Ruston v. Greene*, 3 Law J. (N.S.) Exch. 174; 2 Dowl. P.C. 617.

Where the principal has been committed to prison by commissioners of bankrupt, the bail may move to enlarge the time to render before justification. *Gibson v. White*, 1 Law J. (N.S.) Exch. 69, a. c. 2 C. & J. 85; 2 Tyr. 162.

In the case of a London commission the Court will not enlarge the time for the render of the principal, until after his final examination before the commissioners. *Coombs v. Dodd*, 3 Mo. & Sc. 817.

Although a bail-bond is given, a render may be accepted at any time within eight days from the time of the arrest. *Turner v. Brown*, 2 Dowl. P.C. 547.

Where the sheriff has put in bail above in order to render, and has obtained a Judge's order for rendering at the instance of himself and bail, (see 11 Geo. 4. & 1 Will. 4, c. 78, s. 21.) that order will not be rescinded, though it might be amended by striking out all which shewed it to be granted at the sheriff's instance. *Scoble*, the notice of render should not be stated to be signed by any person as attorney to the sheriff. *Green v. Jacobs*, 3 Tyr. 231.

Time enlarged for bail to render their principal, under imprisonment in a county gaol for eighteen months, pursuant to a sentence of the Court of King's Bench on convictions for libels, until a week after his imprisonment under such sentence had expired. *Campbell v. Ackland*, 2 Law J. (N.S.) Exch. 9, a. c. 1 C. & M. 73; 3 Tyr. 230; 1 Dowl. P.C. 635.

Where the principal has become bankrupt, and is in criminal custody in Newgate, under a committal by a commissioner for not answering satisfactorily, this Court, at the instance of the bail, will stay the proceedings in an action against the bail, and enlarge the time for rendering until a day certain in the next term, on payment of costs; but they will not enlarge the time until the bankrupt has passed his last examination. *Wough v. Ashford*, 4 Law J. (N.S.) C.P. 62, a. c. 1 Bing. N.C. 294; 1 Sc. 167.

Since stat. 2 Will. 4, c. 89, a writ of *capias* is returnable immediately. A defendant, after having given a bail-bond to the sheriff, cannot, within eight days of the arrest, surrender in discharge of his bail. *Hodgson v. Mes*, 4 Law J. (N.S.) K.B. 266, a. c. 6 N. & M. 302.

(M) DISCHARGE OF, BY OTHER MEANS THAN RENDER.

Where, in the course of a cause, an order was made for taxing the bill on which the action was brought, and which by mistake was drawn up as a stay of proceedings:—Held, that the bail could not avail themselves of that order, as a giving of time, so as to discharge them.

An agreement between the plaintiffs and defendant, that the plaintiffs' bill should not be taxed,—held, not binding upon the bail. *Wooman v. Wood*, 1 Dowl. P.C. 681.

Where bail have consented that a stay of execution in the action against their principal, shall not affect their liability for debt and costs, and, when sued on their recognizance, pleaded a sham plea, and have not come in the first instance, the Court will not permit an *exoneretur* to be entered on the bail piece, on the ground of an alleged variance between the declaration and the affidavit to hold to bail in the original action. *Coppin v. Potter Macqueen*, 1 Sc. 372.

If plaintiff, at defendant's request, accepts without opposition bail named by the defendant, defendant cannot afterwards move to discharge the bail, on the ground of a defect in the affidavit of debt. *Mammatt v. Mathew*, 10 Bing. 806, a. c. 4 Mo. & Sc. 356.

An application by bail to enter an *exoneretur*, on the ground of a variance between the affidavit of debt and the declaration,—held too late, where one of the bail was the attorney in the cause, and a cognovit had been given after declaration, upon which judgment had been entered up; and, in an action against the bail, they had pleaded *non tunc* record, and a day had been given to produce the record. *In re Beavan*, 4 Law J. (N.S.) C.P. 122, a. c. 1 Bing. N.C. 443; 1 Sc. 372.

A and B enter into a recognizance of bail for the defendant, then in prison at the suit of the plaintiff. Upon his liberation, the plaintiff agrees to grant him time, upon his giving a cognovit, with stay of execution, until a certain day, provided the bail consent to the arrangement. They do so, making it a condition that they are not to be prejudiced. The plaintiff sues out a writ of *ca. sa.* against the defendant, which is returned *non est inventus*. But of this he does not inform the bail, neither does he give them notice of the cognovit remaining unsatisfied:—Held, under these circumstances, upon the death of the defendant and notice by plaintiff that he held the bail liable, that the bail were entitled to have an *exoneretur* entered upon the recognizance. *Surman v. Bruce*, 3 Law J. (N.S.) C.P. 144, a. c. 10 Bing. 433; 4 Mo. & Sc. 184.

A mere honorary obligation on the part of a plaintiff not to press a defendant for payment of debt and costs, is not such an indulgence to him as will release his bail. *Ladbroke v. Hewett*, 1 Dowl. P.C. 438.

An unprivileged person in custody in execution, elected a member of Parliament, is entitled to his

discharge on motion; and, therefore, bail may have an *exoneretur* entered on the bail piece, if the privileged person be elected between perfecting bail and final judgment. And this was allowed, although a *cognovit* had been given with the express consent of the bail; and the plaintiff, had he not taken the *cognovit*, might have compelled a render before the defendant acquired privilege. *Phillips v. Wellesley*, 1 Dowl. P.C. 9.

Bail are discharged by time being given to their principal without their consent, although they may not have been damnified. *Hannington v. Beare and Another*, 4 Dowl. P.C. 256.

If a defendant against whom judgment has been recovered, afterwards become bankrupt, and obtain his certificate within fourteen days of service of process upon his bail, the bail are entitled, under the general rule of 17th June, 1833, to have proceedings against them stayed, though no notice be given to the plaintiff, or application made to stay such proceedings till after the expiration of the fourteen days. *Jones v. Ellis*, 1 Ad. & E. 382.

Where plaintiff arrests defendant on a *copias*, in an action on promises, and declares in covenant, the Court, since the act, 2 Will. 4, c. 89, will set aside the declaration, but will not discharge the bail. *Ward v. Tummon*, 1 Ad. & E. 619, s.c. 3 N. & M. 376.

Where, in an action by original, the damages were laid at 1,200*l.*, and the declaration contained three counts, but subsequently that declaration was amended under a Judge's order, by adding two more counts and laying the damages at 3,000*l.*:—Held, that such amendment did not operate to destroy the identity of the suit, so as to discharge the bail, but that they were liable to the extent of their recognizance. *Taylor v. Wilkinson*, 4 Law J. (N.S.) K.B. 269, s.c. 5 N. & M. 189; 3 Ad. & E. 184.

Where a plaintiff on general process declares as executor, the bail will be discharged, though the variance is not such that the defendant could avail himself of. *Manesty v. Stevens*, 2 Law J. (N.S.) C.P. 34, s.c. 9 Bing. 400; 2 Mo. & Sc. 563.

#### 6. IN CRIMINAL PROCEEDINGS.

Extension of provisions of 7 Geo. 4, c. 64, relating to bail in felonies. 5 & 6 Will. 4, c. 33; 13 Law J. Stat. 63.

On bills found at the Central Criminal Court for misdemeanours, forty-eight hours' notice of bail is necessary, unless the application be made on a Friday, with a view of detaining the party in custody over Sunday. *Rex v. Carlile*, 6 C. & P. 628.

The Judges at the Central Court, after postponement till the next session, on motion for the prosecution, of the presentation of a bill for a capital offence, refused, on motion for the prisoner, to read over very long depositions, to enable them to decide whether they would admit him to bail, although the application was made on the ground that there was not sufficient time to prepare proper affidavits before the breaking up of the Court. *Rex v. Palmer*, 6 C. & P. 654.

#### BAIL COURT.

[See JUDGE IN BAIL COURT.]

#### BAILIFF.

The statute 13 Edw. 1, (West. 2nd.) c. 37, does not extend to private distresses.

Therefore, in replevin, where the defendant made cognizance, as bailiff of the assignees of a bankrupt, the plea in bar, that he was not a bailiff sworn and known (*juratus et cognitus*), was, upon demurrer, held to be bad. *Begbie v. Haynes*, 4 Law J. (N.S.) C.P. 308, s.c. 2 Bing. N.C. 124; 2 Sc. 193.

#### BAILMENT.

To make an action maintainable against a bailee without reward, to recover the value of property left in his possession, he must be guilty of gross negligence; and, if any negligence on his part is proved, whether it is such as amounts to gross negligence, is a question for the jury. *Doorman v. Jenkins*, 4 Law J. (N.S.) K.B. 29, s.c. 2 Ad. & E. 256; 4 N. & M. 170.

#### BAKING.

Regulation of trade of, in Ireland, 2 Will. 4, c. 31; 10 Law J. Stat. 47.

#### BANKER—BANKRUPT.

[See these titles, *ante*, p. 53-4.]

#### BARON AND FEME.

[See BANKRUPT, Persons liable to become—BILL OF EXCHANGE, Indorsement—and REVENUE.]

##### (A) HUSBAND, LIABILITIES OF.

##### (B) WIFE.

- (a) *Privileges, Liabilities, and Incapacities.*
- (b) *Property.*

##### (C) OF A SEPARATION.

##### (D) ACTIONS AND SUITS BY AND AGAINST.

- (a) *In general.*
- (b) *Pleadings.*
- (c) *Evidence.*

##### (E) CRIMINAL PROCEEDINGS.

##### (A) HUSBAND, LIABILITIES OF.

A, the wife of B, orders goods of C to be sent to the house of D, a relation of A's; C, on the following day sees B, and B accepts a bill, for the price, which he pays at maturity. At the time of paying the bill, B orders goods of C to a small amount for himself. A subsequently orders other goods of C to be sent as before to the house of D:—Held, that there was evidence to go to a jury of B's having so conducted himself as to lead C to believe that A had B's authority to order the last-mentioned goods. *Filmer v. Lynn*, 4 N. & M. 559.

An express promise by a husband to pay a debt incurred by his wife, for which he is not otherwise liable, is binding. *Harrison v. Hall*, 1 M. & Ro. 185. [Tenterden]

To make a husband liable for his wife's board and lodging at the house of a third person, when the wife leaves in consequence of a dispute, it must be shown, either that his conduct rendered it improper for her to live with him, or that he knew

to take her back, except upon conditions which he had no right to make. *Reed v. Moore*, 5 C. & P. 200. [Parke]

A man is answerable to a third person for what is done by his wife, so long as the relation of husband and wife continues, though they may be permanently living apart; at least if it be not shewn that the wife at the time was living in adultery. *Hoad v. Briscoe*, 5 C. & P. 484. [Tindal]

(B) WIFE.

(a) Privileges, Liabilities, and Incapacities.

[See BILL OF EXCHANGE, Pleadings and Evidence—INFANT, Rights and Incapacities—LEGACY, Assignment and Election.]

Under 3 & 4 Will. 4, c. 74, ss. 77 & 91, a feme covert, when her husband has absconded, and has not been heard of for some time, may pass a contingent life-interest in freehold property. *Ex parte Gill*, 1 Bing. N.C. 168.

A husband, whose wife was entitled to a fund in court, signed a memorandum after marriage, agreeing to secure half her property on herself:—Held, reversing the decision of the Court below, that it was competent for the wife to waive this agreement, and that any benefit, which her children might have taken under it, was defeated by her waiver. *Fenner v. Taylor*, 2 Russ. & M. 190.

The Court will not order the payment out of court, of a sum exceeding 200*l.* to which a feme covert is entitled, without her consent in court, although such sum has been made up by the accumulation of small sums. *Peacock v. Burt*, 4 Law J. (N.S.) Chanc. 73.

The wife's consent was taken to pay money to her husband, an infant. *Popham v. —*, 3 Law J. (N.S.) Chanc. 239.

Wife of tenant in tail in possession, with fee in remainder, allowed to make a disposition of her interest therein, without concurrence of her husband, he being lunatic. *Re Gwen Thomas*, 3 Law J. (N.S.) C.P. 167, a.c. 4 Mo. & Sc. 331.

If a married woman represents herself as single, and by that means obtains credit, if arrested, she is not entitled to her discharge on motion. *Simon v. Winnington*, 1 Dowl. P.C. 16.

Where a married woman has held herself out as a widow, and by that means obtained credit, and she is afterwards arrested, the Court will not relieve her summarily. *Hall v. Barber*, 1 Dowl. P.C. 8.

A feme covert who has been arrested and has given a bail-bond, is entitled to be relieved by a summary application to the Court, on a positive affidavit of coverture, where no doubt is raised as to the fact of coverture, and it does not appear that at the time of contracting the debt she made any misrepresentation, or had done any act to justify the plaintiff in concluding that she was not a married woman. *Freame v. Mitford*, 2 Law J. (N.S.) Exch. 6, a.c. 1 C. & M. 54; 3 Tyr. 139.

Where in an action for goods supplied to the defendant's wife, in her separate business, a levy under a *distringas* issued as at common law, was made at the dwelling-house of the wife, when the defendant was out of the country, the Court set aside the service of the *venire* and the *distringas*, and ordered the issues to be returned with payment

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of costs by the plaintiff. *Hiscock v. Badham*, 1 Law J. (N.S.) Exch. 58, a.c. 2 C. & J. 129; 2 Tyr. 159.

In an action of trespass by husband and wife, if a nonsuit takes place, the wife may be taken in execution for the costs, if she has separate property. *Hoad et Uz. v. Matthews*, 2 Dowl. P.C. 149.

The plaintiff hired a house of the defendant, representing herself at the time to be a feme covert; and, upon the faith of the like representations, she obtained goods from various tradesmen:—Held, that her assertions that she was a feme covert, estopped her from suing as a feme sole in respect of a trespass committed by the defendant under colour of a distress. *Langford v. Foot*, 2 Mo. & Sc. 340.

A married woman being arrested, was, on motion, ordered to be discharged. In making the order, the Court said nothing of the costs of the motion. Upon discontinuance by the plaintiff, and the Prothonotary refusing to tax the defendant the costs of her application to be discharged as costs in the cause:—Held, that the taxing officer was right, and that the party was not entitled to such costs. *Mummery v. Campbell*, 3 Law J. (N.S.) C.P. 168, a.c. 10 Bing. 511; 4 Mo. & Sc. 379.

Money belonging to married women, paid to their husbands, the parties being subjects of France, and the law of that country not requiring a settlement. But, it not appearing that the parties were domiciled in France, the married woman to be examined in court. *Bauduin v. Nicholas*, 4 Law J. (N.S.) Chanc. 33.

An agreement made by A, the husband, after marriage, to settle half his wife B's fortune on herself, is not a voluntary agreement, but amounts to a purchase of the wife's equity, and cannot be waived by the wife to the prejudice of her children.

Order made for payment of a sum, part of B's fortune, to A, on her consent being obtained, in consequence of the like order having been made, under the same will, by a former Master of the Rolls and the Lord Chancellor:—but, *semble*, that on principle and authority the wife cannot waive the benefit of the agreement. *Fenner v. Taylor*, 2 Law J. (N.S.) Chanc. 99.

Where sums in court under 10*l.* are payable to a feme covert, the Court will dispense with the usual affidavit of there being no settlement. *Gittings v. M'Dermot*, 4 Law J. (N.S.) Chanc. 217, a.c. 2 M. & K. 69.

(b) Property.

[See DEVISE—MARITAL RIGHT.]

A gift by will by a husband to his wife for her sole use and benefit, is equivalent to a gift for her separate use. — *v. Lys*, 1 You. 562.

It was stipulated, in marriage articles, that monies in the funds, the property of the intended wife, should be for her sole and separate use, to all intents and purposes, as if she were sole and unmarried:—Held, upon the death of the wife, without issue and without having made any appointment of the property, that the husband was entitled to it as her administrator, and not her next of kin. *Proudley v. Felder*, 2 M. & K. 57.

Husband alone may make a tenant to the *præcipe*, in a recovery to be suffered of the wife's land. Such recovery will bind the wife and her heirs, unless re-

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versed within twenty years after coverture determined. *Doe v. Bird*, 3 Law J. (N.S.) K.B. 78, s. c. 2 N. & M. 679.

A trust for the separate use of a woman, whether single or married, is valid. *Davies v. Thornycroft*, 6 Sim. 420.

Held, that the trusts for the separate use of a married woman did not continue upon her second marriage. *Benson v. Benson*, 4 Law J. (N.S.) Chanc. 278.

Husband agrees with devisees of real estate, on which a legacy to his wife is charged in default of personalty, that the legacy shall be considered a debt from them, and that they shall stand in his place against the personalty in respect of that legacy, and also in respect of his wife's share of the residue, if any, and receives part payment from one devisee, and interest from the others:—Held, that the chose in action had not been reduced into possession.

Those circumstances being stated in the answer of the devisees to a bill filed by a second husband for payment of the principal, the executors of the first husband were held not to be necessary parties; but the Master was ordered to report special circumstances respecting the transaction. *Harwood v. Fisher*, 4 Law J. (N.S.) Exch. Eq. 10, s. c. 1 Y. & C. 110.

A conveyance suffered of the wife's copyhold lands in pursuance of a power of attorney by husband and wife in surrender, in order to make a tenant to the principle, held to be good after twenty years, by the operation of the 10 & 11 Will. 3, c. 14. *Doe d. Smith v. Bird*, 3 Law J. (N.S.) K.B. 78, s. c. 5 B. & Ad. 405; 2 N. & M. 679.

A testator charged his estate with 10,000*l.*, the annual interest to be for the sole and separate use of his daughter, then a married woman, "totally free and independent of the debts, controul, and engagements of her husband:—" Held, the daughter having married a second husband, that the trust for her separate use did not continue.

Whether trusts for the separate use of a feme sole will prevail against the marital right upon marriage—*quære*. *Benson v. Benson*, 4 Law J. (N.S.) Chanc. 69, 278, s. c. 6 Sim. 126.

On a marriage a trust was created for the separate use of the wife, with restraint on alienation, or anticipation; the husband died; the wife married again:—Held, that the second husband had power to dispose of his wife's interest during her life. *Knight v. Knight*, 3 Law J. (N.S.) Chanc. 187.

The wife being entitled, in the event of her surviving her father, to a share of leasehold, (vested in trustees for the benefit of all parties interested,) her husband and herself, for valuable consideration, sold and assigned all her interest. The husband died in the lifetime of the tenant for life, leaving his wife, who survived the tenant for life:—Held, that the assignment passed her interest to the purchaser. *Donne v. Reuben Hart*, 1 Law J. (N.S.) Chanc. 57, s. c. 2 Russ. & M. 360.

Personal property was assigned to A and B, upon trust to pay the interest for the separate use of Mrs. W in the usual form, and after her decease, upon trust, for the wife of B, her executors, administrators, and assigns, to and for her own use and benefit; and there was a power for the wife of B to appoint a new trustee in the place of B, in case

of his death in the lifetime of Mrs. W:—Held, that no separate trust was created in favour of the wife of B. *Kensington v. Dollond*, 3 Law J. (N.S.) Chanc. 209, s. c. 2 M. & K. 184.

Devise to A of a term of years, in a house, if he should so long live and continue to inhabit therein; and from and after his decease, or giving up the possession of the premises, or in case he should mortgage, &c. then to the wife of A, for the remainder of the term:—Held, that, as this was a possibility which might arise in the lifetime of the husband, the interest of the wife was such as the husband could dispose of; and that, by his bankruptcy, the whole term vested in the assignees, the husband not being considered as trustee of the remainder, for the benefit of his wife.

The husband, being in embarrassed circumstances, went beyond the sea for six months, leaving his wife and children in the house, and subsequently returned and lived in the house; but, upon his bankruptcy, they were turned out by the assignees:—Held, that his leaving was not a ceasing to inhabit, within the meaning of the will; nor *comme assemblé*, was the turning out by the assignees a giving up of the possession by the bankrupt within that clause. *Doe d. Shaw v. Steward*, 3 Law J. (N.S.) K.B. 141, s. c. 1 Ad. & E. 300; 3 N. & M. 372.

By settlement before marriage, thirty-two cows, &c. and the increase and produce arising therefrom, the property of the woman, are assigned to trustees for her separate use, the husband covenanting to permit her to carry on the trade of a cowkeeper for her sole use. After the marriage, the wife, with the profits of her trade, purchases four more cows:—Held, that the settlement was good against the creditors of the husband, and that the cows purchased after marriage were also protected by it. *Haslington v. Gill*, 3 Doug. 415.

The Duchess of Norfolk was entitled, under the trusts of the settlement made in contemplation of her marriage with the Duke in 1771, to two annuities of 700*l.* and 800*l.*, charged by way of pin-money, upon estates to which the Duke was entitled for his life. The Duke received all the rents and profits of the estates, and maintained the Duchess according to her rank, up to the time of his death in 1815. In 1816, the Duchess was found to have been a lunatic, without lucid intervals, from 1782, and she continued so until 1820, when she died intestate. Her personal representative claimed from the personal representative of the Duke, arrears of the pin-money from 1782 to 1815:—Held by the Lords, reversing the decree of the Court below, that the personal representative of the Duke was entitled to set off any payments made by the Duke, in respect of the principal, against a claim for the arrears by the Duchess during her lifetime, and that the personal representative of the Duchess was not entitled to any arrears of her pin-money. *Howard v. Digby*, 2 C. & F. 634, s. c. 8 Bl. N.S. 224. [Reversing *Digby v. Howard*, 1 Law J. (N.S.) Chanc. 3, s. c. 4 Sim. 588.]

Devise "from and after M B shall have attained the age of twenty-one years, or be married, to M B, her heirs and assigns; but, in case the said M B shall happen to die before she arrives at the age of twenty-one, and without leaving issue of her body, and from and after the decease of the said M B,

without issue as aforesaid, to J S B," &c. M B married, had issue, and died under twenty-one, without leaving issue:—Held, that her husband was entitled to courtesy. *Buckworth v. Thirkell*, 4 Doug. 323.

A married lady being entitled to a share of the proceeds of real estates, directed to be sold, joined with her husband in assigning, and levying a fine of her share to a mortgagee:—Held, that she was barred of her equity to a settlement. *May v. Roper*, 4 Sim. 350.

(C) OF A SEPARATION.

[See DIVORCE.]

[*Westmeath v. Westmeath*, 1 D. & Cl. A.C. 519; 2 Law J. Dig. 52, a.c. 5 Bl. N.S. 339.]

In a suit for separation by the wife for cruelty, where the Court is convinced that the personal safety is in jeopardy, or where it may see reasonable ground to apprehend such a consequence, it is bound to protect her; but the Court can only interfere where there is actual personal ill-treatment, or such threats as would reasonably excite in a mind of ordinary firmness a fear of personal injury. The Court, being of opinion that all the circumstances pleaded would fail, if proved, to establish, that the wife could not return to cohabitation without risk to life or limb—rejected the libel. *Neeld v. Neeld*, 4 Hag. Ec. 263.

When circumstances of sufficient violence are admitted to proof, minor circumstances may also be admitted, but they should be *ejusdem generis*, and not light or trifling. *Ib.* 266.

Letters of the husband exhibited by the wife are evidence against him, and explanations therein contained of his conduct, with respect to the matter charged, are to be taken into the Court's consideration, but other statements therein are not evidence for the husband, at least in debating the plea. *Ib.* 267.

An interdict of intercourse with her family is not cruelty to a wife, though, under circumstances, it might tend to illustrate the temper of the husband. *Ib.* 269.

A suit for restitution of conjugal rights strongly infers that, at the time of instituting such suit, the party had no reasonable ground to apprehend personal violence, but it does not amount to an absolute bar to a sentence of separation for antecedent cruelty; *a fortiori*, it would not exclude the wife from pleading acts of harshness and severity previous to such suit, in conjunction with acts of cruelty subsequently. *Ib.* 268.

A mere violent act, which occasioned pain and injury to the wife, unaccompanied by any threat or any intentional blow, will not warrant a sentence of separation, because it does not infer future risk. *Ib.* 270.

In a suit for restitution of conjugal rights brought by the wife, the husband pleaded her adultery, proved gross impropriety of conduct, absence from home, (unaccounted for,) on two nights, letter from her containing admission of guilt, and endeavour to induce individuals to give false representations as to where she slept:—separation decreed. *Quere*, whether the rule that a separation cannot take place on a mere confession of guilt, applies to a confession in unsuspected letters to third parties. *Owen v. Owen*, 4 Hag. Ec. 261.

Under a citation for cruelty only, in a suit for separation by the wife, adultery by the husband, occurring prior to the institution of the suit, but sworn to have recently come to the wife's knowledge—may be pleaded, even though publication of the evidence on the libel, and on a responsive plea, is about to pass. *Sampson v. Sampson*, 4 Hag. Ec. 285.

Husband and wife having agreed to live apart from each other, a sum of stock was invested in the name of trustees, and, by separation deed, containing the usual provisions, the husband agreed to pay to his wife, for her maintenance, an annuity of 180*l.* a year, and it was declared, that the stock was intended as a security for the payment of that annuity. The deed contained a proviso, that the husband should be indemnified out of the annuity against the debts and contracts of his wife, and all dower and thirds at common law or by custom, which she, at any time thereafter might claim, challenge, or demand from, out of, or against her husband; or his present or future estate, real or personal, and an agreement that the wife should make and execute all such acts, deeds, and matters as should be requisite for the purpose of releasing, barring, or extinguishing all dower or thirds at common law, or by custom, which she could or might claim or demand in, to, or out of any real or personal estate of her husband. The husband afterwards dying intestate, it was held, that the deed did not deprive the wife of her share of her husband's personal estate, under the Statute of Distributions. *Slatter v. Slatter*, 1 Y. & C. 28.

A deed of separation, by which the husband engages to pay an annual sum to his wife upon certain conditions, and which provides, that its trusts shall continue, although the parties should live together again, does not become void at law by the circumstance of the parties afterwards living together for some time, and then again separating.

Whether a court of equity would allow the deed, under such circumstances, to be enforced—*quere*. *Wilson v. Mushett*, 1 Law J. (N.S.) K.B. 250, a.c. 8 B. & Ad. 743.

Separation deeds are not valid without some other consideration than the agreement to live separate.

The wife having separate estate, is able to contract with other persons, and with her husband, in respect of all separate estate; and a court of equity will support such contracts.

The agreement by the husband to permit the wife to enjoy any property she may become entitled to during the coverture, is a sufficient consideration on his part. *Logan v. Birkett*, 2 Law J. (N.S.) Ch. 52, a.c. 1 M. & K. 220.

In an action against the defendant, for not carrying into effect an agreement, a written memorandum of which he had signed, by which he bound himself to pay certain debts and household expenses, &c., and by which the plaintiff's time of quitting a certain house was to be extended, and the plaintiff was to execute a deed of separation between him and his wife: on demurrer to the plea,—Held, that the declaration reciting such memorandum of agreement, and referring to such deed of separation, was good, as nothing appeared on the record to shew, that the present or future separation of husband and wife, was the consideration of such agree-

ment, or that the motives, by which the plaintiff was influenced, were vicious or improper. *Waite v. Jones*, 4 Law J. (N.S.) C.P. 184, s.c. 1 Bing. N.C. 656; 1 Sc. 730.

A bill lies for arrears of alimony after the death of the wife. *Stones v. Cooke*, 3 Law J. (N.S.) Chanc. 225.

(D) ACTIONS AND SUITS BY AND AGAINST.

[See BAIL, Affidavit to hold to—MONEY HAD AND RECEIVED.]

(a) In general.

A feme covert living separate from her husband, and having a competent separate maintenance duly paid to her, may be sued alone on a contract made by her for necessities. *Barwell v. Brooks*, 3 Doug. 371.

A wife of a person who resides in Ireland, herself living in England, and having a separate maintenance under articles of separation, may be sued after the death of her husband for a debt contracted by her in England during his lifetime. *Ringsted v. Lady Lanesborough*, 3 Doug. 197.

In an action against husband and wife, for a debt incurred by the wife, *dum sola*, the Court refused, at the instance of the husband, to set aside an appearance entered for both, it appearing that the wife had given instructions to the attorney. *Williams v. Smith*, 1 Dowl. P.C. 632.

Judgment cannot be entered up against husband and wife on a warrant of attorney given by the wife *dum sola*, without leave of the Court. *Staples v. Parner*, 3 Mo. & Sc. 800.

An action for words, not actionable in themselves, spoken of a wife living separate from her husband, and carrying on a business for herself, of and concerning her mode of conducting the business, must be brought in the name of the husband alone, and not jointly by husband and wife. *Saville v. Swan*, 2 Law J. (N.S.) K.B. 52, s.c. 1 N. & M. 254; 4 B. & Ad. 514.

A debt due from the wife before marriage is entirely barred by the subsequent discharge of the husband, under the Insolvent Act. *Lockwood v. Salter*, 2 Law J. (N.S.) K.B. 198, s.c. 2 N. & M. 255; 5 B. & Ad. 303.

If a woman live separate from her husband, not, as far as it appears, in open adultery, and an action be brought against him and her, for a libel written and published by her—he is liable to damages. *Head v. Briscoe*, 2 Law J. (N.S.) C.P. 101.

A married woman, living apart from her husband, and having a separate estate, promised solicitors, who were conducting various suits and proceedings for her, that she would pay their bills, &c. The promise was by letter, and did not refer to her separate estate:—

Held, that her separate property was liable to pay the bills.

Held also, that a general charge of debt will bind the separate estate of a married woman. *Murray v. Barlee*, 3 Law J. (N.S.) Chanc. 184, s.c. 3 M. & K. 209.

In an action by husband and wife, in which the husband is joined for conformity, commenced without the authority of the husband, the Court will stay proceedings until he is indemnified for costs.

It is the duty of an attorney obtaining an authority from the husband in such an action, to take care that he has an indemnity; but before a motion

is made to stay proceedings, an indemnity ought to be applied for. *Morgan v. Thomas*, 3 Law J. (N.S.) Exch. 90, s.c. 2 C. & M. 388.

It is competent to a jury to infer agency in a wife, to accept a notice with respect to a particular transaction in her husband's trade, from the circumstances of her being seen twice in his counting-house, appearing to conduct his business with reference to the transaction in question, and on one of these occasions giving directions to the foreman. *Plummer v. Sells*, 3 N. & M. 422.

(b) Pleadings.

[*Murray v. Barlee*, 2 Dig. Law J. 53, s.c. 4 Sim. 82.]

To a declaration against husband and wife, for a debt due from the wife before coverture, the husband's discharge under the Insolvent Act is a good plea.

*Quære*—Whether it can be replied that the wife had separate property. *Lockwood v. Salter*, 2 Law J. (N.S.) K.B. 148, s.c. 5 B. & Ad. 303; 2 N. & M. 255.

Adultery of the wife after separation, no plea to covenant to pay a trustee a separate maintenance for the wife. *Baynon v. Batley*, 1 Law J. (N.S.) C.P. 75, s.c. 8 Bing. 256; s.c. 1 Mo. & Sc. 339.

Where, in an action against a married woman, in which she was sued as a feme sole, she pleaded coverture, and the plaintiffs, in their replication, alleged, that before the cause of action accrued, the defendant's husband became bankrupt, and departed the realm without appearing under his commission, and continued to reside in foreign parts:—Held, that such replication was ill; for that, besides not containing any express averment that the defendant's promise was made during her husband's absence; nor any allegation equivalent thereto; it did not state such an *involuntary* absence of the husband, as could communicate to the wife the privileges, or affect her with the liabilities, of a feme sole. *Williamson v. Daves*, 2 Law J. (N.S.) C.P. 3, s.c. 9 Bing. 292; 2 Mo. & Sc. 352.

Replication to a plea of coverture merely stated, that husband of defendant was an alien; that he was not in England at the time of entering into the contracts on which the action was brought, nor since; that plaintiff did not give him credit, and that he dealt with defendant as a feme sole:—Held, to be bad, and that the defendant was entitled to judgment; the Court, however, gave leave to amend on payment of costs. *Stretton v. Basmach*, 3 Law J. (N.S.) C.P. 224, s.c. 1 Bing. N.C. 139; 4 Mo. & Sc. 678.

An agreement between A and B, the wife of A, and C, of the one part, and D of the other, recited that A, B, & C had sued L, and obtained a cognovit from him; that W was bail to the sheriff, and that the bail-bond was forfeited; that W had requested A, B, and C to let L be at large, and to forbear entering up judgment, or proceeding against the bail or the sheriff till a certain day, or W's guaranteeing the security of L's person if the money were not paid before that day; and the agreement further set forth, that it was understood and agreed, and W undertook and promised, that he W would render L on the day, or pay the money, in consideration that A, B, and C would so forbear. W having broken the agreement, A, B, and C declared jointly against W, reciting the agreement, and aver-

ring performance on the part of A, B, and C:—Held, that B was entitled to join. *Wills v. Nurse*, 1 Ad. & E. 65.

(c) Evidence.

[See EVIDENCE, Declarations—WIFE.]

No part of the answer of a feme covert can be read, as evidence against her or her husband, except it relates to her separate estate, as to which she is considered a feme sole. *Massey v. Millatt*, 4 Law J. (N.S.) Chanc. 176.

A, who kept a fruiterer's shop in the year 1824, became bankrupt, but did not surrender to his commission, and from that time to the year 1833, the business was carried on by A's wife. Fruit was supplied to her between 1823 and 1832 to an amount exceeding 266*l.*; and evidence was given that A was seen in London a few times between 1824 and 1833, and was arrested at the shop in 1833, and that he attended the marriage of his daughters at Marylebone Church:—Held, that proof of these facts was not evidence to go to the jury to shew, that A's wife acted as the agent of A, so as to charge him with the price of the fruit, although it might be sufficient to charge him with necessities supplied to the wife. *Smallpiece v. Dames*, 7 C. & P. 40. [Parke]

The admissions in a joint answer by the husband and wife are no evidence against the wife, such joint answer being considered as the answer of the husband alone. *Elston v. Wood*, 2 M. & K. 678.

An officer in the army being required to join his regiment in the East Indies, left his wife in England, and settled a certain sum upon her, which was regularly paid:—Held, in an action by a tradesman for goods delivered at the house in which the wife was living, that it was not to be treated as a case of separation, but that the questions for the jury were, first, whether the goods supplied were necessities, considering the condition in life of her husband; secondly, whether the sum of money settled was sufficient; and, thirdly, whether it was or was not notorious in the neighbourhood that the wife was living in a style not justified by the rank of her husband; and the jury having found the first question in the negative, and the others in the affirmative, it was held, that the verdict must be for the defendant. *Pennys v. Sargeant*, 6 C. & P. 419. [Bosanquet]

(E) CRIMINAL PROCEEDINGS.

[See INDICTMENT—LARCENY.]

The wife of one of several prisoners is inadmissible as a witness. *Rex v. Hood*, 1 M. C.C. 281.

On an indictment against several prisoners, the wife of any one of them is inadmissible as a witness. *Rex v. Smith*, 1 M. C.C. 281.

Upon a joint charge against husband and wife, of receiving stolen goods, the wife cannot properly be convicted if the husband is. *Rex v. Archer*, 1 R. & M. C.C. 143.

If a wife, separated from her husband, take a house, of which the husband, with the landlord's consent, obtains possession:—*Semble*, that if the wife come with others and make a forcible entry into this house, she may be convicted on an indictment for forcible entry, stating it to be the house of the husband. *Rex v. Smyth*, 5 C. & P. 201, s.c. 1 M. & R. 155. [Tenterden]

BARRISTER

Of any of the four Inns of court may be admitted to any other free of duty. 5 & 6 Will. 4, c. 64; 13 Law J. Stat. 146.

BASTARD.

[See POOR, Settlement by Birth.]

The acts relating to the punishment of the putative father and the mother of bastard children, and the liability of the father, are repealed: securities and recognizances for indemnity to parishes made null and void: the mother is bound to maintain the child; but, upon the application of overseers, the Court of Quarter Sessions may make an order on the putative father for its support. See provisions relating to these matters, 4 & 5 Will. 4, c. 76, ss. 69, 70, 71, 72, 73, 74, 75, 76 (Poor Law Amendment Act); 12 Law J. Stat. App. i.

If a husband have access, and others at the same period have a criminal intimacy with his wife, and she have a child, such child is legitimate; but if the husband and wife be living separately, and the wife notoriously living in adultery, a child born under such circumstances would be illegitimate, although the husband had an opportunity of access. *Cope v. Cope*, 5 C. & P. 604, s.c. 1 M. & R. 269. [Alderson]

A baptismal register, in which a party is described as the illegitimate son of his mother, is admissible evidence on the trial of an issue as to his legitimacy. But the declarations of the husband and the wife are not evidence. *Cope v. Cope*, 1 M. & R. 269.

When a bastard child becomes chargeable a month before the Epiphany Sessions, an application for an order to charge the putative father is not too late at the Easter Sessions, *semble*.

The sessions cannot entertain an application, by the overseers of a parish, for an order to charge the putative father of a bastard child, without direct proof of notice to such putative father, notwithstanding his appearance in court. *Rex v. the Justices of the County of Carnarvon*, 5 N. & M. 364.

The parish officers are the proper parties to have the custody of an order of maintenance; and, therefore, if, on the making of such an order, a good order be delivered to them, and a defective order to the reputed father, the former will be deemed the original, and the latter only a "notice thereof," under 18 Eliz. c. 3, s. 2, the defect in which may be cured by a statement of the Justices at the time of making the order, or by a subsequent service of a correct copy of the good order.

Accordingly, at the time of the making of an order of maintenance, the Justices' clerk delivered a good order to the parish officers, but, to the reputed father, an order in which, through mistake, the mother was directed to pay 1*s.* 6*d.* weekly. One of the Justices told the reputed father that he must pay 1*s.* 6*d.* per week, and the parish officers afterwards served him with a copy of the order in their possession:—Held, that the defective order delivered to the father did not justify his refusal to pay arrears of maintenance, nor afford a valid objection to a commitment by reason of such refusal.

A warrant of commitment, under 49 Geo. 3, c. 68, s. 3, for neglect or refusal to pay a sum awarded by

an order of maintenance, must clearly set forth all that is required by the statute, to give the magistrate authority to commit, and will be construed with the same strictness as a conviction.

Therefore, such a commitment is bad, if it omit to state a complaint on oath, by one of the overseers of the parish liable to the maintenance of the bastard child, that it appears to the magistrate that, at the time of the commitment, a sum is due and unpaid;—that the party has been called upon for his defence;—or that he has not shewn any sufficient and reasonable cause for non-payment of the sum adjudged to be due. *Wilkins v. Wright*, 3 Law J. (n.s.) M.C. 39, a.c. 2 C. & M. 191; 3 Tyr. 324; 4 Tyr. 121.

A person on whom a Justice's order had been made for the support of his illegitimate child, disobeyed the order. For such disobedience he was indicted at the sessions, tried and convicted. He was committed to prison, to be brought up on a future day for judgment; the Court recommending that an arrangement should be made. While he was in prison, he arranged to pay a certain sum; part to be paid down, the remainder to be secured to the parish officers by his promissory note. This arrangement being made, he was brought up for judgment; the Court were informed a settlement had been made, but the terms were not stated. He was therefore fined a shilling and discharged. In an action by the parish officers on the note,—held, that the action was maintainable, it not appearing that any undue advantage had been taken of the defendant while he was in custody. *Kirk v. Stickwood*, 2 Law J. (n.s.) M.C. 43, s.c. 4 B. & Ad. 421; 1 N. & M. 275.

Justices have no power to make an order of affiliation, except on the application of the overseers of the parish where the bastard child is actually born; and the fraud of the putative father in removing the mother into an extra-parochial place, previous to the birth of the child, will not give them jurisdiction to make such an order, on the application of the overseers of the parish in which the mother is settled, and to which the child is therefore chargeable. *Rez v. Wilson*, 4 Law J. (n.s.) M.C. 19, s.c. 1 Ad. & E. 230; 4 N. & M. 243.

#### BAYSWATER.

[See SEWERS.]

#### BEER.

Amendment of Act of 1 Will. 4, c. 64, relating to sale of. 4 & 5 Will. 4, c. 85; 12 Law J. Stat. 168.

A licence obtained under the Beer Act, 1 Will. 4, c. 64, does not entitle the party licensed to trade in a borough town, wherein, by legal custom, it is provided that none but freemen shall trade. *The Mayor of Leicester v. Burgess*, 2 Law J. (n.s.) K.B. 187, a.c. 2 N. & M. 132; 5 B. & Ad. 246.

An action for goods sold, &c. delivered to a daughter, who was licensed, and carried on a public house for her father, on the credit of her father, and for his benefit, may be maintained against the father. Such is no fraud on the licensing system. *Brooker v. Wood*, 3 Law J. (n.s.) K.B. 96, a.c. 5 B. & Ad. 1052; 3 N. & M. 96.

*Semble*—A licence to sell beer, although obtained by fraud, is valid, unless the fraud be practised by the party to whom the licence is granted. *Rez v. Minshull*, 1 N. & M. 277.

#### BELLMAN.

The town crier of the town of Brecon claimed the exclusive right of proclaiming auctions and sales of goods within the town, in cases where the owners did not make proclamations themselves, by immemorial usage:—Held, that such a custom was not invalid. *Jones v. Waters*, 4 Law J. (n.s.) Exch. 109, a.c. 1 C. M. & R. 713; 5 Tyr. 361.

#### BENCH-WARRANT.

[See CONSTABLE.]

#### BENEFICE.

[See BOND—SEQUESTRATION—TITHES.]

An annuity was granted by deed, with a power of entry and distress upon ecclesiastical benefices. The deed also gave to the grantee a power of sequestration, and contained a covenant by the grantor to execute a warrant of attorney to enter up judgment; and it was declared by the deed, that the judgment so to be entered up was intended as a collateral security, and for the better and more effectual payment of the said annuity, and that no execution should issue thereon until some quarterly payment should be in arrear. A general warrant of attorney was accordingly executed, but was not expressed to be with the intent that a sequestration should issue, or in any way to create a charge upon the livings:—Held, that the warrant of attorney was not void by the statute of 13 Eliz., as revived by 57 Geo. 3, c. 99.

The Court, however, set aside a sequestration sued out on the deed; and referred it to the Master to see that no more than the arrears had been levied under it. *Moore v. Ramsden*, 1 Law J. (n.s.) K.B. 134, a.c. 3 B. & Ad. 917.

A clergyman granted an annuity; as a collateral security, he gave a warrant of attorney, upon which it was agreed, that judgment might be entered up forthwith; but no execution was to issue, unless the annuity should fall into arrear. But if it were to be in arrear, the annuitant was to have power to issue a sequestration for the whole penalty of the judgment.

The annuity fell into arrear; a sequestration was issued accordingly; and the annuitant having continued in possession under it for more than two years,—The Court ordered, that no further proceedings should be taken upon it, and sent the matter of account to the Master. But for the delay in the application, *semble*, they would have set it aside. *Britten v. Wait*, 1 Law J. (n.s.) K.B. 267, a.c. 3 B. & Ad. 915.

A requisition founded upon stat. 57 Geo. 3, c. 99, s. 50, to nominate a curate, is in the nature of a judgment, and, therefore, such requisition is invalid, unless the incumbent has had a previous opportunity of being heard, either by citation or otherwise, whether the bishop proceed by affidavit or on his own knowledge.



Such a requisition, stating generally that the duties of the benefice are inadequately performed by reason of the negligence of the incumbent, is insufficient, as it should specify the particulars of the negligence, or in what it consists.

*Semble*—That sec. 50 of the statute does not apply to benefices containing one church only. *Capel v. Child*, 1 Law J. (n.s.) Exch. 205, s. c. 2 C. & J. 558; 2 Tyr. 689.

To make a warrant of attorney void within the statute of Eliz., it must appear upon the face of it that it was given with the intent to charge an ecclesiastical benefice.

An annuity was granted by deed, chargeable on an ecclesiastical benefice; a bond and warrant of attorney were given as collateral securities. The bond recited, "that the annuity was charged on a vicarage; and the defeazance on the warrant of attorney (which was in the common form) referred to the bond:—Held, that the warrant of attorney was not void by the stat. 13 Eliz. c. 20; as the reference to the bond was merely by way of identity. *Colebrooke v. Layton*, 2 Law J. (n.s.) K.B. 95, s. c. 1 N. & M. 374; 4 B. & Ad. 578.

A clergyman, whilst the statute of 13 Eliz. c. 20. was not in force, granted an annuity, which he charged upon his living in London, and covenanted, that if he exchanged for any other benefice, he would charge it with the said annuity. Prior to the 57 Geo. 3, c. 99, he exchanged it for a living in Yorkshire, but did not execute any deed, charging this new living with the annuity, until after the passing of the 57 Geo. 3, c. 99.

The covenant was held to create a good equitable charge on the new living from the time of the exchange; and in a suit instituted by the annuitant against the clergyman, and subsequent sequestrators who had had notice of the annuity, the Court, at the hearing, continued a receiver of the rents and profits of the living, who had been appointed by an interlocutory order.

A sequestrator of a living in the North Riding of Yorkshire, who had registered his security, postponed to a prior incumbrancer, by an unregistered deed, of which he had notice. *Metcalf v. the Archbishop of York*, 4 Law J. (n.s.) Chanc. 154, s. c. 6 Sim. 224.

A warrant of attorney given by a beneficed clergyman to a creditor, thereby expressly authorizing such creditor to issue a sequestration, is void under 13 Eliz. c. 20. Where a creditor, under such warrant of attorney, had entered up judgment, and issued a sequestration accordingly,—the Court, at the instance of an annuity creditor, having a subsequent judgment, but which was entered up under a warrant of attorney in the common form, without reference to a sequestration, granted a rule, restraining the plaintiff from further enforcing his writ of sequestration, obtained under such void warrant of attorney. *Ex parte Morris*; *Newland v. Watkin*, 1 Law J. (n.s.) C.P. 177, s. c. 9 Bing. 113; 2 Mo. & Sc. 174.

A rector, after the stat. 13 Eliz. c. 20. had been repealed, and before its revival by 57 Geo. 3, c. 99, demised his rectory to a trustee for ninety-nine years, to secure an annuity. After the passing of 57 Geo. 3, c. 99, by deed reciting the grant of the former annuity, and that A had agreed to purchase

of the grantor an annuity of 574*l.* a year for 4,400*l.*, and out of that sum to pay off the former annuity, and that that annuity and the term created to secure the same, should be assigned to a trustee for A's benefit, the rector granted the said annuity of 574*l.* chargeable on his rectory, and the trustees of the term created to secure the annuity of 1813, assigned it to a trustee for the benefit of A:—Held, that inasmuch as the term was created after the passing of the 43 Geo. 3, c. 84, which repealed the 13 Eliz. c. 20, the assignment of it, though for the purpose of securing the payment of an annuity charged on the benefice after the passing of 57 Geo. 3, c. 99, was valid. *Doe d. Wilks v. Ramsden*, 4 B. & Ad. 608.

An agreement by a rector, with cure of souls, with certain of his creditors, to assign all his future income to a trustee for the liquidation of his debts, he having no other income than that derived from his living, is void under stat. 13 Eliz. c. 20, although the agreement provides for the support of a curate to perform the duties of the living.

If unsigned by the rector, the agreement is within section 3. of the Statute of Frauds; and, therefore, on that account, is no defence to an action by one of the creditors. *Alchin v. Hopkins*, 3 Law J. (n.s.) C.P. 272, s. c. 1 Bing. N.C. 99; 4 Mo. & Sc. 616.

A clergyman granted an annuity, and secured it by a conveyance of his benefice and by a warrant of attorney:—Held, that the conveyance was void, but the warrant of attorney good. *Aberdeen v. Newland*, 4 Sim. 281.

## BEQUEST.

[See LEGACY—WILL.]

## BIDDINGS.

[See VENDOR AND PURCHASER.]

## BIGAMY.

On an indictment for bigamy, if the first marriage was in Ireland, it is no objection that it was by licence, when one of the parties was under age, and that there was no consent of parents, unless such marriage was vacated on that ground within a year, under 9 Geo. 2, c. 11, the Irish Marriage Act. *Rex v. Jacobs*, 1 R. & M. C.C. 140.

The marriage of an infant by licence, without the consent of parent or guardian, solemnized in the interval between July 22, 1822 (when 3 Geo. 4, c. 75. received the royal assent, by which section 11 of 26 Geo. 2, c. 38 is repealed,) and September 1, 1822, when 3 Geo. 4. began to operate generally, is valid. *Rex v. Handly*, 1 R. & M. C.C. 163.

On an indictment against a man for bigamy, it appeared that, for the purpose of concealment, the second wife was married by a name by which she had never been known:—Held, that this was no answer to the charge, although, if the first marriage had taken place under such circumstances, that would have been thereby rendered void. *Rex v. Penson*, 5 C. & P. 412. [Gurney]

## BILL-BROKER.

[See *EVID.*]

When a bill of exchange is presented to the holder, and he is not a party to it, he is not bound to accept it, unless it is a bill of exchange, and he is not a party to it. If it is a bill of exchange, and he is not a party to it, he is not bound to accept it, unless it is a bill of exchange, and he is not a party to it. If it is a bill of exchange, and he is not a party to it, he is not bound to accept it, unless it is a bill of exchange, and he is not a party to it.

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## BILL OF EXCEPTIONS.

A bill of exceptions having been taken to the decision of a Judge and sealed by him, and the case having been removed by a writ to a court of error, an affidavit was filed, stating an allegation in the bill, that the Judge had declared that certain evidence was conclusive to be incorrect, since he had, in fact, left it to the jury; that the bill omitted to set out material points of the evidence, and the Judge, upon being called upon by the court of error, controverted the statements of the affidavit, declaring that he had sealed the bill under an erroneous impression that it had been settled by the court on both sides:—Held, that the court of error ought to have directed the bill to have been taken off the file, for the purpose of having it amended by the Judge's notes.

It is not necessary, in the British West Indies, to set out a writ to oblige a Judge to confess or deny his assent to a bill of exceptions. *Pownall v. Pownall*, 2 K. 161.

## BILL OF EXCHANGE AND PROMISSORY NOTE.

[See *EVIDENCE*, *Assessing Witness*—*Goods Sold*—*Principal and Agent*—*Usury*.]

- (A) VALIDITY.
- (B) FORM AND CONSTRUCTION.
- (C) CONSIDERATION.
- (D) STAMP.
- (E) DRAWING.
- (F) ALTERATION.
- (G) PRESENTMENT FOR ACCEPTANCE.
- (H) ACCEPTANCE.
- (I) ACCEPTOR.
- (K) TRANSFER AND INDORSEMENT.
- (L) PRESENTMENT FOR PAYMENT.
  - (a) In general.
  - (b) Time.
  - (c) Place.
- (M) PROTEST.
- (N) NOTICE OF DISHONOUR.
  - (a) Proof of.
  - (b) When necessary.
  - (c) By and to whom.
  - (d) Form and Mode.
  - (e) Time.
  - (f) When waived.
- (O) HOLDER FOR VALUE.
- (P) ACTIONS AND SUITS.
  - (a) Where maintainable.
  - (b) By and against whom.
  - (c) Lost Bills and Notes.
  - (d) Staying Proceedings.
  - (e) Pleadings and Evidence.
  - (f) Witnesses.
  - (g) Defence.
  - (h) What recoverable.
  - (i) Rule to compute.

## (A) VALIDITY.

[See *post*, *Pleadings and Evidence*.]

If a bill of exchange is given by an insolvent after his discharge, for a debt included in his schedule, and in pursuance of an agreement made before his discharge, for withdrawing an intended opposition,

the defendant cannot be held to bail upon it. *Gould v. Williams*, 4 Dowl. P.C. 91.

A bill of exchange, drawn for the purpose of discounting and applying the proceeds in payment of a former bill, drawn, accepted, and indorsed by the same parties, is not affected by an usurious dealing which would have avoided the first bill; but, *semble*, that it would have been otherwise had the second bill been given expressly in substitution of the first. *Marchant v. Dodgin*, 2 Mo. & Sc. 632.

A bill drawn by an agent after the death of his principal, *bona fide* and without notice, held to be valid by the law of Scotland. *Campbell v. Anderson*, 4 Bligh, n.s. 513.

#### (B) FORM AND CONSTRUCTION.

[See, *post*, Pleadings and Evidence, *Worley v. Harrison*.]

An order to pay money, "provided certain terms are complied with," cannot be available as a bill of exchange. *Kingston v. Long*, 4 Doug. 9.

A bill of exchange for twenty-five, seventeen shillings, and threepence, is a bill of exchange for twenty-five pounds, seventeen shillings, and threepence, and may be declared on as such. *Phelps v. Tanner*, 5 C. & P. 488. [Tindal]

The words "value received," are not essential to constitute a bill of exchange. *White v. Ledwick*, 4 Doug. 247.

An instrument in the following form:—"On demand, I promise to pay," &c., addressed to the defendant, and accepted by him, may be declared on as a promissory note. *Block v. Bell*, 1 M. & R. 149. [Lyndhurst]

A bill of exchange payable at sight is not a bill payable on demand within the exception in 22 Geo. 2. c. 49.

*Quære*, whether days of grace are allowed on bills payable at sight. *Janson v. Thomas*, 3 Doug. 421.

A note, whereby a party promised "to pay or cause to be paid" 180*l.*, is a promissory note, and may be declared on as such, and does not require an agreement stamp. *Lovell v. Hill*, 6 C. & P. 238.

"I promise to pay M. A. D., or bearer, on demand, the sum of 16*l.*, at sight, by given up clothes, &c." is a promissory note, the words "by given up clothes, &c." being equivalent to value received. *Dixon v. Nuttall*, 3 Law J. (n.s.) Exch. 290, s.c. 1 C. M. & R. 307; 6 C. & P. 320; 4 Tyr. 1013.

#### (C) CONSIDERATION.

[See, *post* (F), Actions, Pleading and Evidence—SECURITIES—PRINCIPAL AND AGENT.]

Where a debtor is discharged under an insolvent act, and afterwards gives a promissory note for a debt due before, there is a good consideration for such note, and he may be sued upon it. *Best v. Barber*, 3 Doug. 188.

In an action by an indorsee against the acceptor of a bill of exchange, the mere absence of consideration for the acceptance and prior indorsements, does not throw the onus on the plaintiff of proving the consideration for the indorsement to him, where no circumstances of fraud or illegality appear. *Whitaker v. Edmunds*, 1 M. & R. 366. [Patteson]

The consideration necessary to recover on a bill of exchange, is not such a consideration as would

be required to maintain an action on a special contract independently of the bill; but it is sufficient if the bill was given in respect of a right, which the party receiving it had, of insisting upon a bill from a third person.

Accordingly, a broker at Newcastle shipped a cargo of coals, for which he drew a bill of exchange on the consignees, in favour of the vendors. The bill being returned in consequence of the shortness of the date, the vendors, by the direction of the broker, drew another bill at a longer date, which they sent to the broker's counting-house. The broker had left Newcastle in consequence of embarrassments; but the defendant, who had come there to investigate his affairs, and was in the counting-house, on being informed of the transaction, and requested to sign the second bill, did so generally:—Held, that he was personally liable thereon. *Sowerby v. Butcher*, 3 Law J. (n.s.) Exch. 80, s.c. 2 C. & M. 368; 4 Tyr. 320.

On an issue, whether consideration was given by the plaintiff for a note, the letters of the plaintiff, shewing that he was pressed for money, are evidence for the defendant. *Homan v. Thompson*, 6 C. & P. 717. [Parke]

#### (D) STAMP.

Where, by a promissory note, A promised to pay B on demand 20*l.*, with lawful interest until payment, for value received:—Held, that this was not a note payable to bearer on demand, but was a note payable otherwise than to bearer within two months after date. *Dixon v. Chambers*, 1 C. M. & R. 845, s.c. 5 Tyr. 502.

A bill of exchange, purporting to be payable two months after date, is properly stamped with the duty imposed on bills payable at two months after date, though it be issued before the day on which it bears date. *Williamson v. Garratt*, 2 N. & M. 49.

A note for 200*l.*, with lawful interest reserved from a day prior to the date, requires a stamp applicable to a note for 200*l.* only. *Wills v. Noott*, 4 Tyr. 726.

A promissory note, payable to "A B, or order, on demand," is not a note payable to the bearer on demand, and is consequently within the second class of notes in the first schedule of the Stamp Act, which are chargeable with the lower duty. *Ex parte Robinson*, 1 D. & Ch. 275.

A joint and several promissory note was made by several parties concerned in a joint undertaking for the purpose of securing the repayment of a loan of money, and one of the parties signed it some days after the party who borrowed the money:—Held, that the note did not require an additional stamp, if the last signature was put before the money was advanced,—or if the party last signing had promised to sign the note before the advance of the money, notwithstanding it might not have been signed till afterwards. *Ex parte White*, 2 D. & Ch. 384.

Where a bill was drawn by W W upon H W & Co., payable to his own order, and was accepted, and the following indorsements appeared on it:—"Pay Messrs. Brookes & Penny, or order, W. Wilson, J. R. Innes, Brookes & Penny":—Held, that the indorsement from Innes to Brookes and Penny, operated as a new bill between them; and, therefore, the latter could sue Innes, the real consideration

moving from Brookes and Penny to Innes; and, as it is an inherent property in all bills of exchange, that an indorsement operates as a new bill between the indorser and indorsee, it was not necessary that there should be any other stamp than that which was on it originally. *Penny v. Innes*, 4 Law J. (n.s.) Exch. 12, s. c. 1 C. M. & R. 439; 5 Tyr. 107.

A bill of exchange, post-dated so as to avoid the higher stamp duty on a bill exceeding two months after date, is not void, though the parties concerned in knowingly circulating it, may be liable to penalties. *Williams v. Jerrard*, 2 Law J. (n.s.) K.B. 156, s. c. 2 N. & M. 49; 5 B. & Ad. 32.

A bill of exchange, drawn in England, payable in London, upon a person at Brussels, and accepted by him payable in London, is an inland bill of exchange, within the 55 Geo. 3, c. 184, sch. 1, and must be stamped as such. *Amner v. Clark*, 4 Law J. (n.s.) Exch. 254, s. c. 2 C. M. & R. 468.

A promissory note to pay A B the sum of 100*l.*, is a note payable in some other manner than to bearer on demand, and requires only a 3*s.* 6*d.* stamp. *Cheetham v. Butler*, 3 Law J. (n.s.) K.B. 9, s. c. 5 B. & Ad. 837; 2 N. & M. 453.

#### (E) DRAWING.

Where a party draws a bill in a name different from that which he generally used at the time, it is not necessary in an action against the acceptor to shew that such name was on the bill at the time it was accepted. *Schultz v. Astley*, 7 C. & P. 99. [Tindal]

#### (F) ALTERATION.

[See, *post* (P), Actions and Suits, Pleadings and Evidence.]

The alteration of a bill of exchange by the drawer in a material point, so as to avoid the bill, does not deprive him of the right to sue the acceptor upon the original consideration. *Atkinson v. Howdon*, 4 Law J. (n.s.) K.B. 85, s. c. 4 N. & M. 409; 2 Ad. & E. 628.

An alteration of a bill of exchange by the acceptor, by making it payable at the house of another person instead of at his own residence, is not such a material alteration as to render a new stamp necessary. *Walter v. Cooley*, 3 Law J. (n.s.) Exch. 2, s. c. as *Walter v. Cubley*, 2 C. & M. 151; 4 Tyr. 87.

Under a plea of non-acceptance, the defendant may give evidence of an alteration of the bill after acceptance. *Cock v. Coxwell*, 4 Law J. (n.s.) Exch. 307.

A sold goods to B, and the latter, in payment, indorsed to him a bill of exchange, drawn by him on C; A, after such bill was accepted, altered the time of payment in such bill from four to three months:—Held, that thereby he had made it his own; and that in consequence it operated in satisfaction of the debt for which it was originally given. *Alderson v. Langdale*, 1 Law J. (n.s.) K.B. 273, s. c. 3 B. & Ad. 660.

A bill for 18*l.* having been dishonoured, it was agreed that the holder should receive 8*l.* in cash, and another 10*l.* bill in satisfaction. The drawer accordingly drew another bill, which was accepted by the same acceptor, who, after acceptance, without the consent or knowledge of the former, and without fraud, altered it:—Held, that as this second bill was wholly void, the first was not discharged,

and the drawer remained liable to the extent of 10*l.* *Sloman v. Cox*, 4 Law J. (n.s.) Exch. 7, s. c. 1 C. M. & R. 471; 5 Tyr. 174.

In an action by the indorsee against the acceptor of a bill of exchange, the bill appeared, on inspection, to have been altered in amount, and after the acceptance were the words "at Cockburn's," which were not in the defendant's handwriting. Neither the plaintiff nor defendant gave evidence as to when or by whom the alterations were made:—Held, that it was for the jury to say under the circumstances whether the bill had been altered after the acceptance, and that, if they thought it had, the plaintiff could not recover. *Taylor v. Moseley*, 6 C. & P. 273. [Lyndhurst]

In assumpsit by the indorsee against the acceptor of a bill of exchange, if it appear that, following the acceptance, there are words, not in the acceptor's handwriting, making the bill payable at a particular place, it is incumbent on the plaintiff to shew that the words were written by the acceptor's authority; and it seems that the addition of such words is a material alteration of a bill since, and notwithstanding the statute 1 & 2 Geo. 4, c. 78. *Desbroux v. Weatherley*, 6 C. & P. 758. [Tindal]

#### (G) PRESENTMENT FOR ACCEPTANCE.

Where the holder of a foreign bill of exchange, payable sixty days after sight, detained it for nearly five months, and then put it into circulation, and the party on whom it was drawn having failed before presentment:—Held, in an action brought by such holder (who had taken up the bill,) against the drawer, where the jury had been directed to consider, whether, looking at the situation and interests of both the drawer and holder, there had been unreasonable delay on the part of the plaintiff, in forwarding the bill for acceptance, or putting it into circulation, that the jury were properly directed; and the Court refused to disturb their verdict for the plaintiff. *Mellish v. Rawdon*, 2 Law J. (n.s.) C.P. 29, s. c. 9 Bing. 416; 2 M. & Sc. 570.

#### (H) ACCEPTANCE.

The drawee of foreign bills of exchange, when called upon to accept, said, "I will when I receive funds from France," and at a subsequent period made a statement to this effect: "I would have paid the holder, but for his intemperance":—Held, upon action against the drawee as acceptor, that the funds having been received from France, the expressions above referred to were virtually an acceptance, and amounted to a prospective promise, which as drawee he was bound to observe. *Mendzabal v. Machado*, 3 Law J. (n.s.) C.P. 70, s. c. 3 Mo. & Sc. 841; 6 C. & P. 218.

A party who accepts a bill of exchange by procuration, having no authority so to do, is liable to an action of tort, by an ulterior indorsee, for "falsely, fraudulently, and deceitfully" representing, that he was so authorized; although he may have thought, at the time, that he had authority, or that his act would be recognized by the drawee.

He is not, however, liable as acceptor.

*Quare*—If he would have been liable to such an action, had he appended a memorandum to the bill, to the effect that he accepted by procuration, without authority, trusting that his act would be recog-

nized by the drawee. *Polhill v. Walter*, 1 Law J. (N.s.) K.B. 92, s. c. 3 B. & Ad. 114.

On a bill being presented for acceptance to a drawee, he said, "This I accept, and you may call for it when you like:"—Held, a good parol acceptance in a colony. *Canepa v. Larios*, 2 Kn. 276.

#### (I) ACCEPTOR.

A accepted a bill for the accommodation of B, the drawer, who indorsed it over as a security for a debt, and afterwards became bankrupt. The indorsee entered into an agreement with the assignees, for purchasing part of the bankrupt's property, and for the arrangement of some claims which he, the indorsee, had upon the estate; and he afterwards gave them a release of all demands, no mention being made, during this transaction, of the bill which had been dishonoured: he knew at the time of the agreement, but not when he took the bill, that it was accepted for accommodation:—Held, that notwithstanding the above release, the acceptor was still liable at the suit of the indorsee. *Harrison v. Courtauld*, 3 B. & Ad. 36.

#### (K) TRANSFER AND INDORSEMENT.

[See FOREIGN LAW, and see *ante* (D), Stamp.]

*Semble*, that, by the law of France, a promissory note may be indorsed after it becomes due.

By the law of France, an indorsement in blank of a promissory note is not valid. But, *semble*, that there is nothing in that law which makes it absolutely necessary for a promissory note to be protested for non-payment, in order to enable the holder to recover against the maker. *Trimbey v. Fignier*, 6 C. & P. 25. [Bosanquet]

If a bill has been indorsed in the name of a party without his knowledge, an indorsement by him, after the bill has come to maturity, will not do away with the effect of the fraudulent indorsement; and, consequently, although a party give full value for a bill, he will not be considered as a *bona fide* transferee having any title to it; and the Court will order it to be delivered up.

A note payable to S, the wife of B, is transferable by the husband, by his indorsement, without his wife's joining. *Mason v. Morgan*, 4 Law J. (N.s.) K.B. 12, s. c. 2 Ad. & E. 30; 4 N. & M. 46.

Where a bill of exchange has been negotiated by means of a forgery of the name of the payee as indorser, a court of equity will restrain even a *bona fide* holder of the bill from suing the acceptor, and will direct the forged instrument to be delivered up to be cancelled.

Where the original indorsement of the payee's name on a bill of exchange is a forgery, a real indorsement by the payee, after the bill has arrived at maturity, will not give the holder any title.

A power of attorney giving the agent full powers as to the management of certain specified real property, with general words extending those powers to all the property of the principal of every description, and in conclusion, authorizing the agent to do all lawful acts concerning all the principal's business and affairs of what nature or kind soever, does not authorize the agent to indorse bills of exchange in the name of his principal. *Esdaile v. La Nause*, 1 Y. & C. 394, s. c. as *Esdaile v. Lanoge*, 4 Law J. (N.s.) Exch. Eq. 46.

#### (L) PRESENTMENT FOR PAYMENT.

##### (a) In general.

The making of the note at first is not having sight; and, therefore, no action can be maintained until it has been presented for sight.

*Quare*, whether, after sight, three days' grace should be allowed. *Dixon v. Nuttall*, 3 Law J. (N.s.) Exch. 290, s. c. 1 C. M. & R. 307; 4 Tyr. 1013.

##### (b) Time.

Where a bill, payable on demand, is taken in payment for goods, it is not necessary to present it the same day on which it is received. *Semble*, that reasonable time is a question of law. *Appleton v. Sweetapple*, 3 Doug. 137.

The not presenting of a draft upon the same day on which it is received, is no laches. *Semble*, that reasonable time is a question of law. *Medcalf v. Hall*, 3 Doug. 183.

On Wednesday the 23rd of November, A bought goods from B, which he paid for in country bank-notes. On Monday the 28th, B requested A's servant, as a favour, to exchange the notes for money, which he accordingly did. On the same day, the bank stopped payment; A heard of it on Tuesday, and on Wednesday wrote to B, informing him of the failure of the bank, and desiring to exchange the notes; but the notes were not produced or tendered to B until long afterwards, nor were they ever presented at the bank. In an action brought by A against B, to recover the value of the notes,—held, that A was not entitled to recover. *Rogers v. Langford*, 1 C. & M. 637, s. c. 3 Tyr. 654.

##### (c) Place.

Where a bill is by the acceptor made payable at a particular place, which is not his residence, proof of presentment at that place is not sufficient evidence of dishonour, in an action against the drawer, without proof of the acceptor's handwriting. *Sedgwick v. Jager*, 5 C. & P. 199. [Parke]

The statute 2 Geo. 4, c. 78, has not altered the liability of drawers of bills of exchange, but is confined in its operation to the case of acceptors.

Therefore, in an action by the indorsee against the drawer of a bill of exchange, made payable in the body thereof in London, and accepted payable at a banker's in London, presentment for payment at the banker's in London must be proved; nor will the fact, that the special acceptance was made before the bill passed out of the hands of the drawer, dispense with the necessity of such proof, or vary his liability. *Gibb v. Mather*, 1 Law J. (N.s.) Exch. 87, s. c. 2 C. & J. 254; 2 Tyr. 189; 8 Bing. 214; 1 Mo. & Sc. 387.

Where a bill of exchange was accepted payable at a particular place, and upon taking it for payment to that place, the house was found shut up, it was held, that the averment, "that the bill was duly shewn and presented to the acceptor for payment," was well supported. *Hins v. Adeley*, 2 Law J. (N.s.) K.B. 105, s. c. 1 N. & M. 433; 4 B. & Ad. 624.

#### (M) PROTEST.

Regulations for protest for non-payment of bills of exchange, &c. when drawn, payable at a place

not the residence of the drawee. 2 & 3 Will. 4, c. 98; 10 Law J. Stat. 252.

In declaring against the indorser of a foreign bill of exchange, the omission of the averment of protest is only matter of form, and cannot be taken advantage of under a general demurrer. *Solemons v. Staveley*, 3 Doug. 293.

#### (N) NOTICE OF DISHONOUR.

##### (a) Proof of.

Evidence may be given of a written notice of dishonour of a bill of exchange, without notice to the defendant to produce the original notice. *Swain v. Lewis*, 4 Law J. (N.S.) Exch. 249, a. c. 2 C. M. & R. 261.

##### (b) When necessary.

The drawer of a bill of exchange is entitled to notice of dishonour, though he is informed, before it becomes due, that it probably will not be paid by the acceptor, but will be returned to the indorsee, and though he then tells the indorsee that he supposes there will be no alternative but his taking it up; and that, if he will bring it to him on a certain day, he will pay it. *Pickin v. Graham*, 2 Law J. (N.S.) Exch. 253, a. c. 1 C. & M. 725; 3 Tyr. 923.

##### (c) By and to whom.

If due notice of dishonour be given by any party to the bill, it is sufficient to enable the holder to sue; and it is not requisite that the party, at the time of giving notice, should be the holder of the bill. *Chapman v. Keane*, 4 Law J. (N.S.) K.B. 185, a. c. 4 N. & M. 607; 3 Ad. & E. 193.

##### (d) Form and Mode.

Action on bills of exchange against the drawer:—Held, that a letter bearing date subsequent to the time when the bills became due, and, at a time when the defendants might have received notice of the dishonour of the bills, written by the defendants, and alluding in ambiguous terms to bills (accepted by the acceptor of the present bill,) being returned for non-payment, was rightly left to the jury as evidence from which they might, or might not, infer an acknowledgment of having had notice of the dishonour of the bills, upon which the action was brought. *Booth v. Jacobs*, 3 Law J. (N.S.) K.B. 134, a. c. 3 N. & M. 351.

A letter from the holders of a bill of exchange to an indorser liable upon the bill, threatening legal proceedings if the bill is not paid, is no notice to such indorser of the dishonour of the bill by the acceptor. *Solarte v. Palmer*, 2 C. & F. 93, a. c. 1 Bing. N.C. 194; 1 Sc. 1.

##### (e) Time.

The defendant, in a conversation with the witness, said, "that he had a good defence to an action on a bill of exchange; that the plaintiff did not send him the letter in time," which as the witness understood, referred to the letter giving him notice of dishonour. No other proof of the letter was given, but the defendant had had notice to produce:—Held, that this admission was not evidence to go to the jury, of the fact of the defendant having had notice of dishonour in due time. *Braithwaite v. Coleman*, 4 Law J. (N.S.) K.B. 152, a. c. 4 N. & M. 654.

##### (f) When waived.

An offer on the part of the indorser of a bill to pay part of the amount, and the costs, and to give a warrant of attorney for the residue, will not dispense with the proof of notice of dishonour. *Standage v. Creighton*, 5 C. & P. 406. [Denman]

It was proved, in an action against an indorsee of a bill of exchange, that two months after it was due, it was produced to him, and inquiries were made as to the drawer and acceptor; upon which he said, that if the holder would take 10s. in the pound, he would secure it:—Held, sufficient to dispense with proof of notice of dishonour. *Dixon v. Elliott*, 5 C. & P. 437. [Park]

#### (O) HOLDER FOR VALUE.

[See BILL-BROKER.]

#### (P) ACTIONS AND SUITS.

##### (a) Where maintainable.

*Semble*, that an indorsee for value, who receives part payment from the drawer of an accommodation bill, and takes a new bill to give time for the payment of the remainder, does not thereby discharge the acceptor, unless he was aware that the acceptance had been given for the drawer's accommodation. Whether, if he knew that fact, it would make any difference! *Roffe v. Wyatt*, 5 C. & P. 181. [Tindal]

If a promissory note be concocted in France, the maker being domiciled there, both at the time of making, and when it becomes due, whether, if he afterwards comes to England, an action is maintainable against him in the English courts upon it, although it lacks the formalities required by the French law—*quare?* *Trimby v. Fignier*, 6 C. & P. 25. [Bosanquet]

A, the drawer of a bill, gave it to B, unindorsed, to present it for payment. B did so, and got it noted. Afterwards, A indorsed the bill, and gave it to B, to obtain payment:—Held, that this indorsement was sufficient to enable B to recover in an action against the acceptor, notwithstanding A said, upon the trial, that B was indebted to him, and that he did not give him any authority to bring the action. *Adams v. Oke*, 6 C. & P. 70. [Gurney]

Plaintiff, who was the grandson of the deceased tenant of a farm, remained in possession after his grandfather's death; a bargain was made between plaintiff and M, an in-coming tenant, who had agreed to take the farm from the landlord, by which bargain M was to give plaintiff 30*l.* for the crops, manure, &c., to be secured by the promissory note of M, and a surety, which note was to be held by D, and was to be by D attested and handed over to plaintiff, if plaintiff delivered up the possession of the lands on the next morning, but he was to remain in possession of the house for a few weeks, at the rent of 1*l.* a week, to be paid to M: the note was accordingly drawn, with a clause of attestation, and was signed by M and his surety, and handed to D. The next morning, upon M and D requesting plaintiff to give up the possession, he refused to give up the place; but there was evidence that, on that day, M's cattle were on the lands, and the plaintiff's were not. Plaintiff kept possession of the house for the

three weeks, when he was turned out by a constable. The note was never attested, and it was not proved how the plaintiff got it into his possession:—Held, in an action by the plaintiff against the makers of the note, that the jury were warranted in saying that the bargain had been complied with on the part of the plaintiff. *Reams v. Morgan*, 2 C. & J. 453, s.c. 2 Tyr. 396.

The defendant having given a promissory note as a security for the payment of certain periodical contributions, fines, and interests to a society, the payee sued for arrears due, and took a cognovit for the amount thereof and costs, which he afterwards received, and gave a receipt for the debt and costs in the action; no judgment was entered up on the cognovit:—Held, that a second action could not be maintained on the note, for subsequent arrears. *Siddall v. Rawcliffe*, 2 Law J. (n.s.) Exch. 237, s.c. 1 C. & M. 487; 3 Tyr. 441; 1 M. & R. 263.

An indorsee of a bill of exchange is not prevented from recovering against an indorser, by reason of the mis-spelling of the name of a subsequent indorsee who indorses it over, if, when the bill is presented at the place where it is accepted payable, the answer is "no advice"; although the holder afterwards, pursuant to a prior indorsement "in need," makes presentment to a banker, who refuses payment, on account of the irregularity in spelling; and such indorsee, after due notice of dishonour, at the suggestion of the indorser, sends the bill back to have the mistake in the indorsement rectified, and it is again presented at the banker's, and payment refused by reason of its being overdue. *Leonard v. Wilson*, 3 Law J. (n.s.) Exch. 171, s.c. 2 C. & M. 589; 4 Tyr. 415.

(b) *By and against whom.*

The drawer of a bill of exchange is liable personally, unless he use clear and express terms limiting his responsibility. *Sowerby v. Butcher*, 3 Law J. (n.s.) Exch. 80, s.c. 2 C. & M. 368; 4 Tyr. 320.

Held, that the plaintiff, the drawer of a bill of exchange, having, upon a former occasion, as assignee of a bankrupt, jointly with another, delivered a declaration, in a suit against the defendant (the acceptor), to recover the amount of the same bill, was not such a circumstance as should impeach the title of the plaintiff, and compel him to prove how he obtained the possession of the bill, he, the plaintiff, being the drawer and payee, and the proceedings in the action not being continued beyond the delivering of the declaration. *Dabbs v. Humphries*, 3 Law J. (n.s.) C.P. 139, s.c. 10 Bing. 446; 4 Mo. & Sc. 285.

In an action by drawer against acceptor of a bill of exchange for 101*l.*, defendant proved that he was under age when he accepted the bill. Plaintiff then produced in evidence a letter in defendant's handwriting, purporting by its date to have been written after he came of age, addressed to a third person, in these words:—"I request you to pay H (the plaintiff) 101*l.* at your earliest convenience after the date of this letter, from the money left me by my late grandfather, for which I have given my bill." This letter was proved to have been delivered to plaintiff's clerk, but it did not appear when:—Held, that the letter must, *prima facie*, be taken to have been written and issued at the time when it bore date;

and that, having been written after defendant came of age, and before the bill became due, it would support a count on a promise to pay according to the tenor and effect of the bill. *Hunt v. Massey*, 5 B. & Ad. 903, s.c. 3 N. & M. 109.

Assumpsit against J. K. on a bill accepted by Joseph K. in the name of John K. & Co., there being no plea in abatement:—Held, on proof of the facts, that as the acceptance was in the hand-writing of Joseph, and that he had before done business in the name he signed, that the verdict must be given against him; but the Judge intimated, that, if it had been proved (as it was stated) that John was the party who was arrested in the action, the plaintiff must have been nonsuited. *Wilde v. John Kepp*, 6 C. & P. 235. [Alderson]

A bill of exchange was drawn by A on B, and indorsed to C. The bill was not satisfied when due, but part payments were afterwards made by the drawer and acceptor. Two years after it had become due, D paid the balance to C, the holder, and the latter indorsed the bill and wrote a receipt on it in general terms:—Held, that the receipt was not conclusive evidence that the bill had been satisfied either by the acceptor or drawer, but that parol testimony was admissible to explain it; and it appearing thereby that D paid the balance, not on account of the acceptor or drawer, but in order to acquire an interest in the bill as purchaser, it might be indorsed by D after it became due, so as to give the indorsee all the right which C, the holder, had before the indorsement, and such indorsee might therefore recover from the drawer the balance unpaid by him. *Graves v. Key*, 3 B. & Ad. 313.

(c) *Lost Bills and Notes.*

[See BILL-BROKER—TROVER, Where maintainable; and see *post* (i), Rule to compute.]

To an action by an indorsee against the indorser of a bill of exchange, who had lost the bill by accident, it is a good defence that the plaintiff took the bill fraudulently, or under such circumstances that he must have known that the person from whom he took it had no title, or that the plaintiff was guilty of gross negligence in taking it. But it is no defence that he took it under circumstances in which a prudent and cautious man would not have taken it. *Backhouse v. Harrison*, 5 B. & Ad. 1098, s.c. 3 N. & M. 188.

In an action by the holder of a lost bill of exchange, the proper question for the consideration of the jury is, whether, under the circumstances in which he took the bill, there was gross negligence on his part. *Crook v. Jadis*, 3 Law J. (n.s.) K.B. 87, s.c. 5 B. & Ad. 909; 3 N. & M. 267; 6 C. & P. 191.

A party is robbed of a bank note for 200*l.* He advertises the loss and stops payment at the Bank. In two years after, the note is traced to the defendant, who, in answer to an inquiry as to the mode of obtaining possession of it, says, "he does not know from whom he received it, nor does he care!"—Held, that, under such circumstances, he did not exercise due care, and that he was liable in trover to the owner.

The care and caution to be exercised in taking bank notes, &c. depend, in a great degree, upon, and are measured by, the amount and value of the

note. *Easely v. Crockford*, 3 Law J. (n.s.) C.P. 22, s. c. 10 Bing. 243.

(d) *Staying Proceedings.*

It is no ground for staying the trial of an action on a promissory note given for the amount of a penalty levied under the revenue laws, that the party on whose evidence the conviction proceeded has been indicted for perjury and a true bill found. *Aysheford v. Charlott*, 4 Doug. 210.

(e) *Pleadings and Evidence.*

[See, *ante* (C), Consideration—and see DEMUR-  
RER, Practice—WRIT OF TRIAL, 3 Dowl. P.C. 163.]

Where the acceptor of a bill of exchange pleads that it was accepted without any consideration, and the plaintiff replies that it was accepted for a good consideration, the onus of proof lies on the defendant to shew the want of consideration.

*Secus*—where the plaintiff, in his replication, specifies the particular sort of consideration for which he alleges the bill was accepted. *Batley v. Catterall*, 1 M. & Ro. 379. [Alderson]

A plea to a declaration on a promissory note, in an action by an indorsee against indorser, that the indorsee "had no consideration," or that he indorsed "without consideration," is bad on special demurrer. *Trinder v. Smedley*, 5 N. & M. 138, s. c. 4 Law J. (n.s.) K.B. 206.

A plea, that the defendant did not receive any good and sufficient consideration whatsoever from the plaintiff for accepting the bill, concluding to the country, is bad on special demurrer. *Graham v. Pitman*, 4 Law J. (n.s.) K.B. 206, s. c. 5 N. & M. 37; 3 Ad. & E. 521.

In an action on a bill of exchange by an indorsee against an indorser, a plea that there was no consideration for the indorsement to the plaintiff, is good after verdict. *Easton v. Pratchett*, 4 Law J. (n.s.) Exch. 335, s. c. 2 C. M. & R. 542.

To an action on a bill of exchange, the defendant pleaded no consideration; to which the plaintiff replied a consideration, stating under a *videlicet* what the consideration was, and concluding to the country:—Held, that the plaintiff was not bound to prove the consideration; but that the bill was *prima facie* proof of consideration. *Lowe v. Burrowes*, 4 Law J. (n.s.) K.B. 89, s. c. 4 N. & M. 366; 2 Ad. & E. 483.

The Reg. Gen. H. T. 4 Will. 4, do not enable a defendant, in an action on a bill of exchange at the suit of an indorsee, to plead, that he received no consideration from the drawer, without shewing circumstances of fraud and knowledge of them on the part of the plaintiff. *French v. Archer*, 3 Dowl. P.C. 130.

To a declaration on a promissory note against the maker, he pleaded no consideration. The plaintiff replied, the note was indorsed to her in part payment of a debt, and that she had no notice of the premises in the plea. The defendant rejoined, that she had notice. On demurrer,—Held, that the plaintiff was entitled to judgment. *Pearce v. Champneys*, 3 Dowl. P.C. 276.

Pleas to a declaration by indorsee of a bill of exchange against the acceptor—1st, that it was accepted for the accommodation of the indorser, and indorsed after it was due, but not alleging that it was

accepted before it became due;—2nd, that the indorser, before the indorsement, was indebted to the acceptor, in a sum exceeding the amount of the bill:—Held, to be bad. *Stein v. Yglesias*, 4 Law J. (n.s.) Exch. 5, s. c. 1 C. M. & R. 565; 5 Tyr. 172.

In an action by the indorsees of a bill of exchange against the acceptor, to which the defendant pleads, that the plaintiffs gave no consideration for the bill, a replication alleging generally, that the plaintiffs did give full and valuable consideration, is good, without setting out what the consideration was. *Prescott v. Levy*, 4 Law J. (n.s.) C.P. 87, s. c. 1 Sc. 726; 3 Dowl. P.C. 403.

In an action against the defendants, as acceptors of a bill of exchange, and a plea, alleging that no consideration passed from the indorsee, a replication, averring generally that the bill was indorsed for good and valuable consideration, namely, monies advanced to the indorsers, and due by them to the indorsees, is good; as it is not necessary to state the particulars of the monies advanced, debt due, &c. *Bramah v. Baker*, 4 Law J. (n.s.) C.P. 81, s. c. 1 Bing. N.C. 469; 1 Sc. 350; 3 Dowl. P.C. 392.

To a declaration on a promissory note, a plea, that the defendant made the note without any consideration for so doing, or for his paying the amount thereof, or any part thereof, is bad on special demurrer. *Stoughton v. the Earl of Kilmorey*, 4 Law J. (n.s.) Exch. 138, s. c. 2 C. M. & R. 72; 5 Tyr. 568.

To a plea, stating, that the drawer and payee of the bill was lawfully possessed of the bill, and, being so possessed, he indorsed the bill to F P, and F P indorsed for value to the defendant, a replication, alleging, that there never was a good or valuable consideration for F P indorsing the bill to defendant, was held to be good; and that there was no ground for arresting the judgment or awarding a repleader. *Fancourt v. Bell*, 4 Law J. (n.s.) C.P. 249, s. c. 1 Bing. N.C. 681; 1 Sc. 646.

The indorsee brought an action against the defendant, as acceptor of a bill of exchange; the latter pleaded, that such acceptance was a matter of accommodation, and that no consideration passed from the drawer:—Held, upon demurrer, that the plea was no answer to the action. *Lowe v. Chifney*, 4 Law J. (n.s.) C.P. 9, s. c. 1 Bing. N.C. 267; 1 Sc. 95.

In an action by an indorsee against the acceptor of a bill of exchange, a plea, that there was not at any time, any consideration for his the said defendant's acceptance or paying the said bill of exchange, was held bad on special demurrer. *Reynolds v. Iremy*, 3 Dowl. P.C. 453.

Declaration by a second indorsee against acceptor, on a bill of exchange. Plea, that the acceptance and the indorsements were without consideration. Replication, that the first indorsee indorsed to the plaintiff for value. The plaintiff, at the trial, elected to prove value, and established, that the first indorsee owed him a part of the amount of the bill, and that the payee, who was the first indorser, owed the residue:—Held, that he could only recover on these pleadings the amount due to him from the first indorsee.

*Quare*—whether he was bound to prove value, or the defendant ought to have negatived it.

*Semble*, that the obligation lay upon him. *Simpson v. Clarke*, 4 Law J. (n.s.) Exch. 255, s. c. 2 C. M. & R. 342.



Action by indorsees against indorser of a promissory note. Plea, that the note was made and delivered to the defendant, that he might indorse it for the accommodation of the maker, to enable him to obtain advances of money thereon; that the plaintiffs had only advanced a part, and there was no consideration for the residue. Replication, that the plaintiffs were the holders of the note for good and valuable consideration given to the maker, in respect of their being such holders to the full amount. On this issue, it was held, that the defendant was bound to impeach the consideration given by the plaintiffs in the first instance. Secondly, that the discounting of the note by the plaintiffs was a giving of a valuable consideration, within the meaning of the issue. Thirdly, that in the absence of any notice that the note was to be paid in cash, the plaintiffs were justified in applying it in discharge of past debts, and might still be described as holders for valuable consideration, in respect of the note. *Percival v. Frampton*, 4 Law J. (N.S.) Exch. 139, s. c. 2 C. M. & R. 180; 5 Tyr. 579; 3 Dowl. P.C. 748.

Assumpsit on a banker's cheque, drawn by the defendant, payable to the plaintiff. Plea, that there was no consideration or value at any time for the defendant's making the said draft. Replication, that there was:—Held, that at the trial the defendant might prove on this issue, that the plaintiff was an auctioneer, and had put up certain premises to sale, which were knocked down to the defendant, who gave the cheque in payment of the deposit; but that the plaintiff had wilfully misrepresented the value and title of the premises in the particulars of sale, and therefore the defendant had rescinded the contract: that the legal effect of those facts was, that there was no consideration for the cheque; and that though the plea would have been bad on special demurrer, it was good after verdict. *Mills v. Oddy*, 4 Law J. (N.S.) Exch. 168, s. c. 2 C. M. & R. 103; 5 Tyr. 571.

Where the maker of a promissory note pleads, that he had no value or consideration for the making of it, and this is traversed generally by the plaintiff, the latter is not bound to prove the consideration, until the defendant has shewn the want of it. *Lacy v. Forrester*, 4 Law J. (N.S.) Exch. 138, s. c. 2 C. M. & R. 59; 5 Tyr. 567.

In an action by the payee against the maker of a promissory note, and plea, that the note was drawn and given to plaintiff in consequence of an agreement with a third person, in payment of money won at play by that third person:—Held, that such plea was not supported by evidence that a bill of exchange was first given to the third party in payment of the gambling debt, which, with consent of the parties, was cancelled at a subsequent period, and, in lieu thereof, the promissory note on which the action was brought, with a different time to run: that the defendant was bound to state, in his plea, the precise nature of the agreement upon which the promissory note was given. *Boulton v. Coghlan*, 4 Law J. (N.S.) C.P. 172, s. c. 1 Bing. N.C. 640; 1 Sc. 588.

To a declaration by indorsee against the drawer of a bill of exchange, the defendant pleaded, that he indorsed the bill without having or receiving any value or consideration whatever for, or in respect of, the said indorsement thereof; and that he had not

at any time had or received any value or consideration whatever for, or in respect of, such indorsement. At the trial, evidence was admitted on the part of the defendant, though objected to by the plaintiff's counsel, to shew that the acceptor was only to pay the bill provided he had sold certain goods intrusted to him to the amount thereof:—Held, that, on the issue raised by these pleadings, such evidence was immaterial, and, therefore, the Court refused a rule for a new trial, without deciding whether it was admissible or not.

Secondly, on a motion to enter up judgment for the plaintiff *non obstante veredicto*, it was held, that, after verdict, the plea was sufficient; though it seems that it would have been bad on special demurrer. *Easton v. Pratchett*, 4 Law J. (N.S.) Exch. 78, s. c. 1 C. M. & R. 798; 4 Tyr. 472; 6 C. & P. 730.

In an action by the indorsee against the indorser of a bill of exchange, the declaration need not allege any acceptance, or a special acceptance or presentment at the place where it is made payable, but it is sufficient to prove presentment at that place. *Parks v. Edge*, 2 Law J. (N.S.) Exch. 94, s. c. 1 C. & M. 429; 3 Tyr. 364; and see *Harris v. Packer*, 3 Tyr. 370.

The clerk of a notary presented a bill of exchange at the place where it was made payable, which was dishonoured; upon his return, he, according to the practice and routine of his office, dictated the answer which he received at the place of presentment, to another clerk, who inserted such answer in a book. He also, at the same time, made an entry of the fact in his own book, signed with his name:—Held, that the production of such book, and proof of the hand-writing of the clerk, since dead, was admissible as evidence of the presentment of the bill to the acceptor. *Poole v. Dicus*, 4 Law J. (N.S.) C.P. 196, s. c. 1 Bing. N.C. 649; 1 Sc. 600.

If plaintiff declare on a general acceptance, and defendant, in his plea, affirm it to be qualified under the statute 1 & 2 Geo. 4, c. 78, and use the operative words of the statute—a replication, traversing such averment generally, without using such operative words, is good. *Lyon v. Wall*, 2 Law J. (N.S.) C.P. 47, s. c. 9 Bing. 660.

Where the holder of a bill of exchange gave it to a friend to procure it to be discounted, and the friend, at the request of the discounter, indorsed the bill:—Held, that the holder having received but a part of the amount, and having been called upon to pay the whole bill at maturity, was entitled to sue the discounter for the balance; the only questions for the consideration of the jury being, whether the bill belonged to the original holder or his friend, and whether there was any defence for the discounter against the friend who had indorsed it. *Bastable v. Poole*, 4 Law J. (N.S.) Exch. 25, s. c. 1 C. M. & R. 410; 5 Tyr. 111.

Every note or bill of exchange consists of two parts—one, the admission of a consideration, the other, the terms of payment. Parol evidence is admissible to contradict the former, but not to contradict or vary the latter.

Therefore, where a note was given, payable fourteen days after date, parol evidence was held to be inadmissible to prove that the note was not to be

enforced if a verdict were obtained in a suit between other parties for the actual subject-matter of the consideration. *Foster v. Jolly*, 4 Law J. (n.s.) Exch. 65, a. c. 1 C. M. & R. 703, 5 Tyr. 239.

In an action against the acceptor of a bill of exchange, the defendant may, under the plea of non-acceptance, give in evidence part payment. The rule which requires matters of defence to be pleaded, refers only to those which are in bar of the action, not to such as go merely to the reduction of the damages. *Jacobs v. Shirley*, 4 Law J. (n.s.) C.P. 298, a. c. 2 Bing. N.C. 88; 2 Sc. 157.

In an action by the holder against the acceptor of a bill of exchange, the defendant pleaded, that the drawer, at the time of drawing and indorsing the bill, was a married woman. Replication, that she drew and indorsed the bill by the authority and as the agent of her husband. Upon special demurrer,—held, that such replication was no departure, inasmuch as it tended to strengthen the derivative title of the drawer, and to fortify the declaration. *Prince v. Brunatt*, 4 Law J. (n.s.) C.P. 90, a. c. 1 Bing. N.C. 435; 1 Sc. 342.

Declaration by the drawer against the acceptor of a bill of exchange. Plea, that, before the making and the acceptance, it was agreed by the plaintiff and the defendant, that the plaintiff should consign certain goods to J N abroad, and that, out of the proceeds of these goods, the plaintiff should direct J N to pay the amount of the bill to the defendant; and that, in case they should not have arrived in England when the bill became due, the plaintiff should renew the bill. It was then averred, that the goods were consigned, but that the proceeds had not arrived when the bill became due; that the plaintiff declined renewing the bill, but agreed that the defendant should write to J N, and direct him to pay the whole of the proceeds to the plaintiff; and it was averred that the defendant did so write, and delivered the letter to the plaintiff. The plea concluded with an allegation, that the defendant had received no value or consideration for the payment of the bill:—Held, that the plea was repugnant. *Nyassa v. Wylla*, 4 Law J. (n.s.) Exch. 102, a. c. 1 C. M. & R. 586; 5 Tyr. 377.

A plea by the indorser of a bill of exchange, that the action was commenced before a reasonable time had elapsed for the defendant to pay the bill, after notice to him of non-payment, is bad, as the cause of action arises immediately on the notice of non-payment. *Nyggers v. Lewis*, 3 Law J. (n.s.) Exch. 112, a. c. 1 C. M. & R. 370; 4 Tyr. 847.

What is sufficient evidence, in an action by indorsee against acceptor of a bill of exchange, to identify plaintiff with the drawer of the bill, so as to let in the declarations and letters of the drawer. *William v. Patterson*, 3 Law J. (n.s.) Exch. 138.

Indorsee against drawer of a bill of exchange. Plea, that the defendant's indorsement was in blank; that the defendant delivered the bill to A. (not a party to the bill) only to get it discounted for him; that A. fraudulently, and in violation of that special purpose, delivered it to B, to secure a debt due from A to B, of all which the plaintiff had notice.

Held, on a general demurrer, that the plea was bad, for not showing distinctly that the defendant received no value for the bill. *Scoble*, that a replication to such plea, "that the defendant broke his

promise without the cause alleged by him in his plea," is good. *Noel v. Rich*, 2 C. M. & R. 360.

An alteration in a bill of exchange, after acceptance, may be taken advantage of on a plea that the defendant did not accept the bill. *Cock v. Corwell*, 4 Law J. (n.s.) Exch. 307, a. c. 2 C. M. & R. 291.

To an action against the acceptor of a bill of exchange, the defendant pleads an alteration vitiating the bill. The plaintiff replies (by way of new assignment) that the bill sued on was drawn as declared upon, and is a different bill from that mentioned in the plea. The defendant rejoins, the same alteration in the bill mentioned in the new assignment. The plaintiff cannot, in his surrejoinder, take issue upon the identity of the bill mentioned in the rejoinder with that mentioned in the replication and declaration, and conclude to the country. *Heydon v. Thompson*, 2 N. & M. 403.

To a declaration by indorsee against acceptor, the defendant pleaded, that he, to accommodate the drawer, and without consideration, wrote a qualified acceptance on blank paper, and delivered the paper to the drawer, for the purpose of his drawing thereon a bill at nine months; that he drew a bill at six, which was the bill declared upon, and indorsed it without consideration to S, who indorsed it without consideration to the plaintiff, both indorsees knowing all the facts. The plaintiff new assigned, that the bill pleaded was not the same bill as that declared upon, but another, for that the former was accepted generally, and the defendant never accepted the same in any qualified manner. Plea, setting out, as before, a qualified acceptance on blank paper, for the same purpose as above mentioned, and alleging the same facts as to the drawing and indorsing of a bill, which the plea stated to be the bill above newly assigned, omitting, however, to charge, that the bill was given without consideration, but stated, that the indorsements were made "without any sufficient consideration, and that the indorsees knew that the paper was delivered for the purpose of a bill at nine months, being drawn after the acceptance." Replication, that the bill of exchange mentioned in the last plea was not the bill above newly assigned, but another and different, with conclusion to the country. On demurrer,—held, that this replication admitted the existence of the bill mentioned in the preceding plea, and therefore ought to have concluded with a verification. The plaintiff having obtained leave to amend, replied, "that the defendant did not write his qualified acceptance on the said blank paper, as in the last plea mentioned, in manner and form," &c.; and concluded to the country. On demurrer,—held, that this was, in substance, an allegation that no qualified acceptance was written on the bill declared upon by the plaintiff; that it was, in effect, an answer to the whole plea, and that issue might properly be tendered upon it. *Haydon v. Thompson*, 1 Ad. & E. 210, a. c. 3 N. & M. 309.

An indorsement on a bill of exchange, not stated in the declaration, may be struck out after the bill has been read in evidence, and after an objection has been made on account of the variance. *Mayer v. Jades*, 1 M. & Ro. 247. [Denman]

An instrument, whereby A promises to pay B a sum of money by instalments, but which is to become void upon the death of B, is not a promissory

note, but an agreement to pay upon a contingency. A plaintiff declared on such an instrument, describing it as an agreement or instrument in writing, whereby the plaintiff promised to pay, &c. The agreement, which was set out, appeared to be called on the face of it a "note of hand." A plea, that the defendant did not make the said supposed promissory note, in the declaration mentioned, held bad on special demurrer. *Worley v. Harrison*, 5 N. & M. 173, s.c. 4 Law J. (N.S.) K.B. 268; 3 Ad. & E. 669.

A plea to assumpsit by indorsee of B against a prior indorser, that defendant had no consideration for indorsing, and that B indorsed to plaintiff without any consideration, and that plaintiff had always held without any consideration, is bad in substance. *Trinder v. Smedley*, 4 Law J. (N.S.) K.B. 206, s.c. 3 Ad. & E. 522; 5 N. & M. 138.

#### (f) Witnesses.

An accommodation indorser is liable for the debt of the accommodation drawer, under the 52nd section of 6 Geo. 4; consequently, if the drawer become bankrupt, and obtain his certificate, the indorser may prove under the commission, though he be not called upon to pay the bill until after the bankruptcy. Hence it follows, that in an action by the holder against the accommodation indorser, the drawer is a competent witness for the defendant, as his certificate is a bar to any action that may be brought against him. *Basset v. Dodgin*, 2 Law J. (N.S.) C.P. 84, s.c. 9 Bing. 653; 2 Mo. & Sc. 777.

In trover by the acceptor of a bill of exchange, the drawer and payee is competent to prove for the plaintiff, that he (the drawer) had misappropriated the bill, and that a second indorser had received no consideration for his indorsement. *Fancourt v. Bull*, 4 Law J. (N.S.) C.P. 249, s.c. 1 Bing. N.C. 681; 1 Sc. 645.

#### (g) Defence.

The infancy of the payee is no answer in an action by the indorsee of a bill of exchange against the drawer. *Grey v. Cooper*, 3 Doug. 65.

In an action by the executors of the payee against the executors of the maker of a promissory note, evidence that the note was given to the payee by the maker in lieu of a legacy, on the undertaking of the payee to become the executor of the maker, is admissible; and, coupled with the fact that the payee died before the maker, constitutes a good defence to the action. *Solly v. Hinds*, 3 Law J. (N.S.) Exch. 151, s.c. 2 C. & M. 516; 4 Tyr. 305.

#### (h) What recoverable.

On a promissory note, payable on demand, where there is no proof of any agreement for interest, the plaintiff is only entitled to interest from the day of issuing the writ of summons. *Pierce v. Fothergill*, 3 Bing. N.C. 167, s.c. 2 Sc. 334.

The indorsee of a bill of exchange is entitled to recover the whole amount of the bill, although he has received it only to get it discounted, and a part of the amount only has been advanced on his guarantee to that extent. *Reid v. Furnival*, 2 Law J. (N.S.) Exch. 199, s.c. 1 C. & M. 538; 5 C. & P. 499.

An indorsee of a promissory note, not overdue, but the amount of which is exceeded by a cross-Draft, 1831—35.

demand of the maker on the payee, having notice of such demand at the time of the indorsement, cannot recover against the maker's advances made to the payee on the note subsequent to such notice, although the note is a distinct transaction between the original parties. *Goodall v. Ray*, 4 Dowl. P.C. 76.

It was agreed between the plaintiff, the defendant, and H, that the defendant should make his note for 20*l.*; and that the plaintiff should draw on his bankers for 20*l.*, and pay in this note; and the plaintiff was to have 7*l.* 12*s.*, and the two others 6*l.* 4*s.* each. The money was thus procured; and the defendant, not wanting his 6*l.* 4*s.*, let H have it. It was at first agreed, that, when the note became due, they should contribute their shares to meet it; but H told the plaintiff afterwards, that he would provide 12*l.* 8*s.* towards it:—Held, that, if the defendant gave his note for the accommodation of the plaintiff and H, the plaintiff would not be entitled to recover on it; but that, if the plaintiff was to advance 20*l.*, and receive 7*l.* 12*s.* as a gift, the plaintiff could recover the whole of the 20*l.* on the note:—Held, also, that, if the defendant was to be the only security for 12*l.* 8*s.*, he would be liable to that amount; and, if each was to pay his own share, the plaintiff could only recover 6*l.* 4*s.* from the defendant, and that saying afterwards, that he would pay 12*l.* 8*s.* would make no difference, unless the plaintiff then made a new bargain to release the defendant from liability altogether. *Homan v. Thompson*, 6 C. & P. 717. [Parke.]

*Quære*, whether interest and other expenses necessarily incurred by reason of the non-payment of a bill of exchange, can be recovered where the right of action upon the bill itself is suspended.

Whether the holder of an overdue bill by the receipt of a second bill, for the same amount, on an application to renew the first, is precluded from suing upon the first, or from recovering expenses occasioned by the non-payment thereof, before he has returned the second, or it has been dishonoured?

*Semble*—that in an action by the indorsee of an inland bill of exchange against the acceptor, the plaintiff is not entitled to recover for noting and postage, without an averment of the same by way of special damage.

The holder of an inland bill of exchange, payable in London, was applied to by an indorser, after it was due, and he had remitted it for presentment, to renew the same, and received a second bill for the same amount, the indorser desiring him, when the first bill was returned, to take it to another indorser, whom he named, who would pay the expenses incurred. He did not apply to this person to pay such expenses, but before the second bill arrived at maturity, and without re-delivering the same, brought an action upon the first, and obtained a verdict for the expenses of postage and noting:—Held, that the action was not maintainable. *Kendrick v. Lomas*, 1 Law J. (N.S.) Exch. 145, s.c. 2 C. & J. 405; 2 Tyr. 438.

#### (i) Rule to Compute.

[See PRACTICE, Motions, Rules and Orders.]

Service of a rule *nisi*, to compute principal and interest, on a man servant at the defendant's place

of business, is sufficient. *Alexander v. Emmott*, 1 Law J. (N.S.) Exch. 163.

Service of a rule to compute, by leaving a copy with the defendant's laundress, at his office, is insufficient. *Anonymous*, 3 Law J. (N.S.) Exch. 23.

Service of a rule to compute principal and interest on a joint promissory note on one of several defendants, is good service upon all. *Figgins v. Ward*, 3 Law J. (N.S.) Exch. 136, a. c. 4 Tyr. 282.

A rule nisi to compute, served at York, on the day cause was to be shewn, is insufficient to authorize making the rule absolute, although ten days have elapsed since the service. *Farrell v. Dale*, 2 Dowl. P.C. 16. [Gurney]

A rule was granted to compute principal and interest on a bill of exchange, lost since declaration thereon, on the terms of producing a copy before the Master, with an affidavit that it was a true copy, and that there was no indorsement on the bill itself. *Flight v. Brown*, 2 Tyr. 312.

Where a bill of exchange has been stolen, the Court will grant a rule to refer it to the Master, to compute principal and interest, notwithstanding the loss of the bill. *Allen v. Miller*, 1 Dowl. P.C. 420.

The Court will grant a rule to compute principal and interest on a promissory note, although it is clearly shewn that the note has been destroyed. *Clark v. Quince*, 3 Dowl. P.C. 26.

In entitling an affidavit of service of a rule to compute, the Christian name of the plaintiff as well as of the defendant, must be introduced. *Anderson v. Baker*, 3 Dowl. P.C. 107.

#### BILL OF SALE.

[See ASSIGNMENT, Of Goods and Chattels.]

#### BLOCKADE.

See SHIPPING.

#### BOARD OF CONTROUL.

The Court of Directors have no power, either by the terms of the 16th section of the 33 Geo. 3, c. 52, or by implication, to rescind a resolution, upon which a dispatch was framed and transmitted to the Board of Controul for their approval.

Where the Court of Directors have, in their discussions upon the subject with the Board of Controul, treated a dispatch as a matter relating to government, and have not objected to, but admitted, the jurisdiction of the Board of Controul over the subject-matter thereof, they cannot, after having so treated it, retract and say, that it is a matter relating to the domestic affairs of India only.

*Quere*—whether the Court of King's Bench has jurisdiction to decide, whether a dispatch may relate to the government of India or not.

*Quere*—also, whether the 16th section gives an appeal to the Court of Directors, in case of an altered dispatch, as well as in a dispatch originating with the Board of Controul. *Rex v. the Directors of the East India Company*, 2 Law J. (N.S.) K.B. 76, s. c. 1 N. & M. 335; 4 B. & Ad. 530.

#### BONA NOTABILIA.

[See LIMITATIONS, STATUTE OF, Part Payment.]

#### BOND.

[See ASSESSED TAXES—MASTER AND SERVANT.]

- (A) VALIDITY OF.
- (B) STAMP.
- (C) CONSTRUCTION.
- (D) SURETY.
- (E) ACTIONS AND PROCEEDINGS.
  - (a) In general.
  - (b) Pleadings and Evidence.
  - (c) Assignment of Breaches.
  - (d) Satisfaction.
  - (e) Staying Proceedings.
  - (f) Damages.
- (F) PROCEEDINGS IN EQUITY. [See DONATIO MORTIS CAUSA.]
- (G) SPECIFIC PERFORMANCE. [See SPECIFIC PERFORMANCE.]

#### (A) VALIDITY OF.

[See SHERIFF, Return of Writs.]

[*Duvergier v. Fellowes*, 8 Law J. K.B. 270, a. c. 10 B. & C. 826; 2 Law J. Dig. 60; aff. in House of Lords, 1 Cl. & F. 39, a. c. 6 Bl. N.S. 87.]

A bond given to an incumbent, securing him an annuity of equal value, with the profits of the benefice, upon his resignation, in order that another person may be presented, who may give a general bond of resignation, so that the patron's son, when of proper age, may be presented, is a bond within 31 Eliz., c. 6, s. 8, and void. *Young v. Jones*, 3 Doug. 97.

A bond given by a person to the patron to resign, upon request, is legal. *The Bishop of London v. Fytch*, 3 Doug. 142.

#### (B) STAMP.

[See ASSESSED TAXES.]

A bond conditioned for the payment of an annuity, the condition thereof reciting, that the obligee had contracted with the obligor for the sale to him of a messuage, &c., in consideration (among other things) of an annuity of 150*l.* &c., and that, on the contract for the purchase of the messuage, &c. it was agreed, that for the better securing of the payment of the annuity, the obligor should execute the bond, is properly stamped with a deed stamp of 1*l.* 15*s.*

Such an instrument need not be inrolled under the Annuity Act. *Mastayer v. Biggs*, 3 Law J. (N.S.) Exch. 292, a. c. 1 C. M. & R. 110; 4 Tyr. 466.

A bond conditioned to pay 1,000*l.* on a day five years from the date, and to pay interest, half-yearly, in the meantime, only requires a stamp for the amount for the principal sum of 1,000*l.* *Foreman v. Jeyes*, 5 C. & P. 419. [Parke]

A bond given by country customers to bankers in London, with a condition reciting a request by the obligors to the obligees, to pay from time to

time bills of exchange, &c., and binding the obligors to pay or remit cash, &c. to pay and discharge such bills of exchange at or before such bills of exchange should become due; and, from time to time, to settle accounts and to pay such sums as upon the settling of such accounts should be found due and owing to the obligees, subject to the proviso that "the whole amount of monies to be ultimately recoverable by virtue of the obligation should not exceed the sum of 1000*l*." is a bond for securing the limited sum of 1000*l*. only, and, therefore, requires only a *5*l**. stamp.

In an action by the obligees on the bond, the production by the plaintiffs of bills of exchange accepted by the defendants, payable at the banking-house of the plaintiffs, is sufficient *prima facie* evidence of a balance due to them to that amount, and renders it incumbent on the defendants to prove remittances in discharge of such balance, or to shew the actual state of the account. *Lloyd v. Heathcote*, 2 Law J. (N.S.) Exch. 162, s.c. 1 C. & M. 336; 3 Tyr. 309.

### (C) CONSTRUCTION.

A bond conditioned for the assessment of and arbitration on the damages occasioned by the obligor's working a mine every two months—held to be imperative, and not merely directory as to the periods of arbitration. *Stephens v. Lowe*, 9 Bing. 32.

A testator upon the marriage of a daughter, entered into a bond conditioned for the transfer to the trustees of her settlement, during his life, or within twelve months after his decease, of 10,000*l*. 4*l*. per cent. bank annuities; the only 4*l*. per cent. bank annuities then existing were afterwards reduced to 3*l*. 10*s*. per cent.; but there was existing at the time of his death a new 4*l*. per cent. stock, which had been created two years after the reduction of the old 4*l*. per cent.; the bond is satisfied by a transfer of 10,000*l*. 3*l*. 10*s*. per cent. *Sheffield v. the Earl of Coventry*, 2 R. & M. 317.

Upon the marriage of A with B, the widow and successor of C, a trader, A, in consideration of the stock in trade, which he receives with B, gives a bond to D, conditioned to pay to the children of B by C, within twelve months after her death, 300*l*., if, upon an account taken, the stock in trade and effects of the business, if then carried on by A, shall amount to 400*l*.; but in case, upon such account, the stock in trade shall amount to less than 400*l*., A then shall pay to such children 120*l*. A, during the lifetime of B, discontinues the trade, and ceases to have any stock:—Held, that the obligation is discharged. *Berwick v. Swindells*, 5 N. & M. 378; and see s.c. 3 Law J. (N.S.) K.B. 88; 5 B. & Ad. 914; 3 N. & M. 159; 3 Ad. & El. 868.

Two ladies intrusted much of the management of their affairs to A, who was not a professional person. In the course of business A became bound with them in a bond for 10,000*l*., given on their account; on the same day, they executed a bond to A for 12,000*l*.. The survivor of the two ladies afterwards, by her will, left a legacy of 2,000*l*. to A. The bond for 12,000*l*. was, on the face of it, a simple money bond:—Held, that it must be taken to be a simple money bond, unless impeached by evidence, which shewed that it was partly for indemnity; and that the burden of proving it to be an indemnity

bond lay on the party impeaching the bond. *Nicol v. Vaughan*, 1 C. & F. 49, s.c. 6 Bl. N.S. 104.

### (D) SURETY.

The sale of a tax collector's lands and goods is not a condition precedent to putting in suit a bond given by a surety under 43 Geo. 3, c. 99, for the due performance of the collector's duties. At all events not unless the obligee have notice where to find the collector's property.

Payment to the account of a given year of sums collected for a different year, is no discharge of the demand against the collector in respect of those sums.

It is no objection that the surety's bond is conditioned for payment by the collector to the receiver-general, and to the commissioners, or that it is conditioned for payment at the times by the act appointed. *Gwynne v. Burnell*, 4 Law J. (N.S.) Exch. 340, s.c. 2 Bing. N.C. 7; 2 Sc. 16.

### (E) ACTIONS AND PROCEEDINGS.

#### (a) In general.

An action on a bond, conditioned generally for payment of a specified sum with interest, may be brought without a demand being made. *Gibbs v. Southam*, 5 B. & Ad. 911, s.c. 3 N. & M. 165.

#### (b) Pleadings and Evidence.

Plea to debt on bond, that after the making of the bond the plaintiff by a deed of defeasance by him made, and sealed with his seal, released all obligations, &c. and delivered the said writing to one A B, as an escrow to be by him delivered to the defendant on a certain condition, that the defendant performed the condition, but that before A B could deliver the deed of defeasance, plaintiff got the same covinously out of A B's possession, and detained it. Replication, that the writing in the plea mentioned was not the deed of the plaintiff, and concluding to the country. On demurrer, held good. *Slater v. Carne*, 4 Doug. 222.

The breach of the condition of a bond otherwise well assigned, is not vitiated by the super-addition of immaterial allegations. *Stothert v. Goodfellow and Dalley*, 1 N. & M. 202.

Bond, with a condition, that if the obligor should, within twelve months after the decease of his intended wife, pay unto the child or children of his wife (by a former husband) the full sum of 300*l*., if upon an account of the stock in trade and effects in the linen-drapery business (if then carried on by him,) it shall amount to 400*l*., &c. the bond should be void:—Held, that a plea, that the obligor had, before his wife's death, ceased to carry on the business, was a good bar to an action on the bond. *Berwick v. Swindells*, 3 Law J. (N.S.) K.B. 88, s.c. 5 B. & Ad. 914; 3 N. & M. 159; 3 Ad. & E. 868.

In a creditor's suit by a bond-creditor of the testator, it is not necessary to prove the will against the heir-at-law. *Lucas v. —*, 4 Law J. (N.S.) Chanc. 230.

#### (c) Assignment of Breaches.

In an action of debt on bond, conditioned to pay a certain sum of money on a distant day,

with interest in the meantime, the bond reciting, that the principal sum and interest therein contained, included and were identical with certain other sums, secured by a certain indenture of assignment, bearing even date with said bond. It also recited, that the bond in question was subject to and governed by all the provisions, conditions, &c. contained in the above-mentioned indenture of assignment, bearing even date with the bond:—Held, that no breaches need be assigned, as the bond was within the statute 8 & 9 Will. 3, c. 11, s. 8. *Smith v. Bond*, 2 Law J. (N.S.) C.P. 269, s. c. 10 Bing. 125; 3 Mo. & Sc. 528.

(d) *Satisfaction.*

Legacy held not a satisfaction of a bond given by a father on his daughter's marriage, to secure her portion, under the circumstances. *Forster v. Evans*, 2 Law J. (N.S.) Chanc. 74, s. c. 6 Sim. 15.

(e) *Staying Proceedings.*

A bond for a penal sum of 560*l.*, was conditioned for the payment of 280*l.*, in three years, with interest in the meantime half-yearly. It was provided, that in case of default in payment of the interest, the creditor should be at liberty to call in and demand payment of the principal. Default being made in payment of the interest, and an action brought for the whole,—Held, that the defendant was not entitled to a stay of proceedings, on payment of the interest and costs; the principal having become a debt payable, and not a penalty. *James v. Thomas*, 2 Law J. (N.S.) K.B. 207, s. c. 2 D. & M. 643; 5 B. & Ad. 40.

(f) *Damages.*

Defendant, with two others, entered into a bond in the penal sum of 1,000*l.* conditioned for the payment of rent, observance of covenants, &c.; it recited, amongst other things, that the plaintiff and defendant had agreed to execute a bond in the penalty of 50*l.*, for the payment of rent, observance of covenants, &c. Upon action on the bond first mentioned, and verdict for the plaintiff for 750*l.* due for rent, upon motion to reduce the verdict to 50*l.*, the penalty in the second bond agreed to be executed,—held, that the penalty of the bond, on which the plaintiff sued, could not be cut down or restricted by the penalty of the bond to which the recital was alleged to refer. *Ingleby v. Swift*, 2 2 Law J. (N.S.) C.P. 261, s. c. 10 Bing. 84; 3 M. & Sc. 469.

Under a trust contained in a deed, to pay all sums of money due and secured by bond to persons named therein, together with interest then due and to become due thereon respectively; interest cannot be recovered beyond the penalty of the bond. *Hughes v. Wynne*, 2 Law J. (N.S.) Chanc. 28, s. c. 1 M. & K. 20.

**BONUSES.**

When a bond is given by way of security for allowing a sum of bank stock, and for paying the amount of dividends and interest in the meantime, no bonus by way of addition to the principal of the stock will belong to the lender, and must be paid by the addressee, in the character of capital, sub-

ject to like payments, by way of dividends or interest, as the principal sum advanced was subject to. *Vaughan v. Wood*, 1 Law J. (N.S.) Chanc. 107, s. c. 1 M. & K. 403.

**BOROUGHES AND FRANCHISES.**

Justices in certain cases may commit for felonies to be tried at the Quarter Sessions of the county. Where there is a recorder and a fit prison, persons shall be committed to that prison for any felony or misdemeanour, triable, in general, at county sessions; and the Justices of such boroughs or franchises are required to hold Quarter Sessions, and to try and punish offenders with the same authority as that which is possessed by courts of Quarter Sessions in counties. 4 & 5 Will. 4, c. 27; 12 Law J. Stat. 44.

**BOTTOMRY.**

[See **INSURANCE.**]

**BOUNDARY ACTS.**

England, 2 Will. 4, c. 64; 10 Law J. Stat. 129.  
Ireland, 2 & 3 Will. 4, c. 89; 10 Law J. Stat. 239.

**BOUNDARIES.**

[See **RIVER.**]

The provision in 7 Geo. 4, c. 64, s. 12, as to offences committed within 500 yards of the boundaries of counties, is confined to county boundaries and to prosecutions in counties. It does not apply to prosecutions in limited jurisdictions. *Res v. Welsh*, 1 R. & M. C.C. 175.

**BREWER.**

[See **COVENANT**, Construction of.]

**BRIBERY.**

[See **PARLIAMENT.**]

Provisions for indemnifying witnesses relating to bribery at Stafford. 3 Will. 4, c. 20; 11 Law J. Stat. 56.

Indemnity of witnesses to bribery at Warwick. 4 Will. 4, c. 17; ditto at Liverpool, c. 18; 12 Law J. Stat. 31.

A person discovering another person who is indemnified from the penalties of the statute 2 Geo. 2, c. 24, is not a discoverer within that statute, nor indemnified. *Lord Porchester v. Petrie*, 3 Doug. 261.

**BRIDGES.**

Provisions relating to the erection of, in Ireland. 4 & 5 Will. 4, c. 61, 3 Law J. (N.S.) Stat. 120.

A bridge erected by trustees under the powers of a local act since the 43 Geo. 3, c. 59, without the

approbation of the county authorities, as prescribed by the last-mentioned act, is not a bridge which the county are liable to repair. *Rez v. the Inhabitants of Derbyshire*, 1 Law J. (n.s.) M.C. 15, s. c. 3 B. & Ad. 147.

A person bound *ratione tenure* to repair a carriage-bridge, is not bound to repair a foot-bridge erected of late years by the side of the carriage-bridge. *Rez v. the Inhabitants of Middlesex*, 1 Law J. (n.s.) M.C. 16, s. c. 3 B. & Ad. 201.

The statute 43 Geo. 3, c. 59, which limits the liability of the county to repair bridges, applies only to new bridges built since the passing of the act, and not to bridges built before that act passed, but which have been since widened or enlarged.

The county therefore held liable to repair the latter. *Rez v. the Inhabitants of the County of Lancaster*, 1 Law J. (n.s.) M.C. 1, s. c. 2 B. & Ad. 813.

A parish may be liable by immemorial custom to repair a bridge. *Rez v. the Inhabitants of Hendon, in Middlesex*, 2 Law J. (n.s.) M.C. 55, s. c. 4 B. & Ad. 628.

The county are liable to repair a bridge which, since the passing of the 43 Geo. 3, c. 59, has been built upon the site of an old bridge; although, upon building the new bridge, the provisions of that act were not complied with. *Rez v. the Inhabitants of the County of Devon*, 2 Law J. (n.s.) M.C. 74, s. c. 5 B. & Ad. 383.

Whether a building *super flumen seu cursum aquæ*, is a bridge or a culvert, is a question of fact for the jury; and it is not necessarily a bridge, in point of law, because it is *super flumen seu cursum aquæ*. *Rez v. the Inhabitants of Whitney*, 4 Law J. (n.s.) M.C. 86, s. c. 4 N. & M. 594; 3 Ad. & E. 69; 7 C. & P. 208.

An infant, whose guardian is in the occupation of the estate, and in receipt of the rents and profits, is not liable to the repair of a bridge *ratione tenuræ*, either as owner or occupier. The guardian in socage is such an owner and occupier as to be liable to the discharge of that and other obligations to which the land is subject.

*Quære*—whether the owner of an estate, in respect of which a liability to repair arises, not being in the occupation, is liable to be indicted, or whether the indictment must be against the occupiers. *Rez v. Sutton*, 4 Law J. (n.s.) K.B. 215, s. c. 5 N. & M. 353; 3 Ad. & E. 597.

## BRITISH MUSEUM.

Appointment of a trustee of. 2 Will. 4, c. 46; 10 Law J. Stat. 105.

## BROKER.

[See PRINCIPAL AND AGENT—RATE, Distress for Poor-rate.]

A stock-broker is a broker within the statute 6 Anne, c. 16, and 57 Geo. 3, c. 60, and if not admitted by the Court of Mayor and Aldermen, is liable to a penalty for acting as such within the city of London and liberties thereof. *Clark v. Powell*, 2 Law J. (n.s.) K.B. 145, s. c. 1 N. & M. 492; 4 B. & Ad. 846.

## BUCKINGHAM PALACE.

Authority to apply part of land revenue to repair. 2 Will. 4, c. 3, 10 Law J. Stat. 9; 3 & 4 Will. 4, c. 81, 11 Law J. Stat. 154.

## BUILDING.

[See NUISANCE—STATUTE, Construction of.]

## BUILDING ACT.

The Building Act, 14 Geo. 3, c. 78, s. 100, limits actions to be brought within three months. A had begun to build a party wall, partly on the soil of B, more than three months before the action, but had not completed it within that time:—Held, that B, might recover for such part of the trespass as was committed within the time limited; but that, if nothing had been done within three months, he must bring ejectment. *Trotter v. Simpson*, 5 C. & P. 51. [Parke.]

In an action to recover a moiety of the expenses of a party-wall, it appeared, that the plaintiff, having a term of sixty-one years, let to the defendant on a building lease, for fifty-nine years, land adjoining to his house, at an improved rent; that the defendant, in building, made use of the wall of the plaintiff's house, and when he had completed this building, let it also at a further improved rent:—Held, that the plaintiff was the owner of the improved rent, within the stat. 14 Geo. 3, c. 78, s. 41, and that the defendant was not liable to contribute to the expenses of the party-wall. *Williams v. Pocklington*, 1 Law J. (n.s.) K.B. 28, s. c. 2 B. & Ad. 878.

To an action of trespass for heightening the plaintiff's wall, and thereby obstructing his light, the defendant pleaded the general issue. The defendant having proved that the wall was a party-wall, and that he acted under a *bond fide* belief that the Building Act, 14 Geo. 3, c. 78, justified him in what he had done, the plaintiff was nonsuited:—Held, that evidence of the joint property was receivable under this plea, and that the defendant was entitled to the notice of action required by the act.

The 100th section enacts, that if the plaintiff be nonsuited, the defendant shall have judgment to recover treble costs:—Held, that it was not necessary for the defendant to enter a suggestion on the roll, to entitle him to a taxation of treble costs. *Wells v. Oddy*, 4 Law J. (n.s.) Exch. 149, s. c. 2 C. M. & R. 128; 7 C. & P. 22; 3 Dowl. P.C. 799.

The administrator or executor who, as such, is entitled to the improved rent of premises, is, within the act, 14 Geo. 3, c. 78, "the owner," liable to reimburse a party the moiety of expenses of building a party-wall. The improved rent is only assets in the hands of the executor or administrator, minus the amount of that moiety of the expenses; and, *comme semble*, he might discharge himself from liability to the full extent in this action, under 14 Geo. 3, c. 78, by shewing the amount of the improved rent, and that he has only received sufficient to satisfy a certain amount. *Thacker v. Wilson*, 4 Law J. (n.s.) K.B. 149, s. c. 4 N. & M. 688; 3 Ad. & E. 142.

## BURGHES (IN SCOTLAND).

Amendment of laws relating to election of Magistrates and Council, in 3 & 4 Will. 4, c. 76-7; 10 Law J. Stat. 150.

Explanation of 3 & 4 Will. 4, c. 76, 77; 4 & 5 Will. 4, c. 86, 87, 12 Law J. Stat. 172-3.

## BURGLARY.

If a married woman take a house, in which a burglary is committed, the house must be laid as the house of the husband, although she be living separate from him. *Rex v. Smyth*, 5 C. & P. 201. [Tenterden]

Throwing up a window, and introducing an instrument between such window and an inside shutter, to force open the shutter, if the hand or some part of it is not within the window, is not a sufficient entry to constitute burglary. *Rex v. Rust*, 1 R. & M. C.C. 183.

An entry to a house through a hole in the roof left for the purpose of light, is not a sufficient breaking and entering to constitute house-breaking. *Rex v. Spriggs*, 1 M. & R. 357. [Boanquet]

An indictment for burglary stated in one count, that the prisoner "did break to get out," and in another, that he "did break and get out:"—Held, not sufficient since the statute 7 & 8 Geo. 4, c. 29, s. 11, which uses the words "break out." *Rex v. Compton*, 7 C. & P. 139. [Vaughan]

A permanent building used and slept in only for a short time, for the purpose of a fair, may be treated as the dwelling-house of the person so occupying it, in an indictment for burglary, though unoccupied the rest of the year. *Rex v. Smith*, 1 M. & R. 256. [Park]

Lifting the flap of a cellar usually kept down by its own weight, is a sufficient breaking for the purpose of burglary. *Rex v. Russell*, 1 M. C.C. 377.

If the sash of a window be partly open, but not sufficiently so to admit a person, the raising it so as to admit a person is not breaking of a house. *Rex v. Smith*, 1 R. & M. C.C. 178.

Removing the fastening of a window by the hand introduced through a broken pane of the window, and thereby opening the window and entering, is a breaking, especially if the removal could not have been effected without breaking more of the glass. *Rex v. Robinson*, 1 M. C.C. 327.

A house, the joint property of partners in trade, and in which their business is carried on, may be described as the dwelling-house of all the partners, though only one of them resides in it. *Rex v. Athea*, 1 M. C.C. 329.

A room in a dwelling-house, occupied therewith, and under the same roof, shall be deemed part of the dwelling-house, though it has a separate out-door, and no internal communication with the rest of the house. *Rex v. Burrows*, 1 M. C.C. 274.

Though a servant lived rent free in a house belonging to his master, pay the taxes, and the master's business be carried on in the house, yet if the servant and his family be the only persons who sleep in the house, and the part in which the master's business is carried on, be at all times open to those parts in which the servant lives, it may be stated as the servant's house, though the only part

entered by the thief was that in which the master's business was carried on. *Rex v. Witt*, 1 R. & M. C.C. 248.

A prisoner was indicted for burglary in the dwelling-house of J B; J B worked for one W, who did carpenter's work for a public company, and put J B into the house in question, which belonged to the company, to take care of the house and some mills adjoining; J B received no more wages after, than before he went to live in the house.—Held, not rightly laid. *Rex v. Rawlings*, 7 C. & P. 150. [Gaselee]

A broke into a house, and took two half-sovereigns from a bureau, which he, being disturbed, threw under the grate in the same room:—Held, that this was sufficient to constitute the felony of breaking into a house, and stealing within the stat. 7 & 8 Geo. 4, c. 29, s. 12. *Rex v. Amier*, 6 C. & P. 344. [Park]

A shutter-box partly projected from a house, and adjoined the shop window, which side was protected by wooden panelling, lined with iron:—Held, that the breaking and entering the shutter-box did not constitute a burglary. *Rex v. Paine*, 7 C. & P. 155.

## BYE-LAW.

[See CORPORATION—CUSTOM—MANDAMUS]

## CANAL.

[See RATE, Poor-rate—TOLL.]

Where a canal act gave to the proprietors of the navigation a power of making a canal, and of using the waters of a river for supplying it, but provided, at the same time, for securing to the owners of certain works the use of the surplus waters of that river,—Held, that the making of the canal ascertained and fixed the rights of the parties, and the canal proprietors had no right afterwards to enlarge the canal, and draw a much larger quantity of water from the river, so as injuriously to affect the works in question. A declaration charging it to have been the duty of the canal proprietors to abstain from thus enlarging their canal, and alleging a breach of that duty, sets forth a sufficient cause of action against them.

A clause in a second act of parliament relating to the same canal, declared, that the works thereby authorized should be completed within two years from the time of its passing, and that the money to be raised by it should not be applied to defray the expenses of any of the works not made within the time:—Held, that this clause not only limited the application of the money to works completed within that time, but that no works should be carried on, adversely to the interest of individuals, after the expiration of the two years. A declaration framed on such a clause, and alleging for breach that works were so adversely carried on after the expiration of the two years, was held to contain a sufficient legal statement of a cause of action. *Glemorganshire Canal Company v. Blakemore*, 1 C. & P. 262.

A canal company were authorized, by statute, to demand and sue for certain tolls upon the carriage of goods, and to restrain any carriage or goods in respect of which any such tolls ought to be paid,



and to detain the same until payment made of such tolls, and of all arrears of the same then due from the owner of such carriage or goods; and in case such distress should not be redeemed within five days, to appraise and sell the same, as in the case of a distress for rent; they were not expressly authorized to levy any toll upon carriages:—Held, that trams could not be distrained for arrears of tolls, due from the owners for goods carried in them, if they were not carrying goods of such owners at the time of the distress.

The statute enacted, that any action brought for anything done in pursuance of the act, or in execution of the powers and authorities granted by it, should be brought within six calendar months next after the fact committed:—Held, first, that such a distress was a thing in pursuance of the act: but, held, secondly, that where an owner of trams let them to a third person, and during such letting they were illegally distrained for arrears due from the person hiring, while not carrying such person's goods, and afterwards sold, such owner might sue within six months from the time of sale, on a count complaining of injury done to his reversionary interest by the seizure and sale. *Jenkins v. Cooke*, 1 Ad. & R. 312.

## CAPITAL PUNISHMENT.

[See DEATH.]

## CARRIER.

- (A) LIABILITY.
- (B) ACTIONS.

[See PAYMENT OF MONEY INTO COURT.]

### (A) LIABILITY.

The carrier of goods by water is liable for damages occasioned by running against an anchor to which no buoy appeared to be fastened. *Trent and Mersey Navigation v. Wood*, 4 Doug. 389.

The master of a general ship, on board of which goods have been laden in the Thames for a foreign port, is liable for the loss of the goods occasioned by a forcible robbery, while the ship is lying in the river. *Barclay v. Cuculla y Guna*, 3 Doug. 389.

A booking-office keeper, who also keeps a wine-vault, is guilty of negligence if he allows goods to remain in front of the bar, exposed to persons coming in for liquor, even though they are of too large a size to be conveniently taken into the bar, behind the counter. *Dover v. Mills*, 5 C. & P. 175. [Parke]

If a carrier directs goods to be sent to a particular booking-office, he is answerable for the negligence of the booking-office keeper. In an action against the carrier, the person at the booking-office, who delivered the goods to the carrier, is a competent witness to prove the state in which they were delivered. *Colepepper v. Good*, 5 C. & P. 380. [Gaselee]

In an action against a carrier for the loss of a painting, it appeared, that the stage-waggon in which it was sent had seven horses, but that there

was only one waggoner; the Lord Chief Justice left it for the jury to say, whether the sending but one waggoner was gross negligence, and they found that it was so. *Beckford v. Crutwell*, 5 C. & P. 242. [Tenterden]

Hat bodies, which are made partly of the soft substance which is taken from the skin of rabbits; and partly from the wool of sheep, do not come under the description of furs in the Carrier's Act, 11 Geo. 4. & 1 Will. 4, c. 68. *Mayhew v. Nelson*, 6 C. & P. 58. [Tindal]

A carrier is answerable for safe delivery, as well as for safe conveyance. If, by the course of dealing, the owner of the goods supplies the means of delivery, and these means fail, without the default of the carrier, the latter is exonerated from the delivery. *Nurrell v. Larkins*, 1 Law J. (N.S.) C.P. 2.

The act 11 Geo. 4. & 1 Will. 4, c. 68, extends to every article enumerated in the 1st section, although not, within the words of the preamble, an article of "great value in small compass."

Before a party can recover for loss or injury to any article of such description, he must give express notice to the carrier of the value and nature of the article.

Accordingly, where a looking-glass of the value of 40*l.*, packed in a case, was sent to a carrier's office, in which a notice was affixed, according to section 2 of statute 11 Geo. 4. & 1 Will. 4, c. 68, the words "Plate glass," "Looking-glass," "Keep this edge upwards," being written on the case, but no declaration of the nature and value of the article was made, and no increased rate of carriage paid:—Held, that the carrier was not liable for the damage occasioned by the breaking of the glass, unless he had been guilty of gross negligence. *Owen v. Barnett*, 3 Law J. (N.S.) Exch. 76, a.c. 2 C. & M. 353; 4 Tyr. 133.

### (B) ACTIONS.

When goods are forwarded for sale or approval, the consignor is the party to sue the carriers for the loss of the goods. *Swain v. Shepherd*, 1 M. & R. 223. [Parke]

The bailee of goods sending them by a carrier to the bailor, may sue the carrier for negligence. *Fresman v. Birch*, 1 N. & M. 421.

## CASE.

[See ACTION, Where maintainable.]

A case was directed by the Court to be sent to law, to try whether the execution of a power was a valid execution, although in the event of its being defective, a court of equity would supply the defect. *Greenham v. Gibbeson*, 2 Law J. (N.S.) Chanc. 36.

## CATTLE.

If A set fire to a cow-house, and burn to death a cow which is in it, A is indictable under the statute 7 & 8 Geo. 4, c. 30, s. 16, for killing the cow. *Rea v. Houghton*, 5 C. & P. 559. [Taunton]

## CENTRAL CRIMINAL COURT.

Establishment of, 4 & 5 Will. 4, c. 36; 12 Law J. Stat. 61.

[See CERTIORARI.]

The binding over to prosecute, which is necessary to give the grand jury of the Central Criminal Court jurisdiction in certain cases of misdemeanour, under the 18th section of the act 4 & 5 Will. 4, c. 36, must take place before a magistrate, &c. previous to the session of that court, and cannot be done by the Court itself. *Rex v. Carlton*, 6 C. & P. 661. [Tindal]

## CERTIFICATE.

[See ARBITRATION, Setting aside Award—POOR, Settlement of.]

## CERTIORARI.

[See HIGHWAYS, Surveyors—REMOVAL OF CAUSE.]

- (A) WHEN IT LIES.
- (B) WHEN AND HOW OBTAINED.
- (C) WHEN QUASHED.
- (D) COSTS.
- (E) RETURN.

## (A) WHEN IT LIES.

*Seem*, that the 19 Geo. 3, c. 70, s. 4, empowering the removal of judgments from inferior courts of record, does not apply to judgments obtained by the defendant. *Batten v. Squires*, 4 Dowl. P.C. 53.

A judgment in an action of ejectment in an inferior jurisdiction, is not within the meaning of the 19 Geo. 3, c. 70, s. 11, and therefore, if the defendant leaves the jurisdiction, the judgment cannot be removed into a superior court. *Doe d. Stansfield v. Shipley*, 2 Dowl. P.C. 408.

The Court of King's Bench will, under special circumstances, remove an indictment for a misdemeanour from the Central Criminal Court. *Rex v. Caldecott*, 3 Dowl. P.C. 315.

That Court will remove an indictment by *certiorari*, at the instance of the defendant, from the Central Criminal Court, on the suggestion that it involves points of law arising out of proceedings in Chancery, relative to matters of account. *Rex v. Wainaby*, 2 Ad. & E. 435.

Where a plaint has been entered in the Lord Mayor's Court against two defendants, and one only has been arrested, the cause cannot be removed into the King's Bench without bail being put in for both defendants. *Seem*, that the affidavits in support of the rule for a *procedendo*, in such a case, should not be entitled in the cause in the inferior court, but "in the King's Bench" only. *Jameson v. Schommar*, 1 Dowl. P.C. 175.

The Court will not grant a *certiorari* to remove a warrant of distress to levy poor-rates. *Ex parte Taunton*, 1 Dowl. P.C. 54.

Where an appeal against an order of removal has been tried with the acquiescence of the appellants and the respondents, and the order quashed, a *certiorari* to remove the proceedings for the purpose of quashing the order of sessions, will not be granted,

although the respondents received no notice of trial, as required by a rule of court of the Sessions, and were consequently wholly unprepared for the trial. *Rex v. Justices of the East Riding of Yorkshire*, 3 N. & M. 93.

The prosecutor has a right to remove his indictment at any time before trial, and the Court has no jurisdiction over the costs consequent on exercising that right. *Rex v. Passman*, 2 Dowl. P.C. 529.

The Court will remove a judgment from an inferior court, in order to issue execution thereon pursuant to 19 Geo. 3, c. 70, s. 4, though part of the debt has been levied by process from the inferior court. *Knowles v. Lynch*, 4 Tyr. 477.

A river navigation act provided, that no proceedings to be taken in pursuance thereof should be removed by *certiorari*. By a subsequent statute for improving the same navigation, it was enacted, that all the powers, provisions, exemptions, rules, remedies, regulations, penalties, forfeitures, articles, matters and things whatsoever, contained in the former act, should be in full force, and extend to and be applied and enforced as to that act, and the matters therein contained, in as full a manner to all intents and purposes as if therein re-enacted:—Held, that these were sufficient words to take away the *certiorari* on proceedings under the latter act. By the latter act, it was provided, that if the undertakers of the navigation could not agree with any parties for the purchase of lands, a jury should be summoned to the Quarter Sessions, who should assess the purchase-money to be paid, and also what other separate and distinct sums should be paid for damages before then sustained, or for the future temporary or perpetual continuance of any recurring damages, which should have been occasioned by putting the act in execution; the purchase-money and damages to be assessed separately; and that the Justices in sessions should give judgment for such purchase-money, or recompense, as should be assessed by such jury, which verdict and judgment should be binding on all persons. By a separate clause, it was provided, that the undertakers should not be obliged to receive any complaint of damage, unless notice were given them within six months after the damage. A jury, summoned to assess compensation as above mentioned, found a verdict of 6*l.* for the value of the land taken; present damages nothing: future damages, 2,800*l.* The judgment entered up recited, that the jury had assessed 6*l.* for purchase-money, and no separate or distinct sum for damages before then sustained by the execution of the act, and that they had assessed the distinct sum to be paid for the future temporary or perpetual continuance of any recurring damages, which should be occasioned by putting the act in execution, at 2,800*l.*; and, it was adjudged, that the undertakers should forthwith pay the 6*l.* and the 2,800*l.* A *mandamus* being moved for to the Justices to amend the judgment by striking out the award of 2,800*l.*, it being contended, that the verdict could not legally take effect as an award of present damage under the act, none having yet been sustained:—Held, that as the statute did not allow a removal of the proceedings by *certiorari*, the Court could not indirectly bring them under review by a *mandamus*. The land taken was ground upon which the owners had laid a railway, and they claimed to

have their damage calculated on the assumption, that the purchasers would so use the land as to destroy the railway; the latter, however, declared that, to avoid doing so, they should make a tunnel. The damages so claimed were allowed by the jury, as "future damages." *Quærs*, whether the verdict so given, and entered up in the judgment as above mentioned, was legal. *Res v. Justices of the West Riding of Yorkshire*, 3 Law J. (N.S.) M.C. 117, s. c. 1 Ad. & E. 563; 3 N. & M. 802.

The Court will not allow the propriety of a conviction under the 3 Geo. 4, c. 126, to be discussed upon a special case sent up from the Sessions; the 4 Geo. 4, c. 95, s. 87, having expressly taken away the writ of *certiorari*. *Res v. Beale*, 1 Law J. (N.S.) M.C. 75.

#### (B) WHEN AND HOW OBTAINED.

Prosecutor to obtain leave of Court before removal of indictment by *certiorari*, and defendant to enter into certain recognizances. 5 & 6 Will. 4, c. 33; 13 Law J. Stat. 63.

Held, that a Judge's order or fiat for a *certiorari* to issue in vacation can only be granted *nisi*. *Res v. Inhabitants of Chipping Sodbury*, 3 Law J. (N.S.) M.C. 61, s. c. 3 N. & M. 104.

Where the Sessions have granted a special case, which has not been settled for more than six months after being granted, the *certiorari* for removing the order of magistrates and Sessions must be sued out within six months from the time of granting the case: if it is not sued out, this Court will not grant a *mandamus* to compel the Sessions to enter continuances and hear the appeal. *Res v. Justices of Staffordshire*, 1 Dowl. P.C. 484.

A case sent back to the Sessions to be re-stated, must be reheard; and the Sessions may receive further evidence, and make a new order on such rehearing.

The *certiorari* by which the original order was removed, does not operate to remove the subsequent one. The party wishing to contest such order, must obtain a *certiorari*, and remove it.

A *certiorari* cannot be applied for after the expiration of six calendar months from the making of the order, &c., to be removed, whatever may have been the cause of delay. *Res v. Blazam*, 3 Law J. (N.S.) M.C. 115, s. c. 1 Ad. & E. 386; 3 N. & M. 385.

If a plaintiff without improper motives has removed a judgment into a superior court by an irregular writ of *certiorari* issued without leave of the Court, such amendments will be allowed and terms imposed as will enable him to avail himself of the judgment without prejudice to the defendant. *Rowell v. Breddon*, 3 Dowl. P.C. 324.

The six days' notice of applying for a *certiorari* to remove an order of Justices, must be reckoned exclusively of one day and inclusively of the rest. And this is the general rule of computation in matters of practice, independently of the rule of court H. T. 2 Will. 4, 8. *Res v. Goodenough*, 2 Ad. & E. 463.

A rule for a *certiorari* to remove a record from an inferior jurisdiction, is absolute in the first instance. *Pawsey v. Gooday*, 3 Dowl. P.C. 605.

The Court will not grant a rule *nisi* to remove the depositions taken before a coroner, and to bail a

party charged upon the coroner's inquest with manslaughter, without an affidavit of what took place before the coroner. *Res v. Mills*, 4 N. & M. 6.

Notice to a magistrate (under 13 Geo. 2, c. 18, s. 5), of intention to move for a *certiorari* "on the first day of the next term, or so soon after as I can be heard," is irregular if served on the first day of that term, though the party does not, in fact, move till after the expiration of six days—Held, Denman, C. J. *dubitante*. *In re Flounders*, 4 B. & Ad. 865.

A notice to Justices of an application for a *certiorari*, according to the 13 Geo. 2, c. 18, s. 5, if given by one of the churchwardens and overseers, on behalf of himself and others, is not a good notice in case the others repudiate it; although, *semble*, it would have been sufficient if given solely on his own behalf. *Res v. the Justices of Cambridge-shire*, 1 Law J. (N.S.) M.C. 97, s. c. 3 B. & Ad. 887.

A party who seeks to remove an order of Sessions by *certiorari*, must give notice according to 13 Geo. 2, c. 18, although notice had been given by the opposite party, and a rule obtained, which that party did not afterwards choose to act upon. *Res v. the Justices of Kent*, 1 Law J. (N.S.) M.C. 29, s. c. 3 B. & Ad. 250.

#### (C) WHEN QUASHED.

The Court will not quash a writ of *certiorari*, unless there is an admission, or something tantamount to it, by the party suing it out, that he has done it for the purpose of delay. *Landens v. Shiel*, 3 Dowl. P.C. 90.

A plaint being levied in an inferior court, not of record (the Hull Court of Requests), having cognizance of debts not exceeding 5*l.*, the defendant sued out a writ, in the form of a *certiorari*, commanding C H F to return into the Court of King's Bench the plaint and all things concerning the same. C H F was not a commissioner, but only clerk of the Court of Requests. No affidavit was filed, or order of King's Bench or of a Judge obtained for issuing the writ. This Court, on motion, set it aside. Per Littledale, J., a *certiorari* does not go, as of course, to a court not of record. *Ex parte Phillips*, 2 Ad. & E. 586.

#### (D) COSTS.

The Court of King's Bench have no direct power over the costs incurred in prosecutions in inferior courts. Therefore, where a prosecutor removed an indictment from the Middlesex Sessions by a *certiorari* lodged on the morning of the intended trial,—it was held, that the Court could not direct the prosecutor to pay the costs incurred by the defendants in the court below, even though the conduct of the former might be very oppressive. *Res v. Pasmam*, 3 Law J. (N.S.) M.C. 111, s. c. 1 Ad. & E. 603; 3 N. & M. 730.

To warrant a claim for costs against a defendant, under 5 Will. & M. c. 11, s. 3 (after removal of an indictment by *certiorari* from the sessions), the party applying must be the actual, and not the mere nominal prosecutor, and also the party grieved or injured. *Res v. Dewhurst*, 2 Law J. (N.S.) M.C. 92, s. c. 5 B. & Ad. 405; 2 N. & M. 253.

The defendant was convicted and sentenced, on an indictment for an assault on a watchman and night patrol, within the borough of Derby, who was also a constable of the said borough. The indictment was removed by the defendant from the sessions, and he consequently was liable to costs by the 5 & 6 Will. & M. c. 11, s. 3, if the prosecutor was grieved within the meaning of that statute. The prosecutor took out a side-bar rule to tax the costs under the statute. In Hilary term, 1830, the defendant obtained a rule to shew cause why that side-bar rule should not be set aside, on the ground that the prosecutor was not a party grieved within the meaning of the act, the prosecution having been carried on by the paving and lighting commissioners, acting under a local act of parliament for the borough of Derby; that, although nominally the prosecution was carried on at the instance of the party assaulted, it was, in reality, at the sole expense and by the direction of the above commissioners, and they were not public officers within the meaning of the above statute, prosecuting as such. On cause being shewn, it was contended, that the prosecution was carried on by the commissioners, whose duty it was to preserve the public peace within the borough of Derby, for a matter connected with their duty as commissioners; and, therefore, they might be considered as public officers prosecuting for a fact which concerned them as such, within the meaning of the statute.

But the Court were of opinion that the nominal prosecutor, the party assaulted, was not a party grieved within the meaning of the statute, nor were the commissioners public officers prosecuting as such, within the meaning of the statute, and therefore they discharged the rule. *Rex v. Edwards*, 5 B. & Ad. 407, n.

#### (E) RETURN.

The return to a *certiorari* must return the record itself, and not set it out according to its tenor. *Askew v. Hayton*, 1 Dowl. P.C. 510.

#### CESTUI QUE VIE.

[See ESTATE.]

#### CHAIRMAN.

[See COMPANY.]

#### CHALLENGE.

[See INFORMATION.]

#### CHAMBERS.

[See INTERPLEADER—JUDGE AT CHAMBERS.]

#### CHANCEL.

[See CHURCH.]

#### CHANCELLOR.

[See JUDGE—JURISDICTION.]

Provision for, on his retirement. 2 & 3 Will. 4. c. 111; 10 Law J. Stat. 278.

Provision for, in lieu of fees. 2 & 3 Will. 4. c. 122; 10 Law J. Stat. 314.

#### CHANCERY.

Abolition of certain sinecure offices connected with the Court of. 2 & 3 Will. 4, c. 111; 10 Law J. Stat. 278.

Provisions for the performance of duties connected with certain abolished offices. 3 & 4 Will. 4, c. 84; 11 Law J. Stat. 155.

Regulation of proceedings and practice of certain offices of. 3 & 4 Will. 4, c. 94; ib. 189.

Provisions for amendment of proceedings and practice in Court of in Ireland. 4 & 5 Will. 4, c. 78; 12 Law J. Stat. 154.

#### CHANCERY AND EXCHEQUER.

Authority to advance money out of the Suits Fund, in the Courts of Chancery and Exchequer in Ireland, towards purchasing land and building courts in Dublin. 4 & 5 Will. 4, c. 68; 12 Law J. Stat. 140.

Amendment of act for service of process of Courts of, in England and Ireland. 4 & 5 Will. 4, c. 82; 12 Law J. Stat. 163.

#### CHAPEL AND CHAPELRY.

[See CHURCH.]

#### CHARGE.

[See FINE.]

By a settlement, A B grants to C D a rent-charge issuing out of certain estates, with a term and powers of distress and entry to recover it. Afterwards, A B, by his will, grants to C D out of the same estates a further rent-charge, with the same powers of distress, &c. as are contained in the said indenture with respect to the original annuity. The testator, in a subsequent part of his will, devises the estates to trustees for a term, to raise 15,000*l.* for E F:—Held, that the second annuity takes priority over the 15,000*l.* *Freeman v. Blencowe*, 4 Law J. (N.S.) Chanc. 247.

A, being entitled to a reversionary interest in a fund in court, assigns it to B, and afterwards to C. C obtains an order that the fund shall not be transferred without notice to him, and has the order entered at the Accountant General's office:—Held, that he thereby gained priority over B, who had not taken similar precautions. *Greening v. Beckford*, 5 Sim. 196.

#### CHARITY.

[See MORTMAIN.]

Extension of provisions of 59 Geo. 3, c. 81, relating to charities. 2 Will. 4, c. 57; 10 Law J. Stat. 122.

Continuance of inquiries relating to, by commissioners, until the 1st of March 1837. 5 & 6 Will. 4, c. 71; 13 Law J. Stat. 157.

(A) JURISDICTION OVER.

(B) DEVISE OR BEQUEST TO.

## (C) ADMINISTRATION OF.

- (a) Trustees.
- (b) Objects.
- (c) Property and Revenues.
- (d) Leases and Alienations of Charity Estate.

## (D) PLEADING AND PRACTICE.

## (A) JURISDICTION OVER.

Upon a petition under 52 Geo. 3, c. 101, the Court will adjudicate between the conflicting claims of different charities, where the point to be decided is simply a question of law, depending on the construction of a particular instrument.

An objection to the jurisdiction under the statute, if not raised in the court below, will be very reluctantly entertained on appeal. *In re Upton Warren*, 1 M. & K. 410.

The Court has jurisdiction to extend the application of the income of charity property beyond the mere literally expressed intention of the testator, provided the income be applied to subjects connected with that intention. *The Attorney General v. Dixie*, 2 M. & K. 342.

By the Bedford Charity Act, the trustees of the charity, who are a body corporate, are empowered to remove the master of the English school for just and reasonable cause; and it is provided, that if any trustee or trustees should misdeemean himself or themselves, in any manner relating to the charity, it should be lawful for any person to prefer a petition to the Lord Chancellor against any such trustee or trustees, and with or without making all or any of the other trustees parties thereto, if such person should so think fit; and the Lord Chancellor is authorized to cause the person or persons against whom the petition should be preferred, to be examined in such manner as should be thought fit, for the discovery of the truth of the matter alleged against him. One of the masters, who had been dismissed by the trustees, presented a petition against them, complaining that he had been dismissed irregularly, and not for good and reasonable cause:—Held, that the Court had no jurisdiction to entertain the petition. *In re Bedford Charity*, 5 Sim. 578.

Where a bequest is made exclusively for a specific charitable purpose, and the fund is more than sufficient for satisfying that purpose, the Court has no jurisdiction over the surplus, nor can it be disposed of by the Crown under the sign manual; but application must be made to the legislature for its disposal. *Attorney General v. Ironmongers' Company*, 3 Law J. (N.S.) Chanc. 11, s.c. 2 M. & K. 576.

## (B) DEVISE OR BEQUEST TO.

A devise of estates to the Fishmongers' Company, subject, among other things, to a charge to distribute among the poor 138 quarters of coals, or else money to buy the same coals unto the same number, at the price of 8d. a quarter; reciting, that the sum total in money for the said coals, at the price aforesaid, amounted to 4*l*. 12*s*. a year; and further directing, that if the coals be bought for a less price, then more coals should be given, leaves it optional with the company to distribute either the quantity of coals or the 4*l*. 12*s*. annually. *Jordeyn's Charity*, 1 M. & K. 416, s.c. 5 Sim. 571.

Where annual sums were bequeathed to persons to be distributed in charity at the discretion of the legatees, either to private individuals or public institutions, the Court declared, that the legacies did not fail, but that a scheme was unnecessary; leaving any of the parties at liberty to apply as there might be occasion. *Horde v. the Earl of Suffolk*, 2 M. & K. 59.

A direction to apply funds "for charitable or other purposes, as my trustees shall think fit, without being accountable for such their disposition thereof,"—Held, void for uncertainty. *Ellis v. Selby*, 4 Law J. (N.S.) Chanc. 69.

A testator, by will, directs his leasehold and personal estate to be sold, and the produce to be applied for paying his debts and legacies given by his will, and to be given by any codicil; and by his codicil he gives his executors 2,000*l*. out of his personal estate, upon trusts for public charities:—Held, this was not a void charge, but wholly payable out of personal estate. *Wilson v. Thomas*, 3 Law J. (N.S.) Chanc. 144.

A testator gave two legacies to the respective trustees of certain Catholic schools, upon trust for carrying on the good designs of the said schools. The testator died in 1823:—Held, that the 2 & 3 Will. 4, c. 115, for securing the charitable donations and bequests of his Majesty's Catholic subjects, is retrospective; and that the trustees of the Catholic schools were entitled to the legacies. *Bradshaw v. Tasker*, 3 Law J. (N.S.) Chanc. 183, s.c. 2 M. & K. 221.

## (C) ADMINISTRATION OF.

## (a) Trustees.

A testator, who gave a legacy for charitable purposes to be executed in a foreign country, named as one of the trustees of the charity, an officer created by act of parliament, describing him by his office, and not by his name. The act of parliament having been repealed and the office abolished, the Court referred it to the Master to approve of a proper person to be a trustee in his stead. *The Attorney General v. Stephens*, 3 M. & K. 347.

## (b) Objects.

The teaching of writing and arithmetic may be well introduced into a scheme for the management of a free grammar school. *The Attorney General v. Gascoyne*, 2 M. & K. 647.

Where money had been bequeathed for the purpose of being lent out without interest, in sums not exceeding 200*l*., and the Master, in settling a new scheme for the charity, had directed the maximum of the sums so lent out to be 500*l*.,—it was held, that as the latest of the wills was 200 years old, the increase in the amount of the loans was not inconsistent with the intention of the testator. *The Attorney General v. the Mercers' Company*, 2 M. & K. 654.

A trust to apply the funds "towards the repairs of the church of W, the payment of the 15th, and relief of the poor of W, buying of armour and setting forth soldiers, and repairing Sawbridge bridge, within the parish of W," is of a public nature; and, therefore, an election of a schoolmaster, by a majority of the trustees assembled for that purpose, is valid.

Building a school-house, and educating poor children, is within the meaning of such trust for the "relief of the poor."

The appointment of a schoolmaster, elected by a majority of the trustees at a meeting assembled for the purpose of the election, need not be in writing; nor can he be dismissed, except by a majority of the trustees at a similar meeting. *Wilkinson v. Malin*, 1 Law J. (N.S.) Exch. 234, s.c. 2 C. & J. 636; 2 Tyr. 544.

Queen Elizabeth, by letters patent, on the application of Alexander Nowell, clerk, the dean, and the chapter of St. Paul's, granted certain rents, amounting to 20*l.* per annum (of dissolved chauntries, originally founded in St. Paul's) to B. College in frank almshouse; and she thereby founded a free-school, with a head master and an under master, and six scholarships, and licensed N to found seven more (at such stipends as he should appoint), making thirteen from the school to the college, to be called her scholars. She incorporated the college, governors of the school under that addition to its general name, and licensed them to take other gifts and grants in perpetuity, for the benefit as well of the school and scholars as of other poor students and scholars in general. She appointed, that the head master of the school should have, out of present and future funds, 13*l.* 6*s.* 8*d.* at least; the under master 6*l.* 13*s.* 4*d.* at least; and the six scholars 5 marks each per annum; 4*l.* 13*s.* 4*d.* per annum was afterwards added to the fund by arrangement. N, out of his own funds, purchased a manor and lands subject to certain existing leases, and also a rectory and chapelry, all which he granted to the queen, who, by second letters patent, granted them to the college as governors of the school, and appointed that the rents, &c. should be applied in paying certain specific augmented stipends to the masters and the thirteen scholars, and in paying certain weekly allowances for the improvement of the commons of the fellows and students of the college. This left, in fact, a small surplus, but no surplus was noticed in the letters patent. N dealt with the property in such a manner as to shew his knowledge that the property was improveable on the expiration of the leases. He was always treated as the original owner, and the real founder. He was for a time the principal of the college, and, under his superintendence, all residuary benefit of the trust estate, beyond the precise stipends, were appropriated to the general benefit of the college; ever since which time, the college has pursued the same course. An information being filed to compel the college to apply the increased residuary funds to the benefit of the school and scholarships founded therein:—Held, that N was to be considered as the real founder—that his acts were consistent with the terms of the several letters patent, and must be taken as indicia of the original intent of the foundation. And the Court refused to interfere, to disturb the usage, which had been so long pursued by the college in the administration of the charity. *Attorney General v. King's Hall and College of Brazenose*, 1 Law J. (N.S.) Chanc. 66; affirmed in the House of Lords, 2 C. & F. 296; 8 Bli. N.S. 377.

(c) Property and Revenue.

A sum of money was directed by will to be laid

out by the executors and the survivor of them, and their heirs, in the purchase of lands for the erection of a school, and the education of orphans therein, and their subsequent apprenticeship, or advancement at the university. For these purposes, certain annual payments to masters and others were directed to be made, and, subject thereto, the surplus rents were to be paid to the executors and their heirs. This will was made in 1620, and the lands were purchased. By the subsequent change in the value of money, the annual payments directed became unequal to the charitable objects mentioned by the testator; and the information was filed for the purpose of obtaining a decree for the application of the rents of the estate, to the extent necessary for the accomplishment of the charities of the testator; but the Court held, that the surplus rents, after the specified payments, belonged to those who represented the executors. *Attorney General v. Gascoigne*, 1 Law J. (N.S.) Chanc. 122.

An hospital was founded in the parish of St. Mary Magdalen in the town of Colchester, in the time of Henry the First, for the habitation of leprous and infirm persons. Afterwards, for the purpose of more effectually carrying into execution the intention of the founder, letters patent were granted in the eighth of King James the First, by which it was ordained, that this hospital should consist of one master and five poor men; that the master should be master of the hospital, and of the goods, chattels, &c., and of the revenues of the hospital, and discharge also the duties of priest in the parish; and that the poor men should receive for their support, relief, and maintenance, through the hands of the master or of his assignees, 52*s.* each per annum; that the master and poor of the said hospital should be incorporated; that the Chancellor should be visitor, and have the nomination to the mastership; that the master, with the consent of the Attorney and Solicitor Generals, should have power to make statutes and ordinances, touching the government, election, expulsion, punishment, order, and direction of the master and the poor of the said hospital; and that all the revenues of the lands, formerly or thereafter to be given to the said hospital, should be disposed of according to the statutes, and laws and ordinances aforesaid.

Held, from the construction of the letters patent and long usage, that the poor were not entitled to an increased allowance, from the increased revenues of the hospital. *Attorney General v. Smithies*, 2 Law J. (N.S.) Chanc. 68.

There being a custom in the city of London for the mayor to issue precepts from time to time to the different companies, to lay in a certain quantity of corn, for the supply of the London market, Henry Hazlefoot, Esq., in 1646, conveyed his manor of Pitley, then of the yearly value of 70*l.*, to trustees, upon trust that they should yearly and for ever pay, employ, and dispose of the rents thereof for certain charitable purposes in such deed mentioned, and in sums therein also specified, amounting altogether to 70*l.* per annum; one of the objects of such trusts was "To the master and wardens of the said company 8*l.* yearly for increase of their stock of corn for the London market," and "the rest and residue of the said rents and profits to be paid yearly to the said master and wardens for the fur-

ther increase of *their* stock of corn:"—Held, that as well the 8*l.* per annum, as also the rest and residue of the said rents, were a gift for the benefit of the company, and that the company were entitled to enjoy the benefit which they derived from the custom having ceased. *Attorney General v. Haberdashers' Company*, 2 Law J. (n.s.) Chanc. 33, s. c. 1 M. & K. 420; 5 Sim. 478.

Where, by a will and codicils, real estates are devised to trustees, upon the trusts after mentioned, and those trusts are generally for charitable purposes, if the trusts do not appear to exhaust the whole rents of the property—*semble*, there will be a resulting trust of the surplus for the heir. But where, from the whole tenour of the instruments, it can be gathered that the intention of the deviser is, that all the rents are to be applied to the purposes of the trusts expressed, though the trusts expressed appear not to be sufficient to exhaust the whole fund, the heir will be disinherited; and there being a devise of a small parcel of land at the end of the last codicil, to give an additional income to a schoolmaster of a school founded by the will of the deviser, this affords a presumption of intention, that the whole of the previously devised estates should be applied for the purposes of the trusts, to the exclusion of the heir. *Attorney General v. Wilson*, 3 Law J. (n.s.) Chanc. 126, s. c. 3 M. & K. 362.

A testator devised certain premises, then let at a rent of 10*l.* a year, to the parson and churchwardens of A, upon trust to pay 5*4s.*, 5*4s.*, and 50*s.* to two parishes and a town, for the charitable purposes mentioned in his will, and the other 42*s.* he referred to the good discretion of the parson and churchwardens of the parish of A, to dispose of to the poor, or towards paying fifteenths. The property increased in value:—Held, that such increase was divisible between the charities in the same proportion as the original rent of 10*l.* *Attorney General v. Barham*, 3 Law J. (n.s.) Chanc. 128.

An annual sum was given to trustees, to be paid as an apprentice-fee for a boy, who should be chosen out of a particular parish, failing which, out of certain other parishes; and in default of the sum being claimed, then for the benefit of Christ's Hospital. The sum was not claimed for many years, and considerable arrears accumulated in consequence:—Held, that Christ's Hospital was not entitled to such arrears, but that they ought to be applied according to a scheme for the benefit of the specified parishes in the first place. *In re Upton Warren*, 1 M. & K. 410.

A, after reciting that he was instigated by piety, for the sustentation of Tonbridge School, and of a student in Oxford, granted lands to the Skinners' Company, as governors of the possessions of the school, (by which title they had been then lately incorporated,) to fulfil the uses expressed in a schedule to the grant; and which directed them to make certain payments to the students, to the college at which he was to be placed, for assisting the company, as such governors, in providing a master for the school; to a preacher for preaching, yearly, before the company; and exhorting them to be beneficial maintainers of the school, and to certain poor men of the company. The payments did not exhaust the rents at the time of the grant; and the company, in A's lifetime, and with his knowledge,

applied the surplus to their own use, and had ever since continued to do so. An information, claiming the surplus for the school, was dismissed. *Attorney General v. Skinners' Company*, 5 Sim. 596.

Testator devised an estate to the Fishmongers' Company, to buy and distribute 188 quarters of coals, or money to buy coals at 8*d.* per quarter, amongst the poor; and added, that the sum total in money for the 188 quarters, at the price aforesaid, amounted to 4*l.* 12*s.*; and that, if the coals could be bought for less, more should be given. The testator then gave 40*s.* out of the residue of the rents, to the company, for executing his will; and directed that whatsoever remained should be disposed of in repairing the buildings on the estate, and to the use of the company; but, if they declined to perform his will, then that the estate should go to the Corporation of London for different charitable purposes:—Held, that, though the rents had increased, the company were not bound to distribute, either in coals or in money, more than to the amount of 4*l.* 12*s.* yearly, and that they were entitled to the surplus of the rents. *Jordeyn's Charity*, 5 Sim. 571, s. c. 1 M. & K. 416.

In the administration of charity property, given not for purposes of individual benefit, but for performance of duties, if the revenues increase so as to exceed a reasonable compensation for the duties, the surplus must be applied to other charitable purposes. Where property was given to a schoolmaster, to be applied partly for the purposes of a free school, (incorporated under the name of the schoolmaster and guardians) and partly for other specified charitable purposes, and no intention could be presumed of giving individual benefit to the person filling the office of schoolmaster, the surplus income having increased beyond the extent of a reasonable compensation for the schoolmaster's duties,—the Court directed the surplus to be applied to other charitable purposes. *Attorney General v. the Master of Brentford School*, 1 M. & K. 377.

#### (d) Leases and Alienations of Charity Estate.

Length of possession will not prevail against charitable funds, where the land was purchased with notice of the trusts. *Attorney General v. Christ's Hospital*, 3 M. & K. 344.

If the trustees of a charity estate make a lease upon terms, which, at the time of making it, appear to them *bona fide* to be the best that can be got, a subsequent alteration of circumstances shall not affect such lease; in such a case the question of provident or improvident management is entitled to peculiar consideration. The length of time, during which the property has been occupied under the lease, is also to be taken into consideration. *Attorney General v. Hungerford*, 2 C. & F. 357, s. c. 3 Bli. n.s. 437.

#### (D) PLEADING AND PRACTICE.

Under the Charity Petition Act, where one order has been made on petition, a subsequent order may be obtained on motion. *In re Chipping Sodbury School*, 5 Sim. 410.

The costs of an information must be paid by a company, in which a charitable fund is vested, if the charity be suffered to fall into desuetude. *Attorney General v. Mercers' Company*, 2 M. & K. 654.

The attendance of the Attorney General before the Master upon a reference to settle a scheme for the administration of a charity, may be dispensed with in certain cases. A direction for such attendance in a case where the charity fund did not much exceed 1,100*l.* was struck out of the minutes of the decree. *Attorney General v. the Haberdashers' Company*, 2 M. & K. 817.

On a reference to the Master in a charity suit, to approve of a scheme, the Court will, under special circumstances, (as where the income is small,) dispense with the attendance of the Attorney General before the Master. *Attorney General v. Ladyman*, 4 Law J. (N.S.) Chanc. 231.

The Attorney General is not a necessary party to a suit respecting a dissenters' chapel which is supported by pew rents, it not being a charitable institution.

Parties proceeding in equity, on the ground that such a chapel is devoted to purposes different from those originally intended, need not proceed by information.

All the parties interested in such a chapel must be made parties to such a suit, or their absence accounted for.

In this suit, which was instituted by two of the congregation suing alone, and not on behalf of themselves and the other persons interested, and to which such other persons were not made parties, the Court, at the hearing, gave leave to the plaintiffs to amend their bill, by bringing such parties before the Court, or accounting for their absence. *Milligan v. Mitchell*, 4 Law J. (N.S.) Chanc. 281.

Lands had been given for the endowment of a school, and also lands for the foundation of scholarships in a college, for boys to be nominated by the Master, &c. of the school. The Master and Fellows of the College had the appointment of a master to the school, and, on their default for the space of two months, the Archbishop of York was to appoint.

To an information seeking an account both of the estates given for the school, and of those given for the scholarships, and asking a reference for schemes relating to both charities, a demurrer for multifariousness allowed:

And the information held to be also defective for want of parties, because the Archbishop of York had not been made a party. *Attorney General v. St. John's College*, 4 Law J. (N.S.) Chanc. 73.

A testator devised his real estate to trustees in trust, to dispose of the rents for the benefit of the poor of the city of It and the limits and precincts thereof. The trustees having applied the rents for the benefit of the poor of one only of the parishes in the city, an information was filed on behalf of two other parishes, claiming to participate in the charity, and a decree was made in 1680, directing, that the rents should, for ever thereafter, be divided amongst the three parishes in certain proportions. In 1808 an information was filed on behalf of a fourth parish for a similar purpose; and that parish was decreed to be entitled to a share of the rents in the proportion of its extent and population to the extent and population of the three other parishes; but the proportions, as between those parishes, were not to be altered. An information was afterwards filed on behalf of one of those three parishes, claiming an increased share of the rents, on account of

its population having increased more than the population of the other parishes; but the information was dismissed, the decree of 1680 being final. *Attorney General v. Mayor of Rochester*, 6 Sim. 273.

Where a corporation follow the practice of their predecessors in the application of the profits of charity estates, and no wilful breach of trust or improper motive is imputed to them, the account will not be carried back beyond the time when they had notice that the propriety of such application was questioned; but where the charity estates have been alienated, though at a very distant period, the corporation will be made to compensate the present value of the lands so alienated, out of such general property of the corporation, as was not granted or devised to them upon special trust.

It is the duty of a corporation, when apprised by the information of the nature and extent of the claims made upon them, to cause a diligent examination to be made, before they put in their answer, of all deeds, papers, and muniments in their possession or power, and to give in their answer all the information derived from such examination; and if they pursue an opposite course, and in their answer allege their ignorance upon the subject; and the information required is afterwards obtained from the documents scheduled to their answer, the Court will infer a disposition on the part of the corporation to obstruct and defeat the course of justice; and on that ground alone will charge them with the costs of the suit. *Attorney General v. the Burgesses of East Retford*, 2 M. & K. 35.

#### CHARTER.

[See TOLLS.]

A charter of exemption, granted to tenants of demesne lands, will not operate to exempt those included within the exemption of the charter, from duties imposed by statutes passed subsequent to the charter. *Rex v. Siviter*, 4 Law J. (N.S.) M.C. 108, a.c. 5 N. & M. 125.

King Edward IV. by a charter granted to the corporation of Dover, "all contempts, &c. and all penalties forfeited and to be forfeited, &c. of all and every the barons, &c., in whatsoever courts the said barons, &c. should happen to be adjudged." And by a charter of Charles II., "all fines forfeitures, &c. in the courts aforesaid arising," were granted to the same corporation:—Held, that a forfeited recognizance for the appearance of a party to answer to a charge of misdemeanour, taken within the limits of their jurisdiction, did not pass to the corporation under these charters. *Rex v. the Mayor of Dover*, 4 Law J. (N.S.) Exch. 94, a.c. 5 Tyr. 279.

#### CHARTER-PARTY.

[See SHIP AND SHIPPING.]

#### CHATTEL.

[See LEGACY.]

While the right of property in a chattel is admitted to be in one person, the right of possession of that chattel cannot be absolutely and adversely in another. *Clerk v. Adam*, 1 C. & F. 242.



CHELSEA HOSPITAL.

Provisions with respect to deductions from pensions granted by the Commissioners of. 3 & 4 Will. 4, c. 29; 11 Law J. Stat. 82.

CHESTER.

[See CRIMINALS.]

CHIMNEY SWEEPERS.

Regulation of, and their apprentices, and of construction of flues and chimnies. 4 & 5 Will. 4, c. 35; 12 Law J. Stat. 57.

CHINA AND INDIA.

Regulation of trade to. 3 & 4 Will. 4, c. 93; 11 Law J. Stat. 188.

CHOLERA.

Acts for prevention of. 2 Will. 4, c. 10; 10 Law J. Stat. 16; c. 11 & 27 (Scotland), ib. 18, 41; continuation of these acts, 3 & 4 Will. 4, c. 75; 12 Law J. Stat. 150.

CHURCH.

Churches, building of, in populous parishes. Provisions of 59 Geo. 3, c. 154, made more effectual. 2 Will. 4, c. 61; 10 Law J. Stat. 128.

Church temporalities (Ireland), amendment of laws relating to. 3 & 4 Will. 4, c. 37; 11 Law J. Stat. 89.

Amendment of preceding act. 4 & 5 Will. 4, c. 90; 12 Law J. Stat. 179.

The lay rector is not entitled as of right to make a vault, or affix tablets in the chancel without leave of the ordinary, nor is he entitled to a faculty for such purposes without laying before the ordinary such particulars, as will afford the vicar and parishioners an opportunity of judging of it, and satisfy the ordinary that such vaults or tablets will not interrupt the parishioners in the use and enjoyment of the chancel;—nor has the vicar an absolute  *veto* ; though he may shew cause against the grant of a faculty.

*Seemle*, that the consent of the lay rector must precede the leave of the ordinary for the construction of a vault, or the erection of tablets in the chancel. *Rich v. Bushnell*, 4 Hag. Ec. 164.

Though the freehold of the chancel be in the rector, lay or the spiritual, the use of it belongs to the parishioners; and the ordinary, as protector of their rights, must see that neither their present nor future accommodation be unduly prejudiced. *Ib.* 170.

No fee to the vicar for consent to interments in the chancel is due of common right; and any special custom to such effect must limit the amount, and be strictly proved. *Ib.* 173.

*Quare*, whether the consent of the vicar is necessary to the construction of a vault, or affixing of a tablet in the body of the church, or whether he can claim a fee, unless by a special custom. *Ib.* 172.

By the general law, the use of all pews belongs

to the parishioners, who are to be, in the first instance, seated by the churchwardens, subject to the controul of the ordinary. *Blake v. Osborne*, 3 Hag. Ec. 733.

On the expiration of a faculty limited to a certain period, the right of the parishioners to the pews, the subject of such faculty, revives. *Ib.*

A person, who has permission from the churchwardens to sit in a pew temporarily, and in order, by keeping possession for the future tenant, to carry into effect the conditions of sale of a house with which the pew had for above a century been held under an expired faculty, has no possession on which he can bring a suit for perturbation against a mere intruder, such permission by the churchwardens being illegal, as confirming the sale of the pew. On the plaintiff declaring, he proceeded no further; the Court dismissed the defendant with a *sum nomine expensarum*, refusing to give full costs, on the ground that there had been irregularities on both sides. *Ib.* 726.

The right of nominating to a chapel under the stat. 1 & 2 Will. 4, c. 38, cannot be acquired, unless the conditions required by the act be strictly complied with.

The conditions required, are conditions precedent. *Williams v. Brown*, 1 Curt. 53.

Where parishioners, dwelling within a chapelry, contribute to the repairs of the parish church, it is strong, but not conclusive, evidence that the chapel is a chapel of ease to the inhabitants of the parish, and not a separate and distinct chapelry.

It does not of necessity follow that there cannot be a parochial chapel, because there has not been a union of parishes in ancient times, nor any vicarage or mother church with which the chapel can be supposed to have been anciently united; and the circumstance that there is no vicarage may be accounted for by the fact of the rectory having been conveyed to a monastery prior to the statutes 15 Rich. 2 and Hen. 4. *Dent v. Rob*, 1 Y. & C. 1.

A, B, C, D, coparceners, have a successive right of presentation, in turn, to a vicarage; on an objection to C's title to sell her turn, usurpations on the rights of D and A successively—held, not to affect the right of C to present. *Richards v. Earl of Macclesfield*, 4 Law J. (N.S.) Chanc. 153.

CHURCH RATE.

[See RATE—VESTRY.]

CHURCHWARDENS AND OVERSEERS.

[See MANDAMUS.]

- (A) APPOINTMENT.
- (B) RIGHTS AND DUTIES.
- (C) LIABILITIES.
- (D) ACCOUNTS.

(A) APPOINTMENT.

Though a place have only two houses, it may be a vill by reputation, and separate overseers may be appointed. *Rex v. Overseers of Poor at Eyford*, 4 Doug. 331.

Where a parish has been divided into districts, each having overseers of the poor before the passing

of the 13 & 14 Car. 2, c. 12, a partial union since that time cannot be preserved, if either of the districts desire again to separate. *Rex v. the Justices of Salop*, 1 Law J. (N.S.) M.C. 85, s. c. 3 B. & Ad. 910.

If a private act of parliament direct that overseers shall be appointed "for the term of three years then next ensuing," *semble*, that an appointment "for the space of three years next ensuing the date hereof, or until other overseers shall be appointed," is bad. *Guardians of the Poor of Bristol v. Wait*, 6 C. & P. 591. [Alderson]

#### (B) RIGHTS AND DUTIES.

A custom set up, that the duties appertaining by law to the office of churchwardens have, from time immemorial, been discharged by the overseers of the poor, is a bad custom. *Rex v. the Inhabitants of Wix*, 1 Law J. (N.S.) M.C. 86, s. c. 2 B. & Ad. 197.

It is not among the duties of an overseer to take precautionary measures against contagious diseases. Where, therefore, by a resolution of the vestry, to which the overseer at the time assented, it was resolved, that, the small-pox being in the workhouse, a surgeon should have a certain sum for vaccinating the poor; but the overseer afterwards retracted and refused to pay the surgeon, so that vaccination of the paupers did not take place in consequence; and the small-pox went through the workhouse, and so spread through the parish, and many died of it; — the Court refused a criminal information against the overseer, for not having the paupers vaccinated. *Anonymous*, 4 Law J. (N.S.) M.C. 112, s. c. 6 N. & M. 13; 3 Ad. & E. 552.

#### (C) LIABILITIES.

The statute 55 Geo. 3, c. 137, s. 6, which prohibits any churchwarden, overseer, &c. "from supplying, for his own profit, any goods, materials, or provisions for the use of any workhouse, or otherwise for the support and maintenance of the poor in any parish, &c., for which he shall be appointed," does not extend to a person doing work on the workhouse, and supplying materials incidentally to such work, as a painter and glazier who mends the windows of the workhouse, providing paint, glass, and lead. *Murder v. Waite*, 3 Law J. (N.S.) M.C. 101, s. c. 1 Ad. & E. 514; 3 N. & M. 611.

Where goods are supplied for the poor of a parish on the credit of the churchwardens, overseers, and assistant overseer, they may be all joined in an action for the recovery of the value of such goods, although the bill of particulars charge them all as overseers and churchwardens: and if the assistant overseer claim to be exempt as such, it is for him, in discharge of his responsibility, (and not for the plaintiff) to shew his warrant of appointment as such assistant overseer.

They are equally liable for money borrowed as for goods sold and delivered. *Kirby v. Bannister*, 11 Law J. (N.S.) M.C. 89, s. c. 3 B. & Ad. 1069; 3 N. & M. 119.

One of several churchwardens cannot pledge the credit of the others without their knowledge, even for work which, by the duties of their office, they are bound to have executed.

Thus, where one of several churchwardens gave

orders to the defendant to make certain necessary repairs in the church, and it did not appear that the other churchwardens had authorized him to give such orders, or to pledge their credit,—it was held, that the defendant was entitled to set off his claim for such repairs, in an action by the executor of the churchwarden, by whose orders the work was performed. *Northwaite v. Bennett*, 3 Law J. (N.S.) M.C. 31, s. c. 2 C. & M. 316; 4 Tyr. 236.

By the practice of a parish, the two overseers were always re-appointed *once*; but one of them acted solely for one of the two years, and another for another. The acting overseer for one year ordered coals, which were sent to him, and distributed by him among the poor of the parish; the seller debited the parish with them, and afterwards sued both overseers. The acting overseer suffered judgment by default:—Held, that, upon these facts, the jury were properly told to consider, whether the coals were supplied for the parish, by whom they were ordered, and whether credit was given to the acting overseer only, or to both as overseers; and to find for the defendant, (the overseer who had not acted,) if the plaintiff relied solely on the responsibility of the acting overseer, but otherwise for the plaintiff; and the jury having found for the plaintiff, saying, that the coals were supplied to the parish, and the overseers were jointly liable as such, the Court refused to disturb the verdict. *Eaden v. Titchmarsh*, 1 Ad. & E. 691, s. c. 3 N. & M. 719.

#### (D) ACCOUNTS.

##### [See APPEAL—SESSIONS.]

Overseers are to pass their accounts quarterly. 4 & 5 Will. 4, c. 76, s. 47 (Poor Law Amendment Act); 3 Law J. (N.S.) Stat. App. i.

Where Justices have allowed overseers' accounts, given their certificate of a balance due from the outgoing overseer, under 50 Geo. 3, c. 49, and have subsequently granted their warrant of distress for that balance on an adjudication of a refusal to pay, the Justices have no power to revoke their warrant on the ground of a mistake having been made in the allowance of the accounts. They cannot enter into a re-examination of the accounts.

*Quære*—whether, if they found that they were wrongly informed as to the refusal, they could revoke their warrant. *Barons v. Luscombe*, 4 Law J. (N.S.) M.C. 109, s. c. 4 N. & M. 330; 3 Ad. & E. 589.

Overseers cannot charge in their accounts for sums paid *bond fide* by them to persons for making the rate and collecting the rate, for those are duties imposed upon the overseers, and must be gratuitously performed by them: and a majority of the vestry has no power to bind the parish at large, by a resolution authorizing the employment by the overseers, of parties for those purposes.

The appellant was not rated to the first rate included in the overseers' accounts, but was rated to the three subsequent rates:—Held, that he was entitled to appeal against the accounts for the whole year, as it did not appear that the sums charged by the overseers for the above purposes, were paid out of the first rate, to which the appellant was not rated; and even if that had appeared, he would have been entitled to appeal, because it might have been, that had not those sums been paid out of

the first rate, there would have been no necessity for imposing the subsequent rate at all, or at all events not to so large an amount. *Rez v. Gwyer*, 4 Law J. (n.s.) M.C. 39, s. c. 2 Ad. & E. 216; 4 N. & M. 158.

In general, one overseer is not liable for the receipts of another.

Nor, where one overseer had received for the whole year, and the other signed the accounts as accounts of both, for the sake of conformity, but refused to be sworn to them, was he held liable by reason of his mere signature. *Rez v. the Justices of Essex*, 1 Law J. (n.s.) M.C. 84, s. c. 3 B. & Ad. 941.

Although in general one overseer is not liable for the receipts of another, he is bound to give in some account, in obedience to the 17 Geo. 2, c. 38, even though he has not received any of the money raised by the rates. *Rez v. the Justices of Norfolk*, 2 Law J. (n.s.) M.C. 23, s. c. 4 B. & Ad. 238; 1 N. & M. 67.

Overseers [previous to 59 Geo. 3. c. 12, s. 7.] were not entitled to charge the amount of the salary of an assistant-overseer, though appointed with such salary at a vestry meeting. *Rez v. Welsh*, 4 Doug. 236.

The Ecclesiastical Court has power to order churchwardens to deliver in their accounts, but has no power to examine them. *Hooper v. Leach*, 3 Doug. 434.

#### CIVIL LIST.

Provisions for the payment of certain ancient grants and allowances formerly paid out of. See 3 & 4 Will. 4, c. 86; 11 Law J. Stat. 170.

#### CLAIM OF RIGHT.

[See TOLLS.]

#### CLERGY.

[See BENEFICE—CHURCH—PREBEND—TITHES.]

#### CLERGYMAN.

[See BOND, Of Resignation—GAME—MARRIAGE.]

#### CLERK.

Clerks of the Signet—Provisions of regulations in 57 Geo. 3, c. 63, s. 2, relating to the office of, extended. 2 Will. 4, c. 49; 10 Law J. Stat. 106.

Clerk of the Crown (Ireland),—Regulation of office of. 2 Will. 4, c. 48; 10 Law J. Stat. 106.

Clerk of the Crown, in Chancery—Repeal of so much of 3 & 4 Will. c. 84, as relates to salary of, and substitution of other provisions. 5 & 6 Will. 4, c. 47, 13 Law J. Stat. 79.

A clerk in court is entitled to charge a term fee in a revenue prosecution, at the suit of the Attorney General, where only a *subpoena ad respondendum* issues, without any information or other proceeding being had. The term fee of a clerk in court, in a revenue prosecution, is 3s. 4d., and he cannot charge 6s. 8d. *Attorney General v. Munday*, 2 C. & J. 347, s. c. 2 Tyr. 305; 1 Law J. (n.s.) Exch. 107\*.

Digest, 1831—35.

#### CLERK TO COMMISSIONERS.

The 25 Geo. 3, c. 23, s. 10. (local) enacts, "that the commissioners of the parish of St. Mary, Magdalen, Bermondsey, or any five or more of them, may contract, by deed or deeds in writing, for paving, raising, sinking, altering, &c. and keeping in repair, the streets, lanes, &c. within the said division of the parish, and that such contracts shall be signed by the said commissioners, or any five or more of them, and by the persons contracting to perform such works." The 57 Geo. 3, c. 29, s. 120. (M. A. Taylor's Act.) enacts, "that the said commissioners or trustees, or other persons having the controul of the pavements, in any streets or public places, in any parochial or other district within the jurisdiction of this act, may sue and be sued by the clerk for the time being," &c. The 124th section of the statute enacts, "that where no particular number of commissioners or trustees, &c., are by any local act or acts of parliament relating to such parochial or other district, or by this act, stipulated and required to be necessary to perform any act, matter, or thing, by such acts required to be done or performed, that all and every such act, matter, &c. may be legally and effectually done, executed, and performed by any two or more of such commissioners or other trustees, or persons having the controul of the pavements for the time being." Where the commissioners entered into a certain contract, signed only by one commissioner,—Held, that the plaintiff could not sue for the expenses of certain bonds, in his capacity of clerk; inasmuch as the contract itself was not valid, as it was not signed, as the local act required, by five or more commissioners. Two or more would have sufficed by the 57 Geo. 3, c. 29, s. 124, but a certain number was required by the local statute, 25 Geo. 3, c. 23, s. 10. *Curling v. Johnson*, 2 Law J. (n.s.) C.P. 264, s. c. 10 Bing. 89; 3 Mo. & Sc. 496.

#### CLOSE.

[Meaning of the term, see TRESPASS, Pleading.]

#### COAL.

Coal trade (Ireland)—Regulations of, and repeal of several acts relating to. 2 Will. 4, c. 20; 10 Law J. Stat. 27.

#### COACH-PROPRIETOR.

[See STAGE COACH.]

#### COGNOVIT.

[See AGREEMENT—BANKRUPT, Certificate—PRISONER.]

Judgment may be signed on a joint cognovit, for a default previous to the actual execution by one of the defendants, as his execution, will relate to the date of the instrument or of the signature by the other defendants.

Thus, on a joint cognovit by three defendants for payment of debt and costs by instalments, the

first instalment to be paid on the 5th of November, which was executed by two on the 3rd, but not until the 7th by the other defendant:—it was held, that judgment signed for default of payment of the first instalment was regular.

Where a regular notice of taxation of costs is given, but the taxation is postponed, at the request of the opposite party, to a particular day—*quere*, if any second formal notice be necessary. But it is not requisite to give a full day's notice pursuant to R. M. T. 1830, but such a reasonable notice as may afford the opposite party an opportunity of attending the taxation.

*Quere*—whether the omission to give the day's notice required by the above rule, would render a judgment irregular. *Semble*, that it would not.

Notice of taxation at the Master's office at two in term time, must be understood as two for three; as, according to the practice, no Master is in attendance until the latter hour. *Perry v. Turner*, 1 Law J. (n.s.) Exch. 13, a. c. 2 C. & J. 89; 2 Tyr. 128; 1 Dowl. P.C. 300.

There is no rule in this court, which requires an attorney to be present on the part of a defendant in custody at the time of his executing a cognovit.

Where *a. f. fa.* and *ca. sa.* have issued at the same time, and goods have been seized under the *a. f. fa.* sufficient only to satisfy a part of the landlord's claim for rent, and the expenses of the levy, the defendant cannot also be taken in execution under the *ca. sa.* *Hodgkinson v. Whalley*, 1 Law J. (n.s.) Exch. 68, a. c. 2 C. & J. 86; 2 Tyr. 174; 1 Dowl. P.C. 298.

Judgment may be entered up on a cognovit signed before service of process. *Kerby v. Jenkins*, 1 Law J. (n.s.) Exch. 152, a. c. 2 Tyr. 499.

An unstamped cognovit, containing matter of agreement of the value of 20*l.*, will not be directed to be taken off the file to be cancelled; but after the judgment and execution thereon have been set aside, the plaintiff may procure it to be stamped, and have a new judgment and execution, and may also be allowed to set off the interlocutory costs, given to the defendant on setting aside the former judgment and execution, against the costs in the cause. *Pitman v. Humphrey*, 1 Law J. (n.s.) Exch. 178, a. c. 2 Tyr. 900.

Rule 73 of Hil. term, 2 Will. 4, requiring that an attorney shall be present on behalf of a person in custody executing a cognovit, "expressly named by him, and attending at his request," must be strictly observed; and, therefore, the mere consent of the defendant at the time of the execution of the cognovit, that another attorney who has been requested to attend by the clerk of the defendant's attorney, in consequence of the absence of the principal from home, shall not for him, is not a sufficient compliance with the rule, although the defendant's attorney has previously advised, and seen the cognovit.

*Quere*—whether it is absolutely essential that the attorney subscribing his name as a witness to the execution of the cognovit, should in writing, according to the terms of the rule, "declare himself to be attorney for the defendant, and that he authorizes no such attorney." *Semble*, that he must. *Meier v. Papanticholas*, 3 Law J. (n.s.) Exch. 13, a. c. 2 C. & J. 81; 4 Tyr. 44.

An agreement between an insolvent debtor and

an attorney employed to prepare his schedule and obtain his discharge, that a debt due to the attorney and secured by cognovit shall be omitted in the schedule, and that the cognovit shall be suspended until after the insolvent's discharge, and then revived, is a fraud on the Insolvent Act and the creditors of the insolvent; therefore, judgment and execution upon such a cognovit, after the discharge of an insolvent, set aside with costs. *Tabram v. Freeman*, 3 Law J. (n.s.) Exch. 135, a. c. 2 C. & J. 451; 4 Tyr. 180.

No taxation of costs is necessary upon a cognovit. *Clothier v. East*, 3 Mo. & Sc. 216.

Where a cognovit is given for the payment of a sum generally, the defendant may pay either the plaintiff or his attorney. *Anonymous*, 1 Dowl. P.C. 173.

A judgment and execution on a cognovit, not filed according to the provisions of the 3 Geo. 4, c. 39, are not absolutely void, but only inoperative against the assignees of a bankrupt. A cognovit does not require a stamp, though containing a stipulation not to take advantage of its being given before declaration. *Green v. Gray*, 1 Dowl. P.C. 350.

A cognovit given by a defendant against whom a writ had been issued, and who from the conduct of the parties was led to believe he was under duress, no attorney being present, was set aside, though it was positively denied that he was in custody, or that a warrant had been issued against him. *Turner v. Shaw*, 2 Dowl. P.C. 244.

Where a defendant has given a cognovit for the debt sought to be recovered in an action by the plaintiff, and the plaintiff does not proceed to trial, and the defendant obtains a rule for judgment as in case of a nonsuit, that rule will be discharged with costs. *Smith v. Joy*, 2 Dowl. P.C. 410.

It is not necessary to declare previous to signing judgment on a cognovit. A cognovit does not require a stamp, although the plaintiff at the time of its execution undertakes on a separate paper to give the defendant time. *Morley v. Hall*, 2 Dowl. P.C. 494.

Under a cognovit by which it is agreed, that no judgment is to be signed or execution issued, unless default made in payment of a certain sum with costs by instalments, the plaintiff may sign judgment, and issue execution for the whole sum if default is made in one instalment.

A cognovit containing terms of agreement must be stamped; but it is sufficient to support an execution under it, if it is stamped by the time cause is shewn against a rule for setting aside the execution, on the ground of its not having been stamped. *Rose v. Tomlinson*, 3 Dowl. P.C. 49.

The Court refused to grant a rule for setting aside a cognovit at the instance of the defendant, because it was not stamped. No notice to tax is necessary when a defendant appears in person, and gives a cognovit which is good, though there is no declaration. *Clarke v. Jones*, 3 Dowl. P.C. 277.

In the Exchequer, where the defendant gives a cognovit, the costs may be taxed before judgment is signed; and if, by the terms of the cognovit, the plaintiff is at liberty to tax costs, and sign judgment, but signs his judgment before the costs are taxed, the judgment is irregular. *Wilson v. Northorn*, 4 Dowl. P.C. 212.

It is a sufficient compliance with the rule of 1 Reg. Gen. H. T. 2 Will. 4, s. 72, if the attorney who is called in by a defendant in custody to witness a *cognovit* makes the declaration required by the rule *visd voce*. Where a defendant is in custody upon a *cognovit*, which it is alleged has been satisfied, the Court will refer it to the Master, to see whether there is anything due upon it, but will not order the defendant to be discharged. *Wilson v. Price*, 4 Dowl. P.C. 213.

Defendant gave a *cognovit*, not to be enforced "until after final hearing of a Chancery suit, instituted by the defendant against the plaintiff, and the final decree or order to be pronounced thereon:" and in the event of the decree being in favour of plaintiff, judgment was to be entered up in accordance with the decree, and defendant was not to impede the judgment by proceedings at law or equity, except as aforesaid. The decree having been given in favour of plaintiff, defendant appealed:—Held, that judgment could not be entered up on the *cognovit* till the appeal was determined. *Jones v. Reynolds*, 1 Ad. & E. 384, s. c. 3 N. & M. 466.

### COIN.

Consolidation and amendment of laws against offences relating to. 2 Will. 4, c. 34; 10 Law J. Stat. 49.

The statute 8 & 9 Will. 3, c. 26, in that part which relates to instruments to mark the edges, is not confined to such instruments as were in use when that act was passed; it extends to newly-invented instruments which will produce the same effect. Nor is it confined to such instruments as, used by the hand, unconnected with any other power, will produce the effect. A collar for marking the edges, by having the coin forced through it by machinery, is an instrument within the act, though this mode of marking the edges is of modern invention. *Re v. Moore*, 1 R. & M. C.C. 122.

### COLONIAL REVENUES.

Accounts of, to be audited by Commissioners for auditing public accounts. 2 Will. 4, c. 26; 10 Law J. Stat. 41.

### COMBINATION.

[See CONSPIRACY—UNLAWFUL COMBINATION.]

### COMMISSION.

[See PRINCIPAL AND AGENT—WITNESS, Commission.]

The Court will not make an order (unless by consent of the parties) to limit the number of counsel to be heard.

A commission of review is a matter of grace and favour from the Crown, and not a right in the subject. The Lord Chancellor will not advise a commission unless there is a gross miscarriage on the part of the Court below, either in a matter of fact or law; or unless the Judges in that court indulge

questionable doctrines of law, which it is important to the public interests should receive a solemn determination.

The Court has no power over costs in a petition for a commission of review. *Ingram v. Wyatt*, 1 Law J. (N.S.) Chanc. 135.

### COMMITMENT.

[See MALICIOUS TRESPASS—CONTEMPT.]

Commitments for contempt, by courts of equity. Provisions of 1 Will. 4, c. 36, extended. 2 Will. 4, c. 58; 10 Law J. Stat. 124.

Commitments for contempt; amendment of laws relating to, by courts of equity, in Ireland. 5 & 6 Will. 4, c. 16; 13 Law J. Stat. 11.

The effect of section 39 of 7 & 8 Geo. 4, c. 30, is, that a conviction and commitment under that act are to be read together, and to be held explanatory the one of the other; and, if the conviction justifies the commitment so explained, the commitment is good.

A commitment, under 7 & 8 Geo. 4, c. 30, s. 24, stated, that the party committed had been charged with having unlawfully trespassed upon lands, and with having cut down, and carried away therefrom, a quantity of rushes, of which offence he had been convicted, and ordered to pay 10s. as a penalty, and so much for costs, &c., and required the gaoler, &c. safely to keep him for the space of one month, or until he should be thence delivered by the due order of law:—Held, that the omission of the statement, that the trespass was wilful or malicious, was cured by an allegation in the conviction that the act was done "unlawfully and maliciously:" Secondly, that the conviction supported the commitment, although it was for "cutting and carrying away a quantity of rushes," which, it was objected, was an injury to personal property, whereas the commitment was for an injury to real property; because it was clear, that both proceeded upon the same statute, and were for the same offence: Thirdly, that it was no objection that the commitment was for the non-payment of a penalty, and the adjudication of imprisonment in the conviction for the non-payment of a sum of money by way of compensation for the damage, as the party aggrieved had been examined in proof of the offence, and the money was directed to be applied in the manner in which penalties are directed by the act to be applied: Fourthly, that, although the words, "until he be delivered by the due order of the law," were not equivalent to the words of qualification in the act, "unless the money should be sooner paid;" yet, that, under section 39, the defect and ambiguity in the conclusion of the warrant might be supplied and explained by reference to the conviction, containing an adjudication of imprisonment in the language of the statute. *Daniell v. Phillips*, 4 Law J. (N.S.) M.C. 67, s. c. 1 C.M. & R. 662; 5 Tyr. 293.

Where a Justice is authorized to commit, he may, by parol, order the party to be kept in custody while a warrant is making out.

But, in general, a parol commitment is illegal. Accordingly, where a Justice had authority by statute to commit a party by warrant under his hand and seal; and committed him verbally to prison, where he was taken without a written warrant:—

Held, that the Justice was liable to an action of trespass; and that a warrant, properly dated, drawn up afterwards, was no protection to him against such action. *Hutchinson v. Lowndes*, 2 Law J. (N.s.) M.C. 3, s. c. 4 B. & Ad. 118; 1 N. & M. 674.

### COMMON.

Common fields, facilitation of exchange of lands in. 4 & 5 Will. 4, c. 30; 12 Law J. Stat. 47.

Trespass for breaking and entering three closes in Stalmyne. Pleas in justification, 1. A right of common of turbary; 2. Of pasture. Replication, that the closes are parcel of Stalmyne Moss, within the manor of Stalmyne; and there are divers ancient messuages which have had common of turbary and pasture upon the waste. The replication then stated a custom within the manor of Stalmyne for the owners of Stalmyne Moss, by themselves or their moss-reeves, to assign to the owners of such ancient messuages, certain reasonable proportions of the moss-dales, to be by them held in severalty for the purpose of getting turves; and, after the moss-dales shall have been cleared, the owners of the moss shall hold the same in severalty discharged from all common of turbary and pasture. The replication then stated the clearing and improvement of the closes accordingly. Rejoinder, traversing the custom, and verdict for the plaintiff. On motion in arrest of judgment, it was objected, 1st, that the custom was bad, extending to messuages without the manor; 2ndly, that it was bad, as repugnant to the right claimed in the plea; 3rdly, that it was bad in stating that "reasonable proportions were to be assigned."—Held, that the custom, as stated in the replication, was good. *Clarkson v. Woodhouse*, 3 Doug. 189.

A private act of parliament, for the inclosure of a common, and an award by the commissioner under that act, that all rights of common shall be extinguished, does not render the cattle of commoners, *per cause de vicinage*, liable to be distrained damage feasant, unless the *locus in quo* has been completely fenced, or such commoners have had express notice of the extinguishment. *Wells v. Percy*, 4 Law J. (N.s.) C.P. 144, s. c. 1 Bing. N.C. 556; 1 Sc. 426.

Held, upon a special statement of facts by an arbitrator, as to the inclosure of woods, &c., that 22 Edw. 4, c. 7, did not apply to woods in which a right of common existed, and that 35 Hen. 8, c. 17, s. 7 & 8, providing for the severance and inclosure of woods for seven years after felling, &c., was limited to those in which there had been common from time immemorial. *Dibben v. Marquis of Anglesea*, 4 Law J. (N.s.) Exch. 278, s. c. 2 C. & M. 722; 4 Tyr. 926.

A right of common cannot be reserved in an exception in a demise under the word "land." A right of common (whether appendant or appurtenant, not stated in the case) cannot be severed from the land, and converted into common in gross. *Smith v. Milward*, 3 Doug. 71.

### COMMON COUNTS.

[See MONEY COUNTS—PRACTICE, Form of Declaration—USE AND OCCUPATION.]

### COMPANY.

His Majesty enabled to invest trading and other companies with powers necessary for the conduct of their affairs, and the security of their creditors. 4 & 5 Will. 4, c. 94; 12 Law J. Stat. 205.

[*Duvergier v. Fellows*, 7 Law J. C.P. 15, s. c. 5 Bing. 248; 2 M. & P. 384; 2 Law J. Dig. 75. Affirmed in House of Lords, 1 C. & F. 39, s. c. 6 Bligh, N.S. 87.]

Where an act of parliament constituting a company a corporation, required that certain notices should be given, and a certain number of persons should be present at a general special meeting; and it was alleged, that such notice had not been given, and such number of persons were not present at the meeting, when a bond to the plaintiff was executed.—Held, that, on a plea of *non est factum*, the company might give in evidence such matters as shewed a non-compliance with the provisions of the statute in that respect, although their corporate seal had been affixed to the bond by the proper officer.

The company were also, by the act, required to keep books for the inspection of every member:—Held, that those books were not evidence for the company against a stranger, in order to prove, that the provisions of the act had not been complied with in convening the meeting at which the bond was executed.

The principle upon which partnership books are evidence against all the partners, is, that they are kept by themselves, or by their servants under their authority. Therefore, as the clerk of the company, when once appointed, is under the controul of no individual member, a proprietor entering into a contract with the company is to be deemed a stranger, and cannot be affected by any entry made under the order of the whole body. *Hill v. Manchester and Salford Water-works*, 3 Law J. (N.s.) K.B. 19, s. c. 5 B. & Ad. 866; 2 N. & M. 573.

A party who is precluded by the regulations of a company from holding shares therein, but secretly obtains them, by using the name of another person, cannot maintain an action against another shareholder, for disbursements made for the benefit of the undertaking during the time such shares were held. *Goddard v. Hodges*, 2 Law J. (N.s.) Exch. 20, s. c. 1 C. & M. 33; 3 Tyr. 209.

The Hope Assurance Company were authorized by statute 53 Geo. 3, c. 206, to maintain actions and suits for recovering debts and enforcing claims or demands then due, or thereafter to be due, to the said society, and to prosecute indictments and informations against those who might defraud them, or injure their property, in the name of their chairman or secretary for the time being:—Held, that a libel upon the body generally, the tendency of which was to injure the partnership property, was within the meaning of the act; and that an action in which the chairman of the body was the nominal plaintiff, was well brought. *Williams v. Barber Beaumont*, 3 Law J. (N.s.) C.P. 31, s. c. 10 Bing. 260; 3 Mo. & Sc. 705.

Where, by a resolution, certain fees were voted to the directors of a company;—Held, that a director could not maintain an action for them against the company, (who were also a corporation,) unless

the resolution were a bye-law, or imported a contract under the common seal. *Dunstan v. the Imperial Gas Light Company*, 1 Law J. (N.S.) K.B. 49, s. c. 3 B. & Ad. 125.

## COMPENSATION.

[As to Slave property, see 3 Knapp, 155, and SLAVES.]

[See CERTIORARI—CONTRACT—RIOT.]

The owners of a vessel captured by a foreign power, held to be entitled to a sum of money afterwards awarded by that power as compensation, notwithstanding a previous agreement with the underwriters, that they should, on payment of a certain sum per cent. be exonerated from further demand. *Brooks v. M'Donnell*, 4 Law J. (N.S.) Exch. Eq. 60, s. c. 1 Y. & C. 500.

A agreed to sell an estate, tithe free, to B. Afterwards, C, the vicar of L (in which parish part of the estate was situate), filed a bill for tithes against the occupiers of another part of the estate, as also being situate in L. A agreed that part of the purchase-money should be set apart, as an indemnity to B against the claim made by C, which was accordingly done, and B paid the remainder of his purchase-money, and took a conveyance of the estate. C died, and his suit was dismissed for want of prosecution, but the indemnity fund was not transferred to A. One of C's successors instituted a fresh suit for the tithes of the same lands. Pending these proceedings, it was discovered, that those lands were situate in the parish of S, and were titheable to the rector of S, and, on proof of those facts, the latter suit was dismissed at the hearing:—Held, that B was entitled to a compensation out of the fund, for the tithes of the land situate in S. *Crompton v. Lord Melbourne*, 3 Sim. 353.

Tenant for life must bear the expense of having property surveyed and valued, in order to obtain compensation from the company, and also of investing the sum so obtained. *In re London Bridge Act; Petition of Lawless*, 4 Law J. (N.S.) Exch. Eq. 17.

Necessary expenses of trustees in valuing and computing compensation, will be allowed out of the estate, only upon a reference back to the Master, though the sum be small, and there be an affidavit that the charges are fair and reasonable. *In re London Bridge Act*, 4 Law J. (N.S.) Exch. Eq. 17.

Where, by an act of parliament obtained by a company, it is enacted, "that the jury, impanelled by the sheriff to make compensation, shall settle and ascertain the recompense to be made for the damages sustained by an individual, separately and distinctly from the value of the lands, tenements," &c., it is the duty of the company to see that the jury do make such separate and distinct assessments; and if the jury assess the damages in one sum, and the company have neglected to require a separate assessment before the sheriff, the finding of the jury is not therefore necessarily void. *In re London and Greenwich Railway*, 4 Law J. (N.S.) K.B. 103, s. c. 4 N. & M. 458; 2 Ad. & E. 678.

In estimating the compensation due for the loss of sugar estates, unduly held under sequestration, for a number of years, and of the actual produce

of which, during that time, there was no evidence:—Held, that the allowance of 10*l.* per annum, for each negro upon the estate, was not a right principle to proceed on.

*Semble*, that the proper principle to proceed on, under such circumstances, would be to ascertain the average number of hogsheads of sugar, such estate's usual produce, and to award compensation for the value of that number in each year, after deducting a proper sum for the expenses of cultivation. *Gumbes's case*, 2 Kn. 369.

The act, 11 Geo. 4, c. lxx (passed May 1830), incorporating the Hungerford Market Company, empowers them to purchase certain estates; and section 17 enacts that every lessee or tenant for years or at will of any messuages, &c., to be purchased under the act, shall deliver up possession to the company at three months' notice, they making compensation to every such tenant, &c. who shall be required to quit before the expiration of his term: such compensation, in case of dispute, to be assessed by a jury. Section 19 provides, that all tenants for years, from year to year, or at will, occupiers of any messuages, &c. forming part of the estates to be purchased, who shall sustain "any loss, damage, or injury, in respect of any interest whatsoever for good-will, improvements, tenant's fixtures, or otherwise, which they now enjoy, by reason of the passing of this act," shall receive compensation from the company, by such means as are provided in respect of the tenants of certain hereditaments mentioned in a schedule to the act—namely, by assessment, as before stated. A lessee, whose term expired on the day the company came in possession (June 24, 1830) obtained leave to hold on till the premises were wanted, and did so for a year and three quarters, at the end of which time he quitted, having received half a year's notice. His under-tenant, who came in at Christmas 1828, and had held from year to year, and who knew of the above proceedings, and also received notice to quit, was held entitled to compensation for good-will (to be assessed by a jury) under section 19. *Re v. Hungerford Market Company (Ex parte Still)*, 4 B. & Ad. 592, s. c. 1 N. & M. 404.

Under sections 17 & 19 of the Hungerford Market Act (see the preceding case), compensation was claimed by a party, who, in 1823, became the assignee of a lease for fourteen years, granted in 1818, of premises on the estate, purchased by the company. The lease contained covenants to yield up the premises, with all fixtures and improvements, at the end of the term, and not to underlet or assign without leave; but, this latter clause had not been introduced in contemplation of any advantage to be taken of it by the landlord with reference to the present act. The company suffered the lease to expire, and then turned out the tenant:—Held, that he was entitled to have compensation assessed for the loss, if any, sustained by him in respect of good-will, or the chance of a beneficial renewal of his lease, but not for fixtures set up or purchased, or for improvements made by him, inasmuch as he had no legal interest in them:—Held, nevertheless, that these might be considered by the jury in estimating the chance of a beneficial renewal. *Re v. Hungerford Market Company (Ex parte Gosling)*, 4 B. & Ad. 576, s. c. 1 N. & M. 548.

A local act empowered certain trustees to purchase messuages, &c., and enacted, that if the owners should not agree with the trustees on the terms, or should neglect or refuse to treat, or by reason of absence or disability should be prevented from treating, the trustees should cause a jury to be summoned by the sheriff to assess compensation, and the sheriff should summon and examine witnesses upon oath; and if the jury should give a verdict for more than the trustees had offered, the costs and expenses of summoning and returning such jury and witnesses, and also of the inquest, to be settled by a Justice, were to be borne by the trustees, and recovered by the persons entitled thereto, by distress; but, if the verdict should not be for more than the sum offered, the trustees were to bear one moiety of the costs and expenses aforesaid, and the other party the other moiety; but, where parties from absence or inability could not treat or agree, such costs and expenses were to be borne by the trustees: and afterwards it was enacted, that, in a particular event, messuages, &c. should be sold to certain parties, and that, in case of disagreement as to price, the price should be assessed by a jury, as before, and the expense of hearing and determining such difference be borne in like manner:—Held, that an owner of lands to be purchased, in favour of whom a jury awarded more than the sum offered, was entitled to the costs of the inquiry, including witnesses, attending by attorney at the inquest, conferences, and briefs, and not merely to the expenses of the sheriff and jury; but that the expenses of surveyors, merely as such, could not be included in the costs. *Rez v. Justices of York City*, 1 Ad. & E. 828, a. c. 3 N. & M. 685.

By a local act, a company are empowered to take lands—with an exception of mines—for a railway, paying the value of the lands, and making compensation for damages sustained by reason of the execution of the works, and for damage, loss, or inconvenience sustained by reason of the execution of any of the powers of the act; such value and compensation to be fixed by agreement, or assessed by a jury: mines to be worked by the owner, so that no damage be thereby done to the railway, and in case of damage the owner to repair it at his own expense, or the company to repair in case of neglect or refusal, and recover the expenses from the owner. The owner of land taken by the company, and for which compensation is paid, cannot, upon afterwards discovering that a mine to which he is entitled cannot be worked without doing damage to the railway, claim further compensation in respect of the loss sustained thereby. Compensation in respect of such contingent loss, should have been claimed at the time of the original agreement or assessment. *Rez v. Leeds and Selby Railway Company*, 5 N. & M. 246; 3 Ad. & E. 683.

#### COMPOSITION.

[See DEBTOR AND CREDITOR.]

#### COMPOUNDING AND COMPROMISE.

On a motion to compound a penal action, it must appear, that the defendant has pleaded. *Rez v. Collier*, 2 Dowl. P.C. 581.

Leave of the Court for compounding a penal action where the Crown is entitled to a portion of the penalty, cannot be obtained without the consent of the Attorney General. *Rez v. Gibbs*, 3 Dowl. P.C. 845.

#### CONCEALMENT.

[See INSURANCE.]

#### CONDITION PRECEDENT.

[See CONTRACT, Construction.]

#### CONFESSION.

[See EVIDENCE.]

#### CONFIDENTIAL COMMUNICATIONS.

[See ATTORNEY—EVIDENCE.]

#### CONSENT.

[See LEGACY—VENUE.]

#### CONSIDERATION.

[See PLEADING.]

On the occasion of the death of a person, intestate, and without wife or children, in one of the colonies, a deed was executed between the parents, and brothers and sisters of the intestate, by which it was recited, that the intestate was, at his death, possessed of real and personal estate, and the real estate was settled, in consideration of the settlement of the personal estate, by the eldest brother as heir-at-law; and the personal estate, together with other property of the father, was settled by the father as sole next of kin, in consideration of the settlement of the real estate. The intestate, as it afterwards appeared, had no real estate:—Held, that the possibility of there being real estate was a valuable consideration, sufficient to support the settlement against the father. *Reffell v. King*, 2 Law J. (N.S.) Chanc. 155.

An agreement by C & Co. to answer the draft of S, for repairs, will not give any right to another person, in whose favour a draft or bill is drawn, to proceed against C & Co., there being no consideration between the drawee and C & Co.

*Semble*—That if the agreement had gone on to state in whose favour the draft was to be drawn, there would have been an equity raised. *Rattenbury v. Fenton*, 3 Law J. (N.S.) Chanc. 203.

#### CONSIGNEE.

[See TROVER, Where maintainable—SHIP AND SHIPPING, Liability of Owner.]

#### CONSOLIDATION.

[See INSURANCE.]



## CONSPIRACY.

[See INDICTMENT.]

An indictment for a conspiracy to cheat and defraud a party of the fruits and advantages of a verdict obtained is too general, and bad in point of law. *Res v. Richardson and others*, 1 M. & Ro. 402. [Denman]

An indictment for conspiring, &c. "to prevent the workmen of JG from continuing to work," &c., is supported by evidence of a conspiracy to prevent any from continuing, &c. A combination of workmen for the purpose of dictating to masters what workmen they shall employ, is indictable. *Res v. Bykerdike*, 1 M. & Ro. 179. [Patteson]

The Court will grant a rule nisi for an information for a conspiracy in taking away from his father's house a young man of fortune under age, for the purpose of marrying him to one of the conspirators, though the young man is not heir apparent to his father. *Res v. Green*, 3 Doug. 36.

An indictment does not lie for conspiring merely to exonerate one parish from the charge of a pauper, and to throw it on another. Nor for conspiring to cause a male pauper to marry a female pauper, for that purpose, it not being stated that the conspiracy was to effect such marriage by force, threat, or fraud, or that it was effected in pursuance of the conspiracy. It is unnecessary to allege overt acts, if the indictment charge what is, in itself, an unlawful conspiracy; but, if not, the indictment must shew some illegal act done in pursuance of the conspiracy. Persuading a male pauper, settled in one parish, to marry a female pauper settled in and chargeable to another, is not such an overt act.

To allege in an indictment that an unmarried woman in a parish was with child, is not equivalent to an allegation, that she was chargeable to such parish. [Per Lord Denman, C. J., and Taunton, J.] *Quære*, whether an allegation that defendants conspired together for the purpose of exonerating, &c. is equivalent to an allegation that they conspired to exonerate? [Per Williams, J.] *Res v. Seward*, 3 Law J. (n.s.) M.C. 103, s.c. 1 Ad. & E. 706; 3 N. & M. 557.

If brokers agree together before a sale by auction, that only one of them shall bid for each article sold, and that all articles thus bought by any of them shall be sold again amongst themselves at a fair price, and the difference between the auction price and the fair price divided among them, this is a conspiracy, for which they are indictable. *Levi v. Levi*, 6 C. & P. 239. [Gurney]

## CONSTABLE.

[See ASSAULT—RESIDENCE.]

(A) APPOINTMENT.

(B) POWER, DUTY, AND LIABILITY.

(C) ACTIONS AGAINST.

## (A) APPOINTMENT.

Constables, special, enlargement of powers of magistrates in the appointment of. 5 & 6 Will. 4, c. 43; 13 Law J. Stat. 74.

A local act for the government of a parish appointed trustees; amongst them the rector, church-

wardens, and overseers for the time being, with power to thirteen or more of them to appoint four constables:—Held, that at a meeting of thirteen of the trustees, a constable was well appointed in pursuance of the act, although the rector was not present.

Such trustees held to be empowered to elect to fill up a vacancy occasioned by a person, who was a constable, leaving the parish before the expiration of his year.

Indictment stated, that the defendant was only elected to serve as constable; and then charged, in general terms, that he neglected and refused to execute the office:—Held, to be well charged in point of form; and to be supported by evidence of his having had notice to attend, and neglecting to attend to take the oath of office, it not appearing that he had ever executed any of its duties.

*Semble*—That such an indictment might charge the not taking the oath of office as a specific offence; in which case it would be necessary specially to aver notice to the defendant to attend and take the oath. *Res v. Brain*, 1 Law J. (n.s.) M.C. 53, s.c. 3 B. & Ad. 614.

A person who lived in one township, where he paid his rates and taxes, and did suit and service to the court leet of that township, but who also had in another township a warehouse, in which he never slept, nor any of his servants, but five days out of the seven slept and boarded at a lodging within the latter township:—Held, a resident liable to serve the office of constable within the latter township.

A fine of 300*l.* for refusing to serve such office, held excessive. *Res v. the Lord of the Manor of Manchester*, 4 Law J. (n.s.) M.C. 106; s.c. as *Res v. Mosley*, 3 Ad. & E. 488.

## (B) POWER, DUTY, AND LIABILITY.

A police officer, hearing a noise in a public-house at one o'clock in the night, entered the house, the door being open:—Held, that this was not a trespass. *Res v. Smith*, 6 C. & P. 136. [Tindal]

A party, who has witnessed an affray, is justified in giving one of the affrayers in charge to a constable on the very spot where it was committed, and whilst there is a reasonable apprehension of its continuance.

It is not material who was guilty of the first wrongful act which led to the affray.

*Quære*—Whether a private individual, who has seen an affray committed, may give in charge to a constable who has not, and such constable may thereupon take into his custody the affrayers, or either of them, to be carried before a Justice after the affray has entirely ceased, and after the offenders have quitted the place where it was committed, and there is no danger of its renewal. *Timothy v. Simpson*, 4 Law J. (n.s.) M.C. 73, s.c. 1 C. M. & R. 757; 5 Tyr. 244; 6 C. & P. 499.

A collector of taxes had some apprehension, when he went to demand a tax due, that the tax would be refused, and that he should be resisted in his attempt to levy a distress for the amount. He, therefore, took with him two constables, whom he left outside the door. Having demanded the amount of the tax, he, from what occurred in the house, was apprehensive of some violence being used towards him, and called in the constable:—Held, that he was justified

in admitting the constable into the house. After the constable was admitted, the owner of the house returned, accompanied by ten or twelve men, and upon seeing the constable, told him in strong language to retire:—Held, that the constable was justified in remaining in the house, and that an assault then committed upon him, was upon him then being in the execution of his duty as a constable. *Rez v. Clark*, 4 Law J. (n.s.) M.C. 92, s. c. 4 N. & M. 671; 3 Ad. & E. 287.

### (C) ACTIONS AGAINST.

A chief constable, appointed for one of the divisions of a riding, gave a bond to the clerk of the peace, with condition that he should well and faithfully execute his office, should pay, apply, and account for all sums of money coming to his hands as chief constable of his division, and should in all other respects perform and observe all such orders and directions as should be made or given to him in respect of his said office. The Justices of the riding having ordered a rate to be levied on the inhabitants according to a certain valuation, the constable collected from his division, and paid over to the treasurer, an undue proportion of rate. The Justices, in sessions, resolved that the bond was forfeited, but that no proceedings should be taken upon it. Application being made to this Court on behalf of some of the parties aggrieved, for a mandamus to the Justices or clerk of the peace to put the bond in suit, the Court refused a rule to shew cause. *Semble*, that the taking of a bond with the above condition is not warranted by stat. 63 Geo. 3, c. 51, s. 19. *In re Lodge*, 2 Ad. & E. 123.

A local act of parliament authorized commissioners to appoint surveyors, scavengers, rakers, &c., beadles, constables, watchmen, and other officers, and declared that it should be lawful for such watchmen to secure all malefactors, &c. and all suspected persons who should be found wandering or misbehaving themselves during the hours of keeping watch; and it further enacted, that the watchmen should be sworn in as constables and be invested with the like powers and authorities, &c. as any constables were invested with or enjoyed by law, and that no action should be commenced against any person or persons "for anything done, or to be done, under or by virtue of that act until a month's notice of action had been given":—Held, that the defendants, who had apprehended the plaintiff on reasonable ground of suspicion that he had committed a felony, but had beat him and used more violence than was necessary to secure him, upon proof that they had acted as constables and watchmen under the statute, were within its protection, and entitled to a month's notice of action. *Bulter v. Ford*, 2 Law J. (n.s.) Exch. 286, s. c. 2 Law J. (n.s.) M.C. 109; 1 C. & M. 662; 3 Tyr. 677.

The statute 5 Geo. 4, c. 18, s. 6, which authorizes constables to arrest persons out of their own district, though the warrant be not directed to them by name, does not apply to cases where warrants are issued by the Judges of the Court of King's Bench, but is confined to warrants issued by Justices of the Peace of limited jurisdiction.

Where a warrant, issued by a Judge of the Court of King's Bench, was executed by a constable, to whom it was not directed by name, out of his dis-

trict—it was held, in an action against the constable, that the plaintiff was not bound to demand a perusal and copy of the warrant, under 24 Geo. 2, c. 44, s. 6. *Gladwell v. Blake*, 4 Law J. (n.s.) M.C. 13, s. c. 1 C. M. & R. 636; 5 Tyr. 186.

## CONTEMPT.

### [See ATTACHMENT—COMMITMENT.]

Provisions for enforcing process upon contempts in Ecclesiastical courts. 2 & 3 Will. 4, c. 93; 10 Law J. Stat. 247.

An order for a serjeant-at-arms, upon motion *ex parte*, and without affidavit, upon a sheriff's return of caption and rescue, regular; and the subsequent orders up to a sequestration, not vitiated by reference in them to the original contempt only. *Blackwell v. Tatlow*, 3 Law J. (n.s.) Chanc. 153, s. c. 2 M. & K. 321.

An affidavit in support of a motion for a serjeant-at-arms, under 11 Geo. 4, & 1 Will. 4, c. 36, rule 1, which relates to the defendant's residence, and not to the place where he was at the issuing of the attachment, is insufficient. *Davis v. Hammond*, 5 Sim. 9.

To ground an order for the serjeant-at-arms, under 1 Will. 4, c. 36, s. 15, rule 1, the affidavit must state the party's belief that, at the time of suing forth the attachment, the defendant was in the county into which the writ was issued, and not merely that his last known place of residence was in that county. *Handfield v. Wildes*, 2 R. & M. 91.

To ground an order for the serjeant-at-arms, under 1 Will. 4, c. 36, s. 15, the affidavit need not state the party's belief that due diligence has been used in ascertaining the defendant's residence and in endeavouring to apprehend him; but it must swear to those facts, and in some way or other satisfy the Court of their truth. *Wright v. Green*, 2 R. & M. 93.

The Court will not order the serjeant-at-arms, upon a return of *non est inventus*, upon any other affidavit than that of the solicitor or his town agent, stating, that due diligence has been used in endeavouring to apprehend the defendant, as required by 1 Will. 4, c. 36, s. 1. The affidavit of the town agent, shewing that he issued the writ, and of the sheriff's officer, shewing the steps taken by him to apprehend the defendant, and the manner in which his endeavours were eluded, will not be sufficient. *Pugh v. Pugh*, 2 M. & K. 358.

A reference having been made, under 11 Geo. 4, & 1 Will. 4, c. 36, rule 6, neither the defendant, nor any person on her behalf, appeared before the Master, though she had been personally summoned. The Master proceeded *ex parte* with the inquiry, and reported, that the defendant did not appear to be unable, by reason of her poverty, to employ a solicitor to put in her answer. The Court refused to order the bill to be taken *pro confesso*, but referred it back to the Master to review his report, and ordered the warden of the Fleet to produce the defendant before the Master at such time and place as the Master should appoint, and that the inquiry should be proceeded with in the defendant's presence. *Atkinson v. Flint*, 5 Sim. 77.

Affidavit under 11 Geo. 4, & 1 Will. 4, c. 30,

s. 15, rule 1, by whom to be made. *Handfield v. Woolley*, 4 Sim. 122.

An order for the discharge of a prisoner from his contempt, under 2 & 3 Will. 4, c. 58, may be made upon motion, supported by the certificate of the deputy warden of the Fleet. *Hodder v. Haines*, 5 Sim. 441.

The Master allowed exceptions to an answer for insufficiency, and fixed a time for putting in a further answer. After that time expired, the defendant moved for further time. Motion refused, the defendant being in contempt under the 6th of Lord Lyndhurst's orders. *Wheat v. Graham*, 5 Sim. 570.

If an order be made for a party to do a certain thing, and a copy be served upon him, in which copy there is an error as to the date of the original, he is not bound to obey it; and therefore, if committed for disobeying the order, is entitled to his discharge. *Brandon v. Brandon*, 1 Law J. (n.s.) Chanc. 46.

Publishing a handbill, cautioning persons from purchasing of the defendant certain goods, on the ground of an injunction having issued to restrain the disposal of them, not a contempt, the injunction having been obtained *bond fide*. *Powis v. Hunter*, 2 Law J. (n.s.) Chanc. 31.

An objection taken to the hearing of the cause, because the plaintiff was in contempt, overruled. *Ricketts v. Mornington*, 4 Law J. (n.s.) Chanc. 21.

A party in contempt for not putting in his answer afterwards filed one, and the plaintiff replied to it. The defendant was, on motion, discharged without paying the costs of the contempt. *Stafford v. Ball*, 4 Law J. (n.s.) Chanc. 249.

The fourteen days mentioned in 11 Geo. 4. & 1 Will. 4, c. 26, s. 11, are exclusive of the first and inclusive of the last day. *Ansden v. Whitfield*, 6 Sim. 356.

Where a person takes forcible possession of estates over which a receiver has been appointed, an order for his commitment will be made without an order nisi being previously obtained. *Broad v. Wickham*, 4 Sim. 511.

An active step taken in a cause by defendants in contempt, is not rendered valid by the subsequent tender of the costs of the contempt. Where, therefore, defendants in contempt, having put in answers which were excepted to, obtained the previous order, and afterwards tendered the costs of the contempt, the order was discharged for irregularity. *Taylor v. Sheppard*, 1 Y. & C. 99.

To ground a motion for a contempt in disobeying a rule of court, it is not sufficient to shew the party the original rule, without personal service of a copy of such rule. *Parker v. Burgess*, 3 N. & M. 36.

Mere violent snatching of an original writ of summons from the person serving a copy of it, is not a contempt of the process of the Court. *Weekes v. Whitely*, 3 Dowl. P.C. 536.

A witness, in a prosecution tried at the King's Bench sittings, struck the defendant after the trial was over, as both were in the lobby of the court. The Judge committed him to the custody of the marshal for three days. *Rea v. Wigley*, 7 C. & P. 4. [Coleridge]

## CONTRACT.

[See BANKRUPT, Rights of Assignees—INSOLVENT, Rights of Assignees—INSTRUMENT—WARRANTY.]

### (A) CONSTRUCTION.

- (a) *In general.*
- (b) *Condition precedent.*

### (B) WHEN VALID OR ILLEGAL.

### (C) PERFORMANCE.

### (D) ENFORCEMENT OF, AND RELIEF AGAINST, IN EQUITY.

### (E) ACTION ON.

- (a) *In general.*
- (b) *Pleadings and Evidence.*
- (c) *Damages.*

### (A) CONSTRUCTION.

#### (a) *In general.*

*Semble*—That in modern times the Judge leaves the construction to be put upon mercantile instruments to the consideration of the jury. *Fruhling v. Schrader*, 4 Law J. (n.s.) C.P. 169.

Memorandum of agreement, by which the defendant agreed to deliver wheat-straw at so much per load; and the plaintiff agreed to pay to the defendant or his order 33s. per load for each load of straw so delivered:—Held, that the meaning of such contract was, that each load should be paid for on delivery; and, the plaintiff having refused to pay for a load that had been delivered, the defendant was absolved from his contract, and no action lay for not delivering the remainder. *Withers v. Reynolds*, 1 Law J. (n.s.) K.B. 30, s. c. 2 B. & Ad. 882.

A merchant in Havannah agreed to pay a debt due from him to correspondents in London, by the "first consignment of produce he should make to this country." A cargo of tobacco, in a vessel chartered to proceed to Cowes, in the Isle of Wight, for orders, and thence to a port on the continent,—held, not to be within the terms of the agreement. *Green v. Girton*, 2 Law J. (n.s.) Chanc. 160.

The plaintiff, having entered into an agreement with the defendant, in May 1831, for twelve months, at a salary of six guineas per week, for the performance of various literary works, to be thereafter indicated by the defendant, and during that period nor to engage in any publication similar to the *Court Journal*, in October following, entered into another agreement with the defendant, at a salary of ten pounds per week, to edit the *Court Journal*, "and to devote all his time and attention to the same, save and except the hours he had already engaged to devote to the superintendence of the *County Press*:"—Held, that the first agreement was put an end to by the second; and, therefore, that he was not entitled to maintain an action for his salary of six guineas per week, for the residue of the year, after the second agreement came into operation. *Palmore v. Colburn*, 3 Law J. (n.s.) Exch. 314, s. c. 1 C. M. & R. 65; 4 Tyr. 838.

One M gave a cognovit for 37l., but judgment was not to be entered up, unless default was made in payment of the 37l. by instalments of 5l. per month; and in case default were made in any or

either of the said instalments, the plaintiff was to be at liberty to enter up judgment for the whole. The defendant guaranteed the attendance of M at a particular place, so that, in the event of any of the instalments not being previously discharged, a writ of *ca. sa.* might be executed:—Held, that the defendant was only bound to produce M once; and that, having done so on the first instalment becoming due and not being paid, he was discharged from his undertaking. *Turner v. Pyne*, 3 Law J. (N.S.) K.B. 120, s. c. 1 Ad. & E. 34; 3 N. & M. 354.

A contract, in which A as the renter of tolls, and B as his surety, do hereby severally promise, &c., is a several undertaking, and they cannot be sued jointly. *Lee v. Nixon*, 3 Law J. (N.S.) K.B. 160, s. c. 1 Ad. & E. 201; 3 N. & M. 441.

An engagement to pay 12l. 10s. for the first year, and to advance 10l. per annum, until the salary is 180l., is a yearly hiring. *Fawcett v. Cash*, 3 Law J. (N.S.) K.B. 113, s. c. 5 B. & Ad. 904; 3 N. & M. 177.

An agreement was entered into between two parties, whereby one agreed to purchase, and the other to sell, all the naphtha that he might make for and during the term of two years, say from 1,000 to 1,200 gallons per month, at the rate of 2s. 6d. per gallon, provided, that if the purchaser should be desirous of dissolving the contract before the expiration of the two years, he might do so on giving the seller three months notice in writing:—Held, that this agreement did not necessarily import that the seller was bound to manufacture that quantity of naphtha during the two years; and therefore, having ceased to manufacture it before the expiration of that time, that he was not liable for a breach of contract.

If the instrument conveyed that meaning in the understanding of mercantile men, the plaintiff ought to have so alleged it in his declaration. *Gwillim v. Daniel*, 4 Law J. (N.S.) Exch. 174, s. c. 2 C. M. & R. 61.

If an agreement is in the alternative, and one branch cannot, by law, be performed, the party is bound to perform the other. *Stevens v. Webb*, 7 C. & P. 60. [Parke]

A offered to B 20,000l. of a proposed government loan, which B agreed to take, provided he should have the 20,000l., if A was not wholly excluded. A applied to government for 200,000l. but had only 35,000l. allowed him, whereupon he offered to B 3,500l.:—Held, that B was entitled to receive from A the whole 20,000l. *Mocatta v. Franco*, 3 Doug. 11.

A was in custody on a *ca. sa.*, and, in consideration of the plaintiff's consenting to his discharge, B agreed to pay 35l. or to surrender A to the sheriff. A, on a subsequent day, offered to surrender himself to the sheriff, who would not retake him, as the plaintiff had consented to his discharge:—Held, that the agreement was absolute to pay 35l., and that it was not fulfilled by a tender of the other alternative, the surrender of A. *Stevens v. Webb*, 7 C. & P. 60. [Parke]

The plaintiff took of the defendant a house at a yearly rent, under an agreement, by the terms of which the latter undertook, that up to the date of the agreement he had paid or would pay or discharge "all arrears of rent, rates, taxes, or assessments;" and the former agreed, that "from and after that day, the same should be kept paid by him

for the period he might occupy the premises." At the expiration of the first quarter, the superior landlord distrained for rent:—Held, that there was no implied duty in the defendant to indemnify the plaintiff against this claim, although the agreement between them stipulated for a yearly rent, the defendant having, by the subsequent clause, expressly undertaken to keep the reserved rent paid. *Upton v. Fergusson*, 3 Mo. & Sc. 88.

By the draft of a contract originally made, between a joint-stock company and their manager, it was provided, that the manager should not be removed without the concurrence of the whole committee of management, and that, upon removal, he should receive such compensation as the committee should adjudge, but the contract was not signed. A new contract was afterwards signed, by which the manager was removable by a majority consisting of two-thirds of the committee; in which new contract there was no provision for compensation upon removal; the manager was removed by a vote of two-thirds of the committee:—Held, that the removal was valid, and that no compensation could be recovered, either under the contract or by implication of law. *The Commercial Bank of Scotland v. Pollock*, 4 Bligh, N.S. 543.

An agreement, on dissolution of partnership, to assign the partnership property in consideration of 50l. paid and five bills for 100l. each delivered, is not executory, but executed. *Ex parte Gibson*, 2 M. & A. 4, s. c. 4 D. & Ch. 56.

The plaintiff, being possessed of a term of years, of which two years remained unexpired, demised to the defendant for the remainder of his term minus three days. By the agreement of demise, the defendant was to pay 100 guineas for the fixtures, and a further sum if he agreed with the superior landlord for a longer term. The defendant remained in possession for about three quarters of a year after the expiration of the original term, and paid the superior landlord for so doing at a higher rate than the rent under the lease. There was an interview between the defendant and the original landlord, at which the subject of a renewal was discussed, but the landlord proved that they came to no agreement personally, and he referred the defendant to his solicitor:—Held, that the defendant appeared to have remained in possession only as tenant by sufferance, and that the plaintiff was not entitled to a further sum. *Simpkin v. Ashurst*, 1 C. M. & R. 261, s. c. 4 Tyr. 780.

#### (b) Condition precedent.

Covenant on a charter-party, whereby, if the ship should be lost, burnt, or taken, and it should appear to a court-martial that the master, &c. had made the best defence they could, the freighters covenanted to pay the value of the ship. The holding a court-martial is a condition precedent. *Davison v. Moore*, 3 Doug. 28.

Covenant on a charter-party, that the ship having unloaded her outward cargo at St. T, should directly sail for Dominica, where the defendant should load a homeward cargo, load, &c.; plea, that the ship did not unload her outward cargo at St. T; demurrer:—Held, that the plea was bad, as the unloading at St. T. was not a condition precedent. *Ohlsen v. Drummond*, 4 Doug. 356.

Defendant was to pay for building, upon receiving an architect's certificate that the work was done to his satisfaction. The architect checked the builder's charges, and sent them to defendant:—Held, that this did not amount to such a certificate of satisfaction as to enable the builder to sue defendant, although defendant had not objected to pay on the ground that no sufficient certificate had been rendered. *Morgan v. Binnie*, 9 Bing. 672.

Contract for the purchase of a cargo of olive oil, delivered on the quay, alongside the vessel; to be removed from the quay by the purchasers after passing the scale, and to be at their risk from the time of weighing. Payment to be made by cash for one half the amount of the invoice, the remainder by bills at four months. The true construction of such a contract is, that the goods should be delivered to the purchasers at the quay, and that the cash should not be paid till after the completion of the delivery of the goods, by their having been weighed and the invoice made out.

Therefore, no action lies by the seller against the broker for a breach of duty in delivering the goods to a purchaser (who became bankrupt) without receiving payment of the cash at the time of the delivery. *Gower v. Jones*, 1 Law J. (N.S.) K.B. 10.

#### (B) WHEN VALID OR ILLEGAL.

##### [See ATTORNEY—FRAUD—PARTNERSHIP.]

The mere omission to comply with Excise regulations, to which a particular penalty is annexed, will not render the sale of goods (subject to those regulations) void; therefore, where the permit misstates the strength of spirits sold, (it being required by the statute 6 Geo. 4, c. 80, s. 117, that the permit accompanying any spirits should express the true strength thereof), the plaintiff was held entitled to recover, notwithstanding.

The 124th section of the 6 Geo. 4, c. 80, does not apply to a rectifier of spirits. *Wetherell v. Jones*, 1 Law J. (N.S.) K.B. 139, s.c. 3 B. & Ad. 221.

Where a party has merely omitted to comply with Excise regulations, which are meant to apply to him personally, and the contravention of which subjects him to a penalty, he will not be prevented from recovering the value of goods sold by him. But where an act of parliament is made for the protection of buyers, against the frauds of sellers, a non-compliance with the provisions of the act will render the contract void, notwithstanding that penalties may be annexed for the breach of such provisions.

Thus, where a farmer sold butter packed in firkins not marked as required by 36 Geo. 3, c. 86, s. 3, it was held, that he could not maintain an action for the recovery of the value;—and held, that it does not make any difference that the penalty is given by the same clause which enacts what shall be done. *Foster v. Taylor*, 3 Law J. (N.S.) K.B. 137, s.c. 5 B. & Ad. 887; 3 N. & M. 244.

If two parties enter into an agreement to produce certain performances at an unlicensed theatre, and to share the profits, such contract is illegal; and a bill of exchange given by one to his partner as a security for his moiety, is void; and an action cannot be maintained to recover the amount. *De Begnis v. Armistead*, 2 Law J. (N.S.) C.P. 214, s.c. 10 Bing. 109; 3 Mo. & Sc. 511.

A trader became bankrupt, and a commission was sued out; he and his friends offered a composition, which was accepted, and it was agreed, that a supersedeas should issue, and the messenger be withdrawn. The bills of the solicitors of the commission, of the accountant, and of the messenger, were not at the time made out; but, nevertheless, the solicitors to the commission, who had received a certain sum due to the estate, entered into a written agreement with the defendant (the solicitor to the bankrupt), that if the sum which they (the solicitors to the commission) had received, exceeded the amount of their costs, accountant's and messenger's bills, they would be accountable for the surplus to the defendant; and upon the other hand, if there was a deficiency, he (the defendant) should make it up to the plaintiffs. Upon payment of costs, expenses, &c., there was a deficiency, which the defendant refused to pay. Upon action brought,—Held, that the plaintiffs were not entitled to recover, as it was not alleged in the declaration, nor did it appear, that the supersedeas had actually issued, or that the consent of the creditors had been obtained to the agreement. *Haslam v. Sherwood*, 3 Law J. (N.S.) C.P. 176, s.c. 10 Bing. 540; 4 Mo. & Sc. 434.

An action may be maintained for the value of goods sold in a foreign country, though the seller, at the time of the sale, knows they are to be smuggled, if he gives no assistance to the buyer, by packing or otherwise, to facilitate the illegal importation. *Pellicat v. Angell*, 4 Law J. (N.S.) Exch. 326, s.c. 2 C. M. & R. 311.

The statute 24 Geo. 2, c. 40, s. 12, which prevents a person from recovering for spirits supplied to a smaller amount than 20s. at a time, does not apply to spirits supplied by an hotel-keeper to a guest in his hotel. *Proctor v. Nicholson*, 7 C. & P. 57. [Abinger]

The proprietor of a newspaper cannot recover for the non-performance of a contract for printing, such newspaper before filing the affidavit required by the statute 88 Geo. 3, c. 78, s. 1. *Houstoun v. Mills*, 1 M. & Ro. 325. [Denman]

#### (C) PERFORMANCE.

Where a party contracted to supply and erect a warm-air apparatus for a certain sum,—Held, in an action for the price, (the defence to which was, that the apparatus did not answer,) that, if the jury thought it was substantial in the main, though not quite so complete as it might be under the contract, and could be made good at a reasonable rate, the proper course would be to find a verdict for the plaintiff, deducting such sum as would enable the defendant to do what was requisite. *Cutler v. Close*, 5 C. & P. 337. [Tindal]

#### (D) ENFORCEMENT OF, AND RELIEF AGAINST, IN EQUITY.

A, the proprietor of a newspaper, prevailed on B to make and deliver to the Stamp Office an affidavit, that he, B, was the proprietor of the paper. B afterwards agreed to sell the paper to D; A having become insolvent, his assignees filed a bill to set aside the sale for fraud:—Held, that as B had at A's instance violated the 88 Geo. 3, c. 78, which requires the true names of the proprietors of newspapers to be inserted in the affidavit, his assignees

were not entitled to the relief asked. *Harmer v. Westmacot*, 6 Sim. 284.

Where a contract is entered into for the purchase of an estate by certain persons in their own names, but, in fact, on their own account, and also as agents for other parties, a bill to rescind the contract may be filed in the names of the agents and the other parties. Where the partners in a company or partnership are numerous, a bill may be filed by some of the partners on behalf of themselves and the other partners to rescind the contract, in a case where it is manifest, from the circumstances, and the evidence, that it is for the benefit of all the partners that the contract should be rescinded.

A contract for the sale of iron mines was rescinded, on the ground of fraudulent misrepresentations of the value of the estate, and of the price of ironstone, and other materials, and of the quantities of materials required for the manufacture of iron, notwithstanding possession had been taken, the mines worked, and other acts of ownership had been exercised, and notwithstanding some acts in confirmation of the contract. *Small v. Atwood*, 1 Yo. 407.

On the sale of certain iron works, 200,000*l.*, part of the purchase-money, was paid to the vendor in Bank of England notes. The same notes were delivered by the vendor to his stock-broker, by whom they were paid into his (the stock-broker's) bankers. On the same day the stock-broker purchased a sum of 192,766*l.* 8*s.* 9*d.* new 4*l.* per cent. bank annuities, in the name of the vendor; and the purchase-money for such stock was paid by the cheque of the stock-broker on his bankers. The stock remained in the name of the vendor, and under his controul, for some years, when, pending a suit for setting aside the sale of the iron-works, on the ground of misrepresentation, the vendor transferred the stock in the name of his mother. The sale of the iron-works being rescinded, on the ground of misrepresentation by the vendor, an injunction was granted to restrain the transfer of the stock.

When a contract is rescinded for fraud or misrepresentation, it is the same as if no contract had ever existed, and the parties are restored to the situation in which they were before the contract as nearly as possible. *Ib.* 507.

#### (E) ACTION ON.

##### (a) In general.

[See ACCOUNT STATED—CHURCHWARDENS AND OVERSEERS, Liability.—GOODS SOLD AND DELIVERED.]

Where a person lends money nominally on his own account, but really on account of another, the real lender cannot recover the money, unless he prove distinctly that the loan was in reality intended to be his, and was received as such.

And therefore, where A, as the managing owner of a vessel, was permitted, by the other owners to have the possession of two warrants or orders of the East India Company, to pay to the said owners, or bearer, the sum of money therein mentioned, for freight; and A deposited these warrants in the hands of his bankers, and they received the money due on them, and gave him credit for it in account:—It was held, on assumpsit brought after A's death by the surviving part-owners against the bankers,

that, on proof of the above facts, they could not recover the money, because it was not shewn that the loan was upon their account; for the fact of the warrants being the property of all the part-owners, when placed in the bankers' hands, was, upon the evidence, consistent with the supposition that the loan of the proceeds to the bankers was A's loan. *Sims v. Bond*, 5 B. & Ad. 389, s. c. 2 N. & M. 608.

A, having printed a work, sold 300 copies to B, a bookseller, at 40*s.* a copy, binding himself not to sell to others, in quires under 48*s.*, and in single copies under 50*s.* a copy, until B's 300 were sold, or his consent was obtained. In his letter, which constituted the agreement, he said to B, "I do not expect you to sell under 48*s.* and 50*s.*, but do as you like." When B had sold part of the 300 copies, he went into partnership with C, and transferred all his stock at cost price. He also sold some copies at 46*s.* and 46*s.* A, in contravention of his agreement, sold under the stipulated prices; but on being threatened with proceedings by B, persuaded D, who had purchased the principal part, to consent to give them back, if it would satisfy B. D had an interview with B, and told him this. D said, that he understood the arrangement was a settlement of the difference, and that B went away from the interview perfectly satisfied:—Held, in an action by B against A for a breach of the agreement, that neither the underselling by B, nor the transfer of the stock to the partnership, was ground of nonsuit; but that the arrangement with D was an answer to the action, if the jury thought it made an end of the dispute between the parties:—Held, also, that, on the question of damage, it might be considered whether B's own underselling had or had not contributed to affect the price of the work in the market. *Benning v. Dove*, 5 C. & P. 427. [Denman]

The widow of a publican employed an undertaker to conduct the funeral of the deceased, and deposited with him the beer and spirit licences of the house as a security for the payment of his bill. A, one of the firm of the distillers who supplied the house with spirits, by arrangement with the widow, took out administration. B, the other partner in the firm, promised the undertaker, that, if he would give up the licences to him, he would pay the bill for the funeral:—Held, that the undertaker, having given up the licences to B, might recover the amount against B, although the widow was his original employer, and although he had made out his account charging the administrator as his debtor. *Walker v. Taylor*, 6 C. & P. 752. [Tindal]

Where, by the stipulations contained in a lease, the tenant was to pay the land tax, which he left unpaid during his tenancy, and which the succeeding tenant paid, and the landlord repaid him:—Held, that as the tenant's liability only arose from the special agreement, the landlord could not recover the sums so paid in an action for money paid, but must declare on the special agreement. *Spencer v. Parry*, 4 Law J. (N.S.) K.B. 186, s. c. 4 N. & M. 770; 3 Ad. & E. 331.

##### (b) Pleadings and Evidence.

Where, by an agreement not under seal, a defendant has agreed to pay an entire sum, in respect of a consideration consisting of several distinct things, to be performed on the part of the plaintiff, the de-

fendant is not compelled to bring a cross action, for imperfect performance of any of the plaintiff's undertakings, but may give evidence thereof in reduction of damages.

In an action on an agreement by plaintiff to plant a quantity of trees, and "well and sufficiently to keep them in order" for two years, and to replant such as should die during that period, except from injury by sheep, game, or cattle, the Judge rejected evidence tendered by the defendant, that the trees had been destroyed by being choked up with weeds and grass, and were of no value; and the jury found a verdict for the plaintiff, and that well and sufficiently to keep in order, meant pruning only:—Held, that the evidence was improperly rejected, and that the agreement was not rightly construed: but also held, that as the verdict was not perverse, the defendant could have a new trial only on payment of costs. *Allen v. Cameron*, 2 Law J. (N.s.) Exch. 263, s. c. 1 C. & M. 832; 3 Tyr. 907.

Where a ship-owner, knowing that a port is blockaded, enters into a contract with a merchant for the delivery of a cargo there, if he afterwards refuses to go, he is liable to an action for the breach of the contract; but, whether the damages are to be nominal or otherwise, must depend upon the opinion of the jury as to whether, if the vessel had gone to the place, she would have been able to get in. *De Medeiros v. Hill*, 5 C. & P. 182. [Tindal]

In a contract between the London Dock Company and R S, the latter agreed to execute certain works, and to provide materials, labour, engines, tools, implements, &c., and it was stipulated, that the company's engineer should have the power of rejecting any materials or work, which, in his opinion, should not be in conformity with the contract, and that the directors should be at liberty to alter the plans, and add to or diminish any part of the intended works, in which case a proportionate addition or deduction should be made to or from the sum to be paid to R S, the amount to be computed according to a schedule of prices contained in the specification. R S inclosed land of the company, so as to exclude the public, had the premises watched by persons in his own employ, and erected steam-engines, and placed implements and materials thereon, for the purpose of carrying on the works; but the company's engineer was on the premises every day, superintending the works during their progress, and rejected such materials as he did not approve of. R S, after some time, by letters, in which he referred to and enumerated the machinery and materials he had placed upon the premises, applied for and obtained advances from the company, upon the faith of his agreement, that the engines, implements, and materials, then on, or afterwards to be brought on, the premises, should be a security. The amount of those advances always exceeded the value of the property on the premises. R S having become bankrupt, the company erased his marks on the engines, implements, and materials on the premises, and substituted their own. In trover by his assignees against the company, the cause and all matters in difference being submitted to arbitration,—Held, 1st, That the arbitrator had no authority to award as to the defendants' right to prove under the commission, for their advances, or as to the extent of such proof. 2nd, That the assign-

ees could not recover for extra work done by the bankrupt, as it had been done under the contract, and the work done under the contract had been overpaid. 3rd, That the effect of the bankrupt's agreement was to give the defendants a lien, which, under the circumstances, they had a sufficient possession to support. 4th, That the plaintiffs were entitled to recover for such materials as were brought on the premises after the bankruptcy, although payments were subsequently made to the bankrupt, exceeding the value thereof; as such payments could only be considered as general advances, and not as payments for those particular goods in the course of business, within the protection of s. 82 of 6 Geo. 4, c. 16. *Crowfoot v. the London Dock Company*, 4 Law J. (N.s.) Exch. 267, s. c. 1 C. & M. 637; 4 Tyr. 967.

(c) Damages.

[See DAMAGES.]

### CONTRIBUTION.

[See PARTNERS, Liabilities—PRIZE AGENTS.]

Where a testator devises renewable leasehold, and directs generally the renewal fines to be paid, the rule of equity applies, viz. that those who enjoy the benefit should contribute to the expenses in proportion to their enjoyment. Where a testator proceeds further, and provides a fund for renewal, then the intention of the testator, expressed or implied, is to be the guide in the application of the fund. *The Earl of Shaftesbury v. the Duke of Marlborough*, 3 Law J. (N.s.) Chanc. 30.

### CONVERSION.

M, purchasing an equity of redemption of freehold property, has the entirety conveyed by the vendor and mortgagee under his own direction to a new mortgagee, in trust for sale absolutely, the monies to be applied to pay off both mortgages, and the residue of the monies to be in trust for him (M), his executors, administrators, and assigns, or subject to his appointment. There was no proviso for redemption:—Held, that the property was converted out and out into personalty by the trust deed. *Marechaut v. Case*, 1 Law J. (N.s.) Chanc. 86.

Lease for sixty-two years, and covenant by lessor, at any time within forty years, on payment of 500*l.*, to grant a further term to make up ninety-nine years:—Held, that when lessee declared the option, the 500*l.* became personal estate of the lessor, who was then dead. *Banks v. Crespiigny*, 1 Law J. (N.s.) Chanc. 121.

Devise of freehold and copyhold estates to be sold; monies to arise "to be deemed part of my personal estate." One of the legatees died in the lifetime of the testator:—Held, that the real estate was absolutely converted into personalty, and that the lapsed legacy belonged to the residuary legatees, not to the heir.

Real property purchased with partnership capital, and involved in a partnership concern, to be considered as personal. *Phillips v. Phillips*, 1 Law J. (N.s.) Chanc. 214, s. c. 1 M. & K. 649.

A testator devises his real estate, upon trust, for

sale, and bequeaths the produce of the sale, together with his personal estate, as one mixed fund, to his children attaining the age of twenty-one, and in default of children living to attain that age, he directs his trustees to pay, assign, and transfer such trust monies, funds, or securities to such person or persons as he shall thereafter, by any codicil, direct or appoint, his, her, or their executors, administrators, or assigns, for his or their absolute benefit. The testator's only child who survived him was a daughter, who died under twenty-one, and he made no codicil to his will, in exercise of his power:—Held, that such part of the real estate of the testator as was unsold at the death of the child, descended to her as his heiress-at-law, with the character of personal estate; and the testator's personal estate belonged to her and her mother, under the Statute of Distribution.

At the death of the daughter, there were two sons of the mother by a second husband, who claimed to take equal shares with their mother, in the personal estate of the daughter:—Held, that under the statute of 1 James 2, the brothers and sisters of the half blood were entitled. *Jessop v. Watson*, 2 Law J. (n.s.) Chanc. 197, a. c. 1 M. & K. 665.

Conversion out and out of real into personal estate, in a will, only arises where a testator, by a will duly executed to pass real estate, directs that the produce of the real estate shall be treated at his death as if it had in all respects the quality of personal estate. *Whytall v. Kay*, 3 Law J. (n.s.) Chanc. 94, a. c. 2 M. & K. 765.

The bulk of a testator's property being at the time of making his will in Bank stock, he devises and bequeaths all his freehold and leasehold messuages, tenements, &c. and all his ready money, and securities for money, stocks in the public funds, goods, chattels, and effects, and all other his real and personal estate and effects, to trustees, upon trust to pay the rents, fines, and profits of his freehold and leasehold estate, and the dividends, interest, and proceeds of his money in the funds, and other his personal estate, to his daughter for life, &c. For some years after the testator's death, the trustees continued to pay to the daughter the annual produce of the Bank stock, leaseholds, &c. leaving the testator's property as they found it. On a bill being filed for that purpose, the Bank stock and the leasehold were ordered to be sold, and the proceeds invested in 3½ per cent. consols, and the trustees to reserve out of the future dividends thereof, the difference between what had actually been, and what would have been paid, if the conversion into 3½ per cent. consols had been made on the testator's death. *Mills v. Mills*, 4 Law J. (n.s.) Chanc. 266.

A, after reciting that he was desirous that his real estates should be sold, conveyed them to trustees, in trust to sell or mortgage the same, and to stand possessed of the money to be raised, in trust for him, his executors, &c. By deed of even date, he assigned all his personal property, to the same trustees, in trust for himself, his executors, &c. By a third deed, of even date, after reciting that he was indebted to various persons, and was desirous that his affairs should be wound up, and his real and personal property converted into money and his debts paid, and that the conveyance

and assignments were made to enable his trustees; in the first place, to pay his debts, he declared that the trustees should stand possessed of the money to arise from the sale or mortgage of his real and personal property, in trust to pay his debts, and then in trust for him, his executors, &c. The trustees sold part of the real estates, and the proceeds were more than sufficient to pay A's debts. Shortly afterwards A died, intestate:—Held, that the unsold estates were to be considered as personally. *Biggs v. Andrews*, 2 Sim. 424.

## CONVICTIONS AND ORDERS.

[See COMMITMENT—FALSE IMPRISONMENT—MALICIOUS INFORMATION—MALICIOUS TRESPASS.]

Summary—Amendment of laws relating to appeals against, in Ireland. 4 & 5 Will. 4, c. 93; 12 Law J. Stat. 205.

A summary conviction by Justices for a forcible detainer, must shew either that the entry of the persons was unlawful, or that their possession has been lawfully determined. *Rex v. Oakley*, 2 Law J. (n.s.) M.C. 24, a. c. 4 B. & Ad. 307; 1 N. & M. 58.

It should appear, that the party convicted was summoned, so that he might have an opportunity of traversing the facts. *Rex v. Wilson*, 4 Law J. (n.s.) M.C. 114, a. c. 5 N. & M. 164.

Although, in general, a magistrate may draw up a conviction in proper form, after he has adjudicated; yet, where he makes an order, and delivers it out, he cannot afterwards draw up another in a more formal shape, and treat that as the order made by him on the occasion upon which he delivered out the first order. *Rex v. the Justices of Cheshire*, 2 Law J. (n.s.) M.C. 95, a. c. 5 B. & Ad. 439; 2 N. & M. 827.

A conviction under stat. 3 & 4 Will. 4, c. 55, s. 27, stated that the defendant refused to give up a certificate of registry to his Majesty's officers of Customs:—Held, that this was bad, as not bringing the offence within the words of the section, "shall refuse to deliver up to the proper officers of His Majesty's Customs." The conviction did not state for what purpose the certificate was required: held, per Lord Denman, C. J. and Williams, J., that this omission also made the conviction bad, as not satisfying the words of the same section, "to deliver up for the purpose of such ship or vessel, as occasion shall require."

Held, also that these were defects in substance, and not cured by the general act, 3 Geo. 4, c. 23, s. 3. *Rex v. Walsh*, 3 Law J. (n.s.) M.C. 100, a. c. 1 Ad. & E. 481; 3 N. & M. 632.

In a conviction for a trespass in the day-time, under the 1 & 2 Will. 4, c. 32, s. 30, the Game Act, the words "enter and be" constitute only one offence.

In a conviction under the same section of the same act, the place of committing the trespass may be described as "certain land," without giving it a name or setting it out with abutments.

As by section 45 of that act, the conviction itself cannot be removed out of the inferior court, a verified copy may be used to ascertain whether the conviction is valid. *Rex v. Mellor*, 2 Dowl. P.C. 173.



The general rule is, that where a conviction adapts the state of facts to the words of the statute, that is sufficient; therefore, where a conviction on the statute stated, that A B was convicted before the magistrates upon the oath of T J, a credible witness, of having in his possession, in his dwelling-house, certain materials used in the woollen manufacture, suspected to be embezzled and purloined, to wit, &c. he not producing the party from whom he bought the same, or giving a satisfactory account, and then going on to adjudicate, is good. *Davis v. Nest*, 6 C. & P. 167. [Tindal]

### CONVICTION OF FELONY.

[See JUDGMENT, as in case of a Nonsuit.]

### CONVOY.

[See INSURANCE.]

### CONWAY.

[See MENAI AND CONWAY.]

### COPY.

[See AGREEMENT.]

### COPYHOLD.

- (A) NATURE OF THE TENURE.
- (B) GRANT, SURRENDER, AND ADMITTANCE.
- (C) COURT ROLLS.
- (D) FINE.
- (E) FORFEITURE AND ESCHEAT.
- (F) STEWARD.

[See POWER.]

Copyhold and freehold estates rendered assets for payment of simple contract and specialty debts. 3 & 4 Will. 4, c. 104; 11 Law J. Stat. 217.

#### (A) NATURE OF THE TENURE.

The widow of a tenant in tail of copyhold is entitled to her free-bench, though there is no custom as to the free-bench of widows of tenants in tail, but only as to the free-bench of widows of tenants in fee. *Doe d. the Duke of Norfolk v. Sanders*, 3 Doug. 303.

The right of the equitable owner of a copyhold estate to dispose of his equitable interest by will, cannot be controlled by the custom of the manor. A custom inconsistent with the doctrine of resulting trusts, as, that a person named by the purchaser of a copyhold estate, as the second life according to the custom, shall take beneficially, is unreasonable. *Lewis v. Lane*, 2 M. & K. 449.

By the custom of a manor, the tenant had no power of devising his estate, except by creating two long terms therein, which were devisable. The tenant, to enable him to devise the estate granted such terms to A, who was his tenant from year to year, and afterwards devised the estate. The Court of King's Bench having decided that the terms had

merged in the estate from year to year:—Held, by the Master of the Rolls, on demurrer, that the devisee had no equity against the customary heir, to be relieved against the merger, though effected by mistake. *Woodman v. Tilby*, 4 Law J. (N.B.) Chanc. 169.

#### (B) GRANT, SURRENDER, AND ADMITTANCE.

A, being the owner of a copyhold, made a conditional surrender of it in the year 1826, to W, to secure money lent. In 1832, A sold the copyhold to G, and made a surrender of it to him absolutely. In 1833, G was admitted tenant: and in 1834, W was also admitted tenant:—Held, that on ejectment brought by W, he was entitled to recover. *Doe d. Wheeler v. Gibbons*, 7 C. & P. 161. [Parke]

At a court baron, held in 1812, before the steward of a manor, two copyhold tenements were granted to W R, and J F, *habendum* for their lives and the life of the longest liver of them successively, at the will of the lord, according to the custom of the manor, at the yearly rents of 1*l.* 6*s.* 4*d.* and 7*s.*, all services therefore due, and a heriot when it should happen; and the said W R was admitted tenant; but the admission and fealty of J F were respited until, &c.

In 1823, the lessees of the manor, by deed, appointed C L steward of the manor, with full power to hold courts baron and customary courts, and to do all acts usual to be done by stewards in relation thereunto; and they more especially authorized him to make any voluntary grants of customary or copyhold lands, within or parcel of the manor, and to give licences to demise, or otherwise, as he, the said C L, should think fit, and either in or out of court, as fully as the lessees might or could do.

At a court baron, held out of the manor, in 1825, J F, (who survived W R,) surrendered to the lessees the above-mentioned copyhold messuages, and the lessees by C L, their steward, granted them again to W H L, and J W W, *habendum* for their lives, and the life of the longest liver of them successively, according to the custom of the manor, at the yearly rents of 1*l.* 6*s.* 4*d.* and 7*s.*, and all services therefore due, and a heriot for each of the said tenements when it should happen, according to the custom of the manor; and J H L, and J W W were admitted tenants:—Held, that it was no objection to this grant, that J F, the surviving life, under the grant of 1812, was never admitted tenant; nor that two rents were reserved, without distinguishing how much was payable for each tenement, the same rents having been reserved by a former grant in 1771: nor that a heriot was reserved for each tenement when it should happen, according to the custom of the manor; for if a heriot was not demandable for each tenement, the claim could not be enforced; but that would not avoid the grant:—Held, secondly, that a customary court cannot be held out of the manor unless there be a custom to warrant it; and if one be held out of it without such custom, it is void, and such things there done, as are required to be done at a court, such as presentments by the homage, imposing fines, levying fines, and suffering recoveries, are void. But, thirdly, that, as the lord may grant to, or admit a copyhold tenant, not only out of court, but also out of the manor, the grant of 1825, if it had been made by the lord, would have been

good, though it purported to have been made at a void court.—Held, fourthly, that a steward cannot in his mere character of steward, admit a copyhold tenant out of the manor. Fifthly, that as C L, by the deed of 1823, had a special authority to make any voluntary grants, either in or out of court, as fully as the lessees of the manor could do, he might take the surrender, and make the grant in question out of the manor; and that although he professed, in making the grant, to act only as steward, and not as the special agent of the lord, the grant so made might operate as a grant made by the lord's attorney, and was therefore valid. Sixthly, that although, in general, to make a party tenant by copy of court roll, his admission ought to be notified, for the information of the tenants, at the next or some other court, and a regular entry of it made by certificate, presentment, &c.; yet, as the proceedings at this void court were entered by the steward on the court rolls, as if done at a valid court, the tenants must, at a following court, after the admittance, have had information of what had been done, and that was sufficient. *Doe d. Leach v. Whitaker*, 5 B. & Ad. 409, a.c. 3 N. & M. 225.

Where lands are held by copy of court roll, according to the custom of the manor, they are copyhold within the 55 Geo. 3, c. 192, although they are not held at the will of the lord.

By the special verdict it was found, that previous to the passing of the 55 Geo. 3, c. 192, there did not appear upon the court rolls of the manor, any entry of a surrender of lands, parcel of the manor, and held by copy of court roll thereof, to such uses as should be declared, by the last will of the person making such surrender, had ever been made:—Held, notwithstanding, that they were within the above statute.

*Quere*—whether a negative custom that copyhold lands, surrendered to the use of a will should not pass thereby, is good? A testator devised all the rest, residue, and remainder of his estate whatsoever and wheresoever, and of what nature or kind soever the same might be:—Held, that the words of this devise were sufficient to pass the copyhold estate; and that a copyhold estate would pass by a general devise of real estate, although the deviser had made no surrender to the use of his will. *Doe d. Edmunds v. Llewellyn*, 2 C. M. & R. 503.

A record in the record book of a manor, of admittance to a copyhold, reciting a surrender of the same copyhold to the use of a will, is admissible evidence of the surrender, the steward not being able to find the surrender itself on the roll or elsewhere, and the surrender being irregularly kept in the manor, although all the other surrenders were either preserved or recorded on the roll. *Res v. Thruscross*, 1 Ad. & E. 126, a.c. 3 N. & M. 284.

By a devise of his real estate made before the passing of 55 Geo. 3, c. 192, by a testator, seised of freehold and copyhold lands, who makes no surrender to the use of his will, the copyholds do not pass. So, although the testator having made his will before he dies, after the passing of the act. *Doe v. Bird*, 2 N. & M. 679.

A surrender of copyhold was made to the lord, to the use of A for life, and, after his decease, to the use of such person as he, by any other surrender, or by his will attested by three witnesses, should

appoint. A, was admitted; he never made any surrender; but by a will, attested by only two witnesses, he devised the copyhold. He died after the passing of the 55 Geo. 3, c. 192:—Held, that as he had an interest as well as a power of appointment, his will operated upon the remainder in fee; and the 55 Geo. 3, c. 192, having dispensed with a surrender to the uses of the will, the devise took effect. *Doe d. Hickman v. Hickman*, 1 Law J. (n.s.) K.B. 238, a.c. 4 B. & Ad. 56; 1 N. & M. 780.

In ejectment, to recover copyhold property by the assignee of an insolvent, it is not necessary that the conveyance and assignment from the provisional to the general assignee (lessor of plaintiff,) should be entered on the court rolls. It is sufficient that such conveyance should be entered in the minute book of the steward. The entry of such conveyance on the roll is only requisite under the 20th section of 7 Geo. 4, c. 57, (Insolvent Debtors Act,) in case of a sale of the property in question. *Doe d. Brennan, v. Glenfield*, 4 Law J. (n.s.) C.P. 234, a.c. 1 Bing. N.C. 729; 1 Sc. 699.

To an action of trespass, the plea stated that the plaintiff surrendered to T O A, in trust for securing the payment of 200*l.*, and that thereupon he executed a deed by which it was covenanted, &c. that T O A should stand and be seised of the copyhold premises so surrendered upon trust, as a security for 200*l.* to be paid on a day certain, but in case of default, upon trust to sell when J W should think proper. The declaration then averred default of payment, and justified as servant of T O A:—Held, bad on demurrer, in not stating that J W thought proper to sell.

*Semble*—that the surrenderee would, under such a deed, have a right of entry, for the purposes of sale, without admittance to the copyhold. *Watson v. Waltham*, 4 Law J. (n.s.) K.B. 98, a.c. 4 N. & M. 537; 2 Ad. & E. 485.

By the custom of a manor, on the surrender of a wife, if the husband consents to the surrender, such consent shall be expressed in the surrender and admission; and without his consent the surrender is wholly inoperative; and, by the custom of the manor, the husband takes no interest after the wife's decease, as tenant to the curtesy. It would seem that such a custom is good, and applies generally, whether the husband has an interest or not; and that a surrender by the wife, in which it did not appear that it was with the husband's consent, would be void. At all events, supposing evidence of such consent could be supplied by parol testimony, yet, upon a case which did not find that there was any consent, the Court would not take upon themselves to draw an inference of that fact from circumstances stated, although by the case they were at liberty to draw any inference which a jury might have drawn.—By another custom of the manor, a surrender may be made by an attorney duly appointed; but, when a surrender is so made, it is always mentioned in the surrender that it was made by an attorney duly appointed:—Held, that a surrender purporting to be made by the assignees of a party calling themselves assignees duly appointed, which made no mention of the bankruptcy, would not be binding as an act of his attorney, not only on account of the custom to state in the surrender the due appointment of

such attorney, but for want of all proof of authority from him.

The fact of the surrender as to the bankrupt's interests might be proved by other evidence, and proof of his bankruptcy and the appointment of assignees.

By deed, January 26th, 1796, reciting, that a sale had taken place under a commission against Brown Shelton, the premises in question were conveyed to the defendant; and the defendant, acting upon that conveyance, on the 9th of February, 1796, executed a settlement of the property on himself. The first deed, which recited the bankruptcy, was not signed by the defendant; the second was:—Held, that this was no evidence against him of the bankruptcy, and that he could not, by executing the latter, be said to have adopted and recognized the facts stated in the former deed. *Doe d. Shelton v. Shelton*, 4 Law J. (n.s.) K.B. 167, s. c. 4 N. & M. 857; 3 Ad. & E. 466.

One who takes a copyhold estate by descent may devise it, although he may not have been admitted; whether, by the custom of the manor, a fine on such admission is due to the lord or not. The lord, however, is not to be deprived of his fine due upon the admission of the heir, but in that case will be entitled to a double fine on the admission of the devisee of the heir—*comme semble*. *Right d. Taylor v. Banks*, 1 Law J. (n.s.) K.B. 254, s. c. 3 B. & Ad. 664.

A copyhold estate descending on the heir of the copyholder will pass by his will, though he dies before admittance. *King v. Turner*, 2 Law J. (n.s.) Chanc. 188, s. c. 1 M. & K. 466.

Surrender of a copyhold to such uses as A shall appoint, and in default, and until such appointment; to the use of A. A, without admittance, executes the power of appointment:—Held, that his appointee was entitled to be admitted, without A's being first admitted. *Rez v. the Lord of the Manor of Oundle*, 3 Law J. (n.s.) K.B. 117, s. c. 1 Ad. & E. 283; 1 N. & M. 586; 3 N. & M. 484.

#### (C) COURT ROLLS.

The Court will not reform an entry on the court rolls, unless the lord be a party to the suit, or consent to such order as the Court shall think fit to make; but the lord consenting to such order, the Court decreed that surrender and admission on the court rolls, which gave an interest to the wife of a mortgagor in fraud of the mortgage, should be reformed. *Elston v. Wood*, 2 M. & K. 678.

#### (D) FINE.

Where the lord of a manor has taken a full fine for the admittance of a tenant for life, he is not entitled to a second full fine, on the admission of the remainder-man, without the taking of such second fine is authorized by a special custom of the manor.

Where the lands to which the tenant is to be admitted, are subject to fen or drainage taxes, whether in estimating their value for imposing the lord's fine, they are to be valued as subject, or not, to an allowance for such taxes—*quære*. *The Dean and Chapter of Ely v. Caldecot*, 1 Law J. (n.s.) C.P. 131, s. c. 8 Bing. 439; 1 Mo. & S. 683.

A testator devises freehold and copyhold estates to trustees, upon trust, out of the rents and profits, or by mortgage, sale, or other disposition thereof,

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or of any part thereof, to levy and raise all sums of money necessary for paying fines and fees of admittance, and for paying the expense of repairs, &c. of buildings, and the land-tax and other outgoings; and subject thereto, upon trust, out of the rents and profits, to pay 200*l.* a year to the testator's widow, in lieu of dower; and subject thereto, to pay the clear rents and profits to the testator's daughter for life; with divers remainders over:—Held, that the fines on admittance of the trustees to the copyhold estates, being raiseable immediately, are to be raised by mortgage; and that the rents and profits, subject to the annuity to the testator's widow, are to be paid to the tenant for life; and that, the testator having himself provided an express fund for defraying the expense of admittances to the copyholds, the tenant for life is not bound to contribute according to the time of enjoyment, or in any other way. *Playters v. Abbott*, 3 Law J. (n.s.) Chanc. 57, s. c. 2 M. & K. 97.

#### (E) FORFEITURE AND ESCHAT.

Where a copyhold was surrendered to a mortgagee and his heirs, and no condition was expressed in the surrender, and the mortgagee died intestate and without an heir, it was held, that the lord of the manor was entitled to enter upon the copyhold as an escheat. *Attorney General v. the Duke of Leeds*, 1 M. & K. 343.

No act of waste subjects a tenant to forfeiture, unless the act be injurious to the inheritance. But the question, whether the act be injurious, is not, of necessity, decided by the question as to the value of the estate after the act has been done: *ea, gr.* it may be an act which would increase the value of the estate, yet be injurious to the inheritance, as it may impair the evidence of the title. In such case, the act would be waste. *Doe d. Grubb v. the Earl of Burlington*, 3 Law J. (n.s.) K.B. 26, s. c. 2 N. & M. 534.

A copyholder in fee surrendered to the use of another person, and afterwards, and before the admittance of the surrenderee, committed and was convicted of a simple felony: there being a custom in the manor that any tenant of customary tenements, who should commit and be convicted of felony, should forfeit his said tenements to the lord.—Held, that the surrenderor, before admittance, was still tenant for the purpose of forfeiture; and that his estate was forfeited to the lord, and the surrenderee not entitled to be admitted. *Rez v. Lady Jane St. John Mildmay*, 5 B. & Ad. 254, s. c. 2 N. & M. 778.

#### (F) STEWARD.

See, *ante*, Grant, Surrender, and Admittance.

Whether the steward of a manor, who neglects to comply with the provisions of the 49 Geo. 3, c. 149, s. 33, as to delivering out copies of court roll within four months, can maintain an action for his fee in respect of them, *quære*. But where, in a particular case, such court rolls were delivered to a person who filled an equivocal character as between the steward and the tenant, the Court held such delivery to be substantially a compliance by the steward with the provisions of the act. *Underwood v. Woodhouse*, 1 Law J. (n.s.) K.B. 219.

Y

## COPYRIGHT.

A agrees with B and C to write a work upon the 'Practice of the Court of King's Bench.' Having completed his contract, he undertakes to write a similar work upon the 'Practice of the Common Pleas.' Of this work he executes a portion, which he places in the hands of those with whom he formed the contract. Of the portion thus completed, many pages were copied *verbatim* from the work on the 'Practice of the King's Bench.' Upon action against the party for not completing the second work, he gave a cognovit, by which he agreed to pay certain damages for his default; and, by a condition in the cognovit, the portion of the second work, which was completed, and of which many pages were mere transcripts of the first work, were returned to him, and which he afterwards published on his own account:—Held, upon an action against him for piracy by two persons, one of whom was a plaintiff in the former action, that such cognovit was a good defence, both against the plaintiff in the former action, and his co-plaintiff in this. *Sweet v. Archbold*, 2 Law J. (N.S.) C.P. 204, s. c. 10 Bing. 133; 3 Mo. & Sc. 299.

Where the defendant, (who was the author of a farce,) had, before the passing of 3 Will. 4, c. 15, assigned all his right, title, and interest in the copyright of the farce to plaintiff:—Held, that the plaintiff was "the assignee of the author," within the meaning of that act, and that he alone had the right subsequently of causing it to be represented at a place of public entertainment for profit, and that the defendant himself had no right. *Cumberland v. Planché*, 3 Law J. (N.S.) K.B. 194, s. c. 1 Ad. & E. 580; 3 N. & M. 537.

A person is not entitled to the sole and exclusive liberty of printing an engraving, &c. unless he engrave upon the plate the day on which it was first published, and the day be marked and printed on the print; and he cannot maintain an action for infringement of a copyright of the print, under 17 Geo. 3, c. 57, if the day be omitted to be printed. *Brookes v. Cock*, 4 Law J. (N.S.) K.B. 144, s. c. 4 N. & M. 652; 3 Ad. & E. 138.

A music-seller in England purchases the copyright of an opera from the composer, a foreigner, resident abroad. The Court will restrain the sale of the music of the opera adapted to dancing here, though taken from a republication in Paris, after it had appeared in this country, under a power reserved in the deed of assignment.

The taking of seventeen bars in succession out of an air composed of thirty-two bars, will amount to a piracy. The fact of the owner being a foreigner will not vary the property of the copyright. *D'Aimains v. Boosey*, 4 Law J. (N.S.) Exch. Eq. 21, s. c. 1 Y. & C. 288.

A made a copy of a print invented by B, in colours, and of larger dimensions, and exhibited it as a diorama. The Court refused to restrain the exhibition until the right had been established at law. *Martin v. Wright*, 6 Sim. 227.

In a suit to restrain the sale of pirated copies of a print, where the answer did not suggest that the prints complained of were not pirated copies, a decree was made, under the particular circumstances, though the prints, which had been exhibited to the

witness who proved the offence, were not produced at the hearing. *Fradella v. Weller*, 2 R. & M. 247.

## CORONER AND CORONER'S INQUEST.

[See CERTIORARI—PRISONER, Charging in Execution.]

It is no objection to a coroner's inquisition, that one of the jurors did not sign his Christian name at length, if the names be set out at length in the body of the inquisition. *Rex v. Bennett*, 6 C. & P. 179. [Gurney]

The Court, on the application of the Crown, set aside a coroner's inquisition, for defects apparent on the face of it. Rule absolute in the first instance. *In re Cully*, 5 B. & Ad. 230, s. c. 2 N. & M. 61; s. c. 2 Law J. (N.S.) M.C. 102, (nomine *Rex v. the Coroner of Middlesex*.)

If a coroner's inquisition states it to have been taken on the affirmation of a man, it should state that man to be either a Quaker or a Moravian. *Rex v. Polfeld*, 2 Dowl. P.C. 469.

## CORPORATION.

[See CHARITY—USE AND OCCUPATION—MANDAMUS—PILOT.]

## (A) RIGHTS, LIABILITIES, AND DISABILITIES.

## (B) BYE-LAWS.

## (C) OFFICERS AND MEMBERS.

## (a) Qualification.

## (b) Election.

## (c) Rights, Duties, and Liabilities.

## (d) Amotion.

## (D) REMEDIES BY AND AGAINST.

## (E) DISFRANCHISEMENT.

## (A) RIGHTS, LIABILITIES AND DISABILITIES.

Provisions for preventing the application of corporate property to election purposes. 2 & 3 Will. 4, c. 69; 10 Law J. Stat. 195.

Where the crown granted a borough in fee farm to a corporation, and acquitted them of a part of the rent, willing that they should repair the banks, mounds, sea-shores, and pier within the same:—Held, that an action lay against the corporation at the suit of an individual, whose house had been injured by the sea, in consequence of the neglect of the corporation to repair the sea-shore and mounds. *The Mayor and Burgesses of Lyme Regis v. Henley*, 1 Bing. N.C. 222, s. c. 1 Sc. 29; 2 C. & F. 331; 8 Bligh, N.S. 690, (affirming s. c. 3 B. & Ad. 77).

An essoin does not lie for the corporation, nor in a personal action. *Argent v. the Dean and Chapter of St. Paul's*, 3 Doug. 238.

A corporation is liable in tort for a wrongful distress, made by their authorized agent, although that agent be appointed by parol only, and not under seal. *Smith v. the Birmingham Gas Company*, 3 Law J. (N.S.) K.B. 165, s. c. 1 Ad. & E. 526; 3 N. & M. 771.

By act of 42 Geo. 3, c. 56, for enlarging, &c. the poor-house of the parish of Chatham, certain per-

sons and their successors were nominated guardians of the poor, and trustees for putting the act into execution: by different sections of the act, they were empowered to raise money by mortgage or grant of annuity, to purchase and to take a conveyance to themselves and their successors: by the 39th section, they were to sue and be sued in the name of their treasurer for the time being, and he was to be reimbursed out of the monies received by the guardians under the act, for all *costs, damages, and charges*, that he should be put to as plaintiff or defendant in any such action. The plaintiff, in 1805 and 1820, was duly elected treasurer to the said guardians, under the provisions of the act, and continued in office from 1805 to 1811, and from 1820 to 1828. As such treasurer, in 1808, he obtained a decree from the Court of Chancery in favour of the parish of Chatham, who were adjudged to be entitled, in respect of a particular district, to two thirty-second parts of the rents, &c. arising from a certain fund, called Watts' Charity, and the sum of 1115*l.* 12*s.* 4*d.* was paid over to him as such treasurer, on that account. This sum, in 1822, the plaintiff, by order of the then guardians, paid over to them. On the petition of the inhabitants of the particular district, within the parish of Chatham, praying that the two thirty-second parts of the rents, &c. of Watts' Charity, might be applied to the exclusive use of Chatham *infra*, the plaintiff, after he ceased to be treasurer, was ordered by the Court of Chancery to pay the sum, which he had received as treasurer to the guardians, into court, that the proceeds might be applied to the exclusive benefit of Chatham *infra*; which was done:—Held, that the guardians were a body having perpetual succession, and, for the purposes of suing and being sued, a corporation; and, therefore, that the plaintiff was entitled to recover from the now guardians the sum so paid by him, as money paid to their use; 2ndly, that the sum to be recovered against the defendant (the now treasurer) in the present action, was *costs, damages, and charges*, within the meaning of the 39th section. *Jefferys v. Gurr*, 1 Law J. (N.S.) K.B. 23, s. c. 2 B. & Ad. 833.

By 1 & 2 Geo. 4, the defendants were incorporated with all the rights and privileges of a corporation. By the 52nd section, certain persons were appointed directors to transact the business of the company, and, by the 71st section, their power was confined to the ordinary proceeding of the company: Held, that they had power to grant an annuity for life to a retired clerk, by way of pension. The deed by which such an annuity was granted had the corporation seal affixed. This was held to bind the corporation, unless they shewed very clearly, that the provisions of the act had not been complied with, with regard to the manner in which this deed was executed.

*Quære*—Whether the entries in the company's books were admissible in evidence for the company, in order to shew that the provisions of the act had not been complied with. *Clarke v. the Imperial Gas Light and Coke Company*, 2 Law J. (N.S.) K.B. 30, s. c. 4 B. & Ad. 316; 1 N. & M. 206.

*Semble*—That a corporation is liable to be sued either by a stranger or one of its members, for goods sold and delivered (if essential to the purposes for

which the company was incorporated), or for services performed, under a contract not under seal. *Dunstan v. the Imperial Gas Light Company*, 1 Law J. (N.S.) K.B. 49, s. c. 3 B. & Ad. 125.

#### (B) BYE-LAWS.

[See MANDAMUS.]

A corporation cannot, by a bye-law, narrow the number of persons eligible to corporate offices. *Rez v. Sawwell, Mayor of Cambridge*, 3 Doug. 207.

A bye-law restraining the right of election to a select body, is good; but if it limit the number of those who are eligible to an office, it is bad.

By charter of the 14th Richard 2, it was granted to the tailors and linen armourers, to elect one master and four wardens, from among themselves, so often as they should please, in manner as they should think best; by long usage, (since 1488,) the master and wardens, and court of assistants, who were past masters, had been accustomed to elect the master; and it appeared from the records of the company, that the master had been generally elected from the court of assistants, but there had been instances of his being elected from the liverymen of the fraternity:—Held, that the only ground upon which the Court would have granted a *quo warranto*, would have been upon the question, whether the usage had been such as to limit the number of the eligible, by confining the right to the court of assistants; but that there was not necessarily an inference, that the two parts of the usage were one entire usage, and therefore, that there was not sufficient doubt to induce the Court to grant the rule. *Rez v. Attwood*, 2 Law J. (N.S.) K.B. 57, s. c. 1 N. & M. 286; 4 B. & Ad. 481.

It is no objection to the proceeding of an inferior corporate court, upon a bye-law, that, from the nature of the proceeding, it might by possibility be inferred that the members of the corporation would feel a remote interest in the question.

Nor is mere non-user of the bye-law in a particular district of the corporate place a sufficient reason for the Court above to remove the proceedings. *Shaw v. Furze*, 1 Law J. (N.S.) K.B. 216.

#### (C) OFFICERS AND MEMBERS.

##### (a) Qualification.

A custom, that the aldermen of the city of London (who are Justices of the Peace, and of oyer and terminer, and from whom the Lord Mayor is chosen) should decide upon the fitness of the person returned to them to serve the office of alderman—Held, to be a good custom. *Rez v. the Mayor of London*, 1 Law J. (N.S.) M.C. 10, s. c. 3 B. & Ad. 255; 2 N. & M. 126.

##### (b) Election.

Where a corporator is duly elected mayor, he may be compelled to take the office either by mandamus or indictment; but, when it is admitted that the election has been merely a pretence and contrivance, the Court will grant a mandamus under 11 Geo. 1, to proceed to another election. *Rez v. the Mayor, &c. of Colchester*, 4 Doug. 14.

By charter of Car. 2, there were to be in the borough of S, a mayor, aldermen, and twenty-four capital burgesses. On the death or removal of an alderman, the mayor and aldermen, or the greater

part of them, were to elect a capital burgess, to supply his place; when a capital burgess died, &c., the mayor, aldermen, and other capital burgesses, or the greater part of them, were to elect a successor from among the inhabitants and burgesses; and the mayor was to be annually elected on a certain day "by the burgesses of the said borough, or the greater number of them," with the consent of twenty-four freeholders and inhabitants, to be chosen as directed by the charter. In practice, the mayor had always been elected by the capital burgesses only. At the election of mayor on the charter-day in 1832, there was not a majority of the number of twenty-four capital burgesses present, and no other burgesses attended:—Held, that this did not avoid the election, for that the word "burgesses" in the charter (where it treated of the election of mayor) could not be construed to mean only capital burgesses; that the right of election did not devolve upon the body of capital burgesses by the mere forbearance of the other burgesses to interfere; and that the capital burgesses, in electing the mayor, acted in the capacity of burgesses merely. *Rez v. Goldsmith*, 4 B. & Ad. 835.

On motion for a *quo warranto* information, an affidavit stating the relator's information and belief that the officer was elected at a court held on a certain day, and there was at the court where he was elected as aforesaid, a proper number of electors present, is answered if it be sworn that there was a proper number of electors at the court held on the specified day, and that the officer was not elected at the court. The officer is not bound to answer for the proceedings of any other day than that specified by the relator. *Rez v. Rolfe*, 4 B. & Ad. 840, s.c. 1 N. & M. 773.

Where it is granted by charter, that a corporation shall have so many aldermen, and so many capital burgesses, and when one of the latter shall die, depart, or be removed, another shall be elected in his place "by the mayor and aldermen, and other capital burgesses then surviving or remaining, or the greater part of them," the election must be made by a majority of the full numbers of aldermen and of capital burgesses; a mere majority of the members of both bodies, who happen to survive at the time, is not sufficient. *Rez v. May*, 4 B. & Ad. 843.

In pleading, it was averred, as an immemorial custom, that the jury of the court leet holden for the borough and manor of L, exercised, and had the right of presenting persons to be admitted burgesses of the borough, and that persons so presented had a right to be admitted burgesses. After verdict, finding the custom to be as averred, it was objected, that the custom was bad, inasmuch as it did not appear that the manor and borough were co-extensive, and the jury presenting might, therefore, be strangers to the corporation. But the Court held the custom, as found, to be sufficient. *Rez v. the Duke of Beaufort and another*, 2 Law J. (N.S.) M.C. 134, s.c. 5 B. & Ad. 442; 2 N. & M. 815.

#### (c) Rights, Duties, and Liabilities.

##### [See MANDAMUS.]

Where, by a resolution, certain fees were voted to the directors of a company,—Held, that a direc-

tor could not maintain an action for them against the company, (who were also a corporation,) unless the resolution were a bye-law, or imported a contract under the common seal.

*Semble*—That a corporation is liable to be sued either by a stranger or one of its members, for goods sold and delivered (if essential to the purposes for which the company was incorporated), or for services performed, under a contract not under seal. *Dunstan v. the Imperial Gas Light and Coke Company*, 1 Law J. (N.S.) K.B. 49.

The treasurer of a company incorporated by act of parliament, in whose name the company are to sue and be sued, but whose body and goods are expressly exempted from the effect of process, does not waive this privilege by referring to arbitration an action in which he is the nominal party on behalf of the company. *Corpe v. Glyn, Glyn v. Corpe*, 1 Law J. (N.S.) K.B. 272, s.c. 3 B. & Ad. 801.

#### (d) Amotion.

##### [See MANDAMUS.]

An alderman of London in execution, and under an escape warrant, without probability of discharge, may be removed. *Rez v. Mayor of London*, 4 Doug. 860.

#### (D) REMEDIES BY AND AGAINST.

An ecclesiastical corporation is not bound by any agreement, unless it can be manifested by deed.

Time is of the essence of a contract for the granting of a lease by such a corporation, where part of the consideration is a fine which is to be divided amongst the existing members of the corporation.

Thus, where the majority of the Dean and Chapter of Ely accepted a proposal for a lease of church property, upon payment of a fine on a given day, and signed an entry in the corporation books, of their agreement to grant such lease, but the intended lessee failed on the day specified to pay the fine,—the Court, on a bill filed by such intended lessee, refused to decree a specific performance of the agreement. *Carter v. the Dean of Ely*, 4 Law J. (N.S.) Chanc. 132.

#### (E) DISFRANCHISEMENT.

A corporation, possessed of a common, made a bye-law, that every freeman might stock thereon with ten sheep. A freeman, who had stocked his full number, stocked ten more in the name of another freeman. For this he was disfranchised by the corporation:—But held, by the Court, to be no cause of disfranchisement; and a peremptory mandamus was ordered to restore him. *Rez v. Great Grimsby*, 1 Law J. (N.S.) M.C. 23.

#### COSTS.

[See COMPENSATION—DEMURRER—EJECTMENT—EXECUTOR—JUDGE AT CHAMBERS—MALICIOUS ARREST—PRACTICE, in Equity—RECEIVER—SET-OFF—TRUST AND TRUSTEE.]

##### (A) IN GENERAL.

##### (B) PLAINTIFF'S RIGHT TO.

##### (C) DEFENDANT'S RIGHT TO.

##### (D) SUGGESTION TO DEPRIVE OF.

##### (E) OF CREDITORS.

##### (F) ON MOTIONS AND RULES.

- (G) NEW TRIAL.
- (H) OF PROOF OF DOCUMENTS.
- (I) DOUBLE AND TREBLE COSTS.
- (K) CERTIFICATE.
- (L) SECURITY FOR.
- (M) SET-OFF.
- (N) TAXATION OF.
  - (a) *In general.*
  - (b) *Attornies' and Solicitors' Bills.*
- (O) ALLOCATUR.
- (P) PAYMENT OF, HOW ENFORCED.
- (Q) IN THE HOUSE OF LORDS.
- (R) IN COMMITTEES OF THE HOUSE OF COMMONS.
- (S) IN THE PRIVY COUNCIL.
- (T) IN THE ECCLESIASTICAL COURTS.
- (U) IN THE COURT OF BANKRUPTCY.
- (X) IN CRIMINAL CASES.

#### (A) IN GENERAL.

Costs—Practice in Taxation between Party and Party—Close Copies—Commissioners' Fees—Fees to Counsel—Expense of Copies furnished to the Court—Employment of an Accountant. See *Small v. Atwood*, 4 Law J. (N.S.) Exch. Eq. 1, s.c. 1 Y. & C. 53.

A vendor who contracts to sell an estate, and files a bill for specific performance, must pay the costs, if it turns out he has no title. *Eagle v. Taylor*, 3 Law J. (N.S.) Chanc. 16.

The claim of a mortgagee to be paid his costs, does not entitle his executor to payment, if the mortgagee dies before they are paid. *Anonymous*, 3 Law J. (N.S.) Chanc. 120.

On leave being given to a defendant to file a supplemental answer, the defendant ought to pay, not only the costs of the application, but also the extra costs incurred by the plaintiff, in consequence of the filing off the supplemental answer. *Brown v. Hill*, 4 Law J. (N.S.) Chanc. 50.

The amount of costs of a demurrer by a witness follows the same rule as the costs of a demurrer by parties, namely, full taxed costs, unless the Court orders the contrary. *Sawyer v. Birchmore*, 4 Law J. (N.S.) Chanc. 249.

Defendant, who had put in three answers, in consequence of not disclosing the whole of the facts upon which the bill was dismissed in the first answer, made to pay the costs incurred after the first answer, resulting from the inefficiency thereof. *Baker v. Carter*, 4 Law J. (N.S.) Exch. Eq. 12, s.c. 1 Y. & C. 250.

*Semble*—a person named trustee and executor under a will, who disclaims the trust, and afterwards, in his character of trustee, is made a party to a suit, having never accepted the trust, is not entitled to costs as between solicitor and client. *Norway v. Norway*, 3 Law J. (N.S.) Chanc. 111, 163, s.c. 2 M. & K. 278.

Costs of an arbitration under an order of Nisi Prius, are not costs in the cause. *Taylor v. Lady Gordon*, 9 Bing. 570, s.c. 2 Mo. & Sc. 725.

Tenant for life of lands sold under the provisions of the London Bridge Act, 10 Geo. 4, c. 136, is not entitled to his costs out of the fund arising from the sale. *Ex parte Pasmore*, 1 Y. & C. 75; and see *In re London Bridge Act*, 4 Law J. (N.S.) Exch. Eq. 17.

If a defendant in an action of replevin, which is made a special jury cause, withdraws his avowries, and the Judge directs him to pay "all costs," that will not include the costs of the special jury. *Bell v. Tainthorpe*, 2 Dowl. P.C. 518.

Where an act of parliament, establishing a railway company, authorized the company to purchase lands of corporations, tenants for life, &c., and directed, that the purchase-money should be applied in the redemption of the land-tax upon other parts of the property unsold:—Held, that a tenant for life, who had redeemed the land-tax, before the passing of the act, might reimburse himself out of the proceeds of the lands purchased of him by the company. The costs of an application to the Court under such an act of parliament, to have the purchase-money applied in the redemption of the land-tax, will be allowed out of the purchase-money, although the act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands to be settled to the like uses. *Ex parte Northwick*, 1 Y. & C. 166.

#### (B) PLAINTIFF'S RIGHT TO.

[See SPECIAL VERDICT.]

[Plaintiff in *scire facias* to have costs, in what cases. See 3 & 4 Will. 4, c. 42, s. 34; 11 Law J. Stat. 98.]

Where, in trespass *quare clausum fregit*, the defendant pleaded a right of way, and the plaintiff new assigned, to which the defendant pleaded not guilty: on a verdict for the plaintiff, on the new assignment, with 30s. damages, it was held, that he was not entitled to his full costs. *Cockerel v. Allanson*, 3 Doug. 109.

In an action for slanderous words, which are actionable only because spoken of and concerning the plaintiff in the way of his business, less than 40s. being recovered, the plaintiff is only entitled to the same amount of costs as damages under the 21 Jac. 1, c. 16, s. 6. *Greenfell v. Pierson*, 1 Dowl. P.C. 406.

If a defendant pleads the general issue, and several special pleas, and the jury find for him on the general issue, and for the plaintiff on the special pleas, the latter is entitled to the costs of the pleadings and witnesses on those pleas. *Hart v. Cutbush*, 2 Dowl. P.C. 456.

In trespass, the defendant pleaded, first, not guilty, and secondly a justification. Issue on the first plea, traverse to the second, and new assignment for excess. Issue joined on the traverse, plea of not guilty withdrawn, and judgment by default on the new assignment. *Not pro.* as to the issue on the second plea, and a writ of inquiry executed on the judgment by default:—Held, that the plaintiff was only entitled to the costs of executing the writ of inquiry. *Ruddock v. Smith*, 1 Dowl. P.C. 467.

Where a plaintiff succeeds on one of several issues, and the defendant succeeds on the others, but the defendant's witnesses are as necessary on the issues found against him, as on the issues found for him, the plaintiff will be entitled to the costs of all the witnesses upon the issues found for him, and the defendant to none of his. *Richards v. Cohen*, 1 Dowl. P.C. 533; and see *post*, p. 167.

In an action of slander, the declaration contained ten counts, the jury found a verdict for the plain-

tiff, with 50*l.* damages on the seventh count, and 100*l.* on the other nine counts. On a writ of error being brought, the Court held that the sixth count was bad, and, consequently, that a *venire de novo* must be awarded; but, on the plaintiff consenting to remit the 100*l.* damages, the Court of Exchequer directed that the verdict should be retained on the seventh count:—Held, that the plaintiff was not entitled to the costs of the other nine counts. *Dadd v. Crease*, 2 C. & M. 223, s. c. as *Dods v. Crease*, 3 Law J. (n.s.) Exch. 12; 2 Dowl. P.C. 269.

In an action for breach of covenant for title, the plaintiff is entitled to recover a sum paid to the person claiming, by way of compromise, as also the costs which he has incurred with his own attorney in settling it. *Smith v. Compton*, 1 Law J. (n.s.) K.B. 146, s. c. 3 B. & Ad. 407.

A plaintiff who succeeds on a second trial, is entitled to the costs of the first trial, in which no verdict could be given by reason of the absconding of one of the jurors, although he refused to consent to a verdict by the other eleven. *Harrison v. Bennett*, 2 Law J. (n.s.) Exch. 38, s. c. 1 C. & M. 203.

In an action of libel, defendant pleads the general issue and six special pleas; verdict for plaintiff on general issue and one special plea, for defendant on the other five. Upon motion, judgment is entered up for the plaintiff, *non obstante veredicto*, as the five pleas, the issues on which are found for the defendant, are bad in law:—Held, on application for costs, that neither party was entitled to the costs of the issues found for the defendant, on which the judgment of the Court was finally entered for the plaintiff. *Goodburne v. Bowman*, 2 Law J. (n.s.) C.P. 148, s. c. 9 Bing. 532, 667; 2 Mo. & Sc. 70; 3 Mo. & Sc. 69.

In an action against a sheriff for an illegal arrest, the plaintiff may recover the costs incurred in obtaining his discharge by an order of a Judge, although, on his refusal to give an undertaking to bring no action, the Judge made no order for those costs. But, on an allegation that "he has been forced and obliged to pay," he can only recover such costs as he has either actually paid, or such as have been paid by his attorney; a mere liability to pay will not be sufficient. *Pritchett v. Boevey*, 2 Law J. (n.s.) Exch. 251, s. c. 1 C. & M. 775; 3 Tyr. 949.

The plaintiff brought an action against the defendant, for the breach of a charter-party; the verdict passed for the plaintiff, with 254*l.* damages, with leave to defendant to move to enter a nonsuit, or to reduce the damages to 1*s.* Upon motion accordingly, the verdict was allowed to stand, but the damages were reduced to nominal. Upon the taxation, the Prothonotary refused to allow the plaintiff his costs in shewing cause against the rule.

And held, that the officer was right, as the question was decided, substantially against the plaintiff. *M'Andrews v. Adams*, 4 Law J. (n.s.) C.P. 4, s. c. 1 Bing. N.C. 270; 1 Sc. 98.

Where the Court had set aside a writ of inquiry, and awarded a fresh writ in consequence of the rejection of evidence tendered by the defendant, who, instead of going down to a second assessment of damages, paid the whole amount of the verdict:—Held, that the Master was wrong in allowing the

plaintiff the costs of that inquiry. *Porter v. Cooper*, 4 Law J. (n.s.) Exch. 192, s. c. 2 C. M. & R. 232.

Where there are several counts on one agreement, of which there is only one breach, the Court will limit the verdict to one count, and will only allow the costs of one. *Ward v. Bell*, 2 Law J. (n.s.) Exch. 271, s. c. 1 C. & M. 848; 3 Tyr. 904; 2 Dowl. P.C. 76.

If there be two counts in a declaration, one of which is so framed, that if the plaintiff obtain judgment upon it, he will be entitled to double costs, and upon the other only to single costs, and a verdict is taken for the plaintiff, subject to the opinion of the Court upon a case,—on the arguing of which, the Court throw out an opinion, that the plaintiff is clearly entitled to judgment upon the latter, and the plaintiff's counsel acquiesces, and does not call upon the Court to give any opinion upon the former,—the plaintiff is only entitled to have judgment entered for him upon the latter, and no judgment will be entered on the former. *Tibbitts v. Yorks*, 4 Law J. (n.s.) K.B. 56.

An incumbrancer refusing to join as a co-plaintiff in a suit for the protection and administration of the fund, must bear his own costs as a defendant.

A party being entitled in remainder, in the event of A B dying under twenty-one, files a bill for account and protection of the property. A B attains twenty-one during the progress of the suit: the plaintiff is, nevertheless, entitled to his costs out of the estate. *Martin v. Drinkwater*, 4 Law J. (n.s.) Chanc. 176.

On motion for a nonsuit on the ground of variance between the declaration and the contract of guarantie therein set out, or for a new trial, on the ground, that the guarantie was not continuing, the Court being of opinion that the defendant was liable upon the contract, but that it was improperly declared on, made a rule that the verdict which had been found for the plaintiff for the sum secured, should stand, but that the defendant should be allowed to deduct therefrom his costs of the trial, and of the motion. On taxation, the officer allowed to the plaintiff his costs up to the notice of trial, and to the defendant all the subsequent costs:—Held, that he had done right. *Allan v. Kenning*, 3 Mo. & Sc. 80.

A delivered goods to B, a wharfinger, to be kept for him; and afterwards directed B to transfer them to C, which was done. D then gave notice to B not to deliver the goods to any one but him, and thereupon B refused to deliver the goods to C, upon which C brought trover against B, and B filed a bill of interpleader. Afterwards D abandoned all claim to the goods, and withdrew his notice:—Held, that the case was a proper case of interpleader, and that D, who had occasioned the suit, must pay to the plaintiff and the other defendants their costs at law and in equity. *Mason v. Hamilton*, 5 Sim. 19.

#### (C) DEFENDANT'S RIGHT TO.

[See *supra*, *Allan v. Kenning*; and see HIGHWAY, Costs.]

One or more of several defendants having *à nolle prosequi*, or verdict, shall have costs. 3 & 4 Will. 4, c. 42, ss. 32, 33; 11 Law J. Stat. 98.



If a defendant offers to pay part of a debt, which the plaintiff refuses to accept, and the defendant then pays the money into court, and the plaintiff takes it out, the defendant is entitled to costs from the time of the offer. *Marryott v. Clapp*, 1 Dowl. P.C. 701.

Where a cause is referred to arbitration, and the costs are to abide the event, the defendant is entitled to them if it appear by the award, that the plaintiff's demand is under 40s., which might have been recovered in a court of conscience. *Butler v. Grubb*, 3 Doug. 217.

A proposal to refer, made after the commission day, held not to warrant the plaintiff in not proceeding to trial, and that he was liable to pay the costs of the day. *Eaton v. Shuckburgh*, 2 Dowl. P.C. 624.

Costs of the day for not proceeding to trial pursuant to notice, may be moved after the signing of final judgment and taxation of costs by the plaintiff. *Redil v. Lucock*, 3 Law J. (N.S.) Exch. 16, s. c. 2 C. & M. 337; 4 Tyr. 281.

In trespass against several defendants appearing by the same attorney, but pleading severally, a defendant who is acquitted is entitled to his own separate costs, and also to an aliquot portion of the costs incurred jointly with the defendants who have been found guilty, on satisfying the Master that he has not been indemnified by those defendants. *Ridley v. Harris*, 2 Law J. (N.S.) Exch. 89.

Declaration in trespass, containing two counts, against four defendants. Verdict of guilty against one on the first count, of acquittal of him on the second count, and of the other three on both counts:—Held, that each of the defendants was entitled to his aliquot share of the costs of the defence: and the costs of the three acquitted defendants, and of the other defendant on the second count, were to be deducted from the plaintiff's costs on the first count, unless it could be shewn that the acquitted defendants had not actually incurred any costs. *Starling v. Cozens*, 4 Law J. (N.S.) Exch. 223, s. c. 2 C. M. & R. 445.

Where, to a declaration for libel, containing several counts, some of the defendants plead the general issue, and others demur to some of the counts, and also plead the general issue to the remainder, the defendants who have demurred are not entitled to tax costs on obtaining judgment upon the demurrer. *Forbes v. King*, 2 Law J. (N.S.) Exch. 109, s. c. 1 C. & M. 435; 3 Tyr. 385.

In an action upon the case for a libel, the declaration, containing one count, set out the publication at full length, alleging by innuendos the whole to be intended to apply to the plaintiff. The jury found a very small portion of the publication to have been intended to apply to the plaintiff, and expressly negatived the innuendos contained in the other parts:—Held, that, although the plaintiff was entitled to the verdict, the defendant was entitled to the costs of that part of the declaration, and the issues raised thereon by the plea of not guilty, the innuendos contained in which the jury had negatived. *Prudhomme v. Fraser*, 4 Law J. (N.S.) K.B. 87, s. c. 4 N. & M. 512; 2 Ad. & E. 645.

The plaintiff brought an action on the case against eighteen defendants, for an injury done to his reversion in certain premises. One of the defendants

suffered judgment by default, the others pleaded, and a verdict was found for them:—Held, that they were entitled to their costs under the 4 Jac. 1, c. 3, s. 2. *Price v. Harris*, 3 Law J. (N.S.) C.P. 188, s. c. 10 Bing. 557; 4 Mo. & Sc. 474.

Where a defendant has consented to withdraw a juror, he cannot afterwards apply to the Court to make the plaintiff's attorney pay his costs, on the ground that the action was brought without the consent or authority of the plaintiff. *Hammond v. Thorpe*, 3 Law J. (N.S.) Exch. 358, s. c. 1 C. M. & R. 64; 4 Tyr. 838.

By the rule 74 of *Regulæ Generales*, H. T. 2 Will. 4, "the costs of all issues found for the defendant shall be deducted from the plaintiff's costs":—Held, that it is not necessary that the witnesses, whose costs are allowed, should be examined exclusively in support of the issue which is found for the defendant; but that it is a question for the Master, what costs were reasonably incurred in preparing the defence upon that issue. *Doe d. Smith v. Webber*, 4 Law J. (N.S.) K.B. 71, s. c. 2 Ad. & E. 448; 4 N. & M. 381.

Where an action for a nuisance, and all matters in difference were referred to an arbitrator, the costs of the cause to abide the event, and he awarded a nonsuit to be entered, because the defendant was not proved to have committed the injury, but decided the right in favour of the plaintiff:—Held, that the defendant was entitled to the costs of all his witnesses, to the time of trial, as well those who negatived his committing of the act as those who came to establish his right. *Radclyffe v. Hall*, 4 Law J. (N.S.) Exch. 191, s. c. 2 C. M. & R. 258; 3 Dowl. P.C. 802.

Though the defendant succeeds on a plea which goes to the whole declaration, he is not entitled to the costs of any issues on which the jury have been discharged. *Valance v. Evans*, 2 Law J. (N.S.) Exch. 272, s. c. 1 C. & M. 856; 3 Tyr. 865.

Under rule 74, H. T. 2 Will. 4, a defendant is entitled to the costs of the issues found for him, but not to the costs of any other witnesses than those whose testimony is confined to such issues. *Lardner v. Dick*, 3 Law J. (N.S.) Exch. 140, s. c. 2 C. & M. 387; 4 Tyr. 289.

Upon a declaration in assumpsit of several counts, to which the general issue is pleaded, and a verdict is found on one count for the plaintiff, and on the remaining counts for the defendant, the defendant is entitled, under the rule T. T. 2 Will. 4, to have the costs of the counts found for him deducted from the plaintiff's costs. *Knight v. Brown*, 9 Bing. 643, s. c. 2 Mo. & Sc. 797.

Under 1 Reg. Gen. H. T. 2 Will. 4, s. 74, the defendant is entitled to the costs of all issues found for him, although they exceed the costs of those found for the plaintiff. *Milner v. Graham*, 2 Dowl. P.C. 422.

Where there are several defendants, and a verdict passes against some and for others, the latter are entitled to their aliquot proportion of the whole costs incurred, and not merely to 40s. each. *Griffiths v. Jones*, 5 Law J. (N.S.) Exch. 267, s. c. 2 C. M. & R. 333.

Before the issue was made up, the cause was referred; the costs of the cause were to abide the event of the award. The arbitrator found, that the

plaintiff had sustained damage to a certain amount upon one of the breaches of covenant specified in his particular; and, as to the rest, that he had no cause of action against the defendant:—Held, that the defendant was entitled, under rule 74, Hil. T. 2 Will. 4, to the costs of those issues that were found for him, notwithstanding the cause was not in strictness at issue. *Daubus v. Richman*, 1 Sc. 564.

In replevin, the defendant pleaded, that the goods belonged to himself and others, as assignees under a commission of bankrupt; he also avowed taking the goods as a distress for rent arrears. Verdict for the plaintiff on the issue joined on the plea; for the defendant, on the avowry:—The Court refused to allow defendant costs on the issue found for the plaintiff. *Middleton v. Mucklow*, 10 Bing. 401.

#### (D) SUGGESTION TO DEPRIVE OF.

[See REQUESTS, COURT OF—COUNTY COURT.]

#### (E) OF CREDITORS.

A simple contract creditor, who files a bill for the administration of a testator's assets, is entitled to have his costs out of the estate, though the assets prove insufficient for the payment of the specialty creditors. *Larkins v. Paxton*, 2 M. & K. 320.

Costs as between solicitor and client, given out of the fund to a simple contract creditor, who was plaintiff in a suit, to administer his deceased debtor's estate, although the assets had proved insufficient to satisfy the specialty creditors. *Barker v. Wardle*, 2 M. & K. 818.

The insufficiency of the fund to pay the debts is the only case in which the plaintiff in a creditor's suit is entitled to his costs as between solicitor and client. *Brodie v. Bolton*, 3 M. & K. 168.

In a creditor's suit, the plaintiffs are entitled to their costs as between solicitor and client, though the fund is insufficient to pay the debts. *Tootal v. Spicer*, 4 Sim. 510.

Where a motion is made after decree, in a creditor's suit, to restrain a creditor from suing at law, the creditor is entitled to the costs of the motion. *Jones v. Jones*, 5 Sim. 678.

#### (F) ON MOTIONS AND RULES.

[See JUDGE AT CHAMBERS.]

Where a party shews cause successfully in the first instance, he is not entitled to costs. *Pitch v. Green*, 2 Dowl. P.C. 439.

Costs of shewing cause in the first instance not allowed. *Clark v. Lord*, 3 Law J. (n.s.) Exch. 20.

On setting aside proceedings for irregularity, costs not given unless prayed for by the rule. *Re v. the Sheriff of Middlesex*, 2 Law J. (n.s.) 235, s.c. 2 Dowl. P.C. 5; 1 C. & M. 486; 3 Tyr. 440.

Whether the costs of a motion can be given where they are not mentioned in the notice of motion? *Lord Portarlington v. Graham*, 4 Law J. (n.s.) Chanc. 241.

Where cause is shewn against a rule which requires more than the party obtaining it is entitled to, the opponent is still liable to pay the costs, on its being made absolute as to part, if he has shewn cause against the whole rule. *Graham v. Carruthers*, 1 Law J. (n.s.) Exch. 101.

Where a party fails in the greater portion of the matter contained in his notice of motion, but succeeds as to part of it, he must, nevertheless, pay the costs of the application. *De Tastet v. Smith*, 4 Law J. (n.s.) Chanc. 126.

An order giving a defendant his costs as of an abandoned motion, discharged, it appearing that he was in contempt at the time for want of an answer. *Ellis v. Walmsley*, 4 Law J. (n.s.) Chanc. 161.

Where a rule in a cause is discharged generally with costs, the party at whose instance the application is made, and not the defendant, is the party by whom the costs are payable, and against whom an attachment will be granted.

Thus, after the discharge of a rule to set aside judgment and execution for irregularity, where the defendant had become bankrupt, the Court ordered an attachment against the assignee, it appearing from the former rule and the affidavits thereon, as well as from the fact of the solicitor to the commission acting in the proceedings connected with it, that the rule was obtained substantially at his instance. *Routledge v. Giles*, 1 Law J. (n.s.) Exch. 172, s.c. 1 C. & J. 163.

A party gave notice of a motion, and died before the motion was heard, and the suit was revived by his executors, who declined to proceed with the motion. The bill revived by the executors was dismissed with costs:—The costs of the abandoned motion are not costs in the cause. *Lewis v. Armstrong*, 3 M. & K. 69, s.c. 4 Sim. 140.

Where a motion was made to compel a defendant to produce an instrument to have it stamped, the Court, on making the rule absolute, refused to allow more costs than the plaintiff would have been entitled to if the application had been made to a Judge at chambers. *Vaughan v. Trewent*, 2 Dowl. P.C. 299.

Where a motion is made by a defendant to set aside process on an affidavit of merits, and payment of costs, the plaintiff is not entitled to go into a long statement in his affidavit, to shew that the defendant has no merits; and if he does, the Court will order the Master not to allow them. *Heane v. Battersby*, 3 Dowl. P.C. 213.

No objections to the Master's taxation can be entertained, unless they are specified in the affidavit or rule. Whether a rule prays for several things, to some of which the party is entitled and to others not, but cause is shewn against all, no costs are given on either side; though, if cause had been shewn against the bad part only, the party shewing cause would have had costs. *Alison v. Furnival*, 2 Dowl. P.C. 49.

Where an application to discharge a debtor out of custody, under the 48 Geo. 3, c. 123, is successfully opposed on notice, no costs are allowed. *Anon.* 1 Dowl. P.C. 148.

The motion for costs for not proceeding to trial, is for a rule to be absolute in four days, unless cause is shewn in the meantime. *Robinson v. Robinson*, 3 Dowl. P.C. 177.

#### (G) NEW TRIAL,

[See NEW TRIAL.]

#### (H) OF PROOF OF DOCUMENTS.

*Quere*—Whether, if the party succeeding do not give the notice required by the rule, H. T. 4 Will. 4,

No. 20, a reasonable time before the trial, he shall be deprived of the costs of proving a document.

Where a notice was given not within a reasonable time before the trial, but the attorney to whom it was given refused to admit the execution, and did not make that objection, the Court held the successful party entitled to his costs of the proof. *Finn v. Billingsley*, 4 Law J. (N.S.) Exch. 196, s. c. 2 C. M. & R. 246.

### (I) DOUBLE AND TREBLE COSTS.

[See COUNTY COURT—JUSTICES, Actions against—REQUESTS, COURT OF.]

The defendant is not entitled to treble costs, under the Highway Act (18 Geo. 3, c. 78, s. 81), where a verdict is given for him. *Ward v. Bateman*, 1 Dowl. P.C. 620.

Commissioners of a court of requests, who have power to commit for contempt, are not within the 42 Geo. 3, c. 85, s. 6, which extends the 21 Jac. 1. (giving double costs) to all persons empowered to commit to safe custody; and therefore, where trespass for false imprisonment is brought against them for an act done in the execution of their office, and the plaintiff is nonsuited, they are not entitled to double costs. *Makey v. Goodden*, 1 Dowl. P.C. 463.

The statute 10 Car. 2, st. 2, c. 2, s. 10, giving double costs on affirmation of a judgment upon a writ of error, was held not to apply where the party about to sue out such a writ had, in order to avoid execution, paid the damages and costs to the opposite attorney, with a notice to retain them in his hands, and the attorney had deposited the sum in a bank, where it produced interest. *Wright v. Fairfield*, 2 B. & Ad. 959.

### (K) CERTIFICATE.

Where, to an action for assault and battery, the defendant pleaded *son assault demesne*, and justified, and the plaintiff replied, more force and violence than necessary; upon which was found a verdict for plaintiff, damages 1*l.*—Held, that, it being admitted upon the record that there was a battery, the Judge could not certify under the statute 43 Eliz. c. 6, to deprive of costs; that the case was not within the stat. 22 & 23 Car. 2, and, consequently, that the plaintiff was entitled to full costs, without a certificate under that statute. *Bold v. Daw*, 4 Law J. (N.S.) K.B. 241, s. c. as *Bone v. Daw*, 3 Ad. & E. 711; 5 N. & M. 230.

A Judge at Nisi Prius has no authority, under 8 & 9 Will. 3, c. 11, s. 1, or 3 & 4 Will. 4, c. 42, s. 32, to grant a certificate to deprive defendants, police officers, who have been acquitted, of their right to full costs, given by the Metropolitan Police Act, 10 Geo. 4, c. 44, s. 41,—as the act 3 & 4 Will. 4, c. 42, only extends the operation of the prior act of 8 & 9 Will. 3, and does not controul or repeal intermediate acts. *Humphrey v. Woodhouse*, 4 Law J. (N.S.) C.P. 142, s. c. 1 Bing. N.C. 506; 1 Sc. 395.

In an action on the case for words spoken of the plaintiff as a schoolmaster, without an allegation of special damage, the jury found a verdict for 20*s.* damages only, but the Judge certified to give the plaintiff full costs:—Held, that he had no power to do so; and the Master having, in consequence of the certificate, taxed to the plaintiff his full costs,

was ordered to review his taxation. *Goodall v. Ensell*, 3 Dowl. P.C. 743; s. c. 2 C. M. & R. 249.

A Judge has power to certify under 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs in an action of trespass, where the defendant has let judgment go by default. *Harris v. Duncan*, 4 Law J. (N.S.) K.B. 66, s. c. 2 Ad. & E. 158; 4 N. & M. 68.

The Court will not set aside a Judge's certificate, under 43 Eliz. c. 6, to deprive the plaintiff of costs, if the Judge has power to certify, although the certificate may have been granted on an erroneous ground. *Cann v. Facey*, 5 N. & M. 405.

In an action brought by an executor, if the defendant has obtained a verdict, and the Judge who tried the cause has, upon summons, but without hearing any affidavit, certified to deprive the defendant of costs, under the statute 3 & 4 Will. 4, c. 42, s. 31, the Court will not review his order. *Quare*, whether they have authority to do so. *Maddock v. Phillips*, 5 Ad. & E. 198.

A sheriff or Judge of an inferior court, to whom a cause is sent by writ of trial under 3 & 4 Will. 4, c. 42, s. 17, has no power of certifying to deprive of costs pursuant to 43 Eliz. c. 6, s. 2. *Wardroper v. Richardson*, 1 Ad. & E. 75, s. c. 3 N. & M. 839.

### (L) SECURITY FOR.

[See EJECTMENT—PAUPER—PRACTICE, IN EQUITY, Dismissal of Bill.]

A rule for security for costs may be obtained after an order for time to plead. *Wilson v. Minchin*, 1 Law J. (N.S.) Exch. 39, s. c. 2 C. & J. 87; 2 Tyr. 166; 1 Dowl. P.C. 299.

*Semble*—That the defendant may move for security for costs, although he has obtained an order for time to plead, "pleading issuably, rejoining gratis, and taking short notice of trial."

But the affidavit upon which such motion is founded, should state clearly when the fact of the plaintiff's residence out of the jurisdiction of the Court came to the defendant's knowledge. *Mercer v. M'Leuer*, 2 Law J. (N.S.) Exch. 10.

Where a defendant pleads, after it has come to his knowledge that the plaintiff is abroad, the Court will not oblige the latter to give security for costs. *Brown v. Wright*, 1 Dowl. P.C. 95.

It is too late to apply for security for costs after judgment signed. Unless a previous application is made, the costs of the rule will not be allowed. *Bohrs v. Sessions*, 2 Dowl. P.C. 710.

Where a defendant is guilty of laches in declaring, the plaintiff is not deprived of his claim to security for costs by obtaining time to plead. *Fry v. Wills*, 3 Dowl. P.C. 6.

In an action brought upon a bond, in the name of the obligee, resident abroad, for the benefit of an assignee in this country, the defendant may claim security for costs from the nominal plaintiff; the assignee's written undertaking is not sufficient. *Yonde v. Yonde*, 3 Ad. & E. 311.

Obtaining an order for time to plead does not preclude a defendant from obtaining security for costs. *Gurney v. Key*, 3 Dowl. P.C. 559.

The rule, that security for costs cannot be obtained after issue joined, extends to an application for a reference to the Master, to direct further security, where the amount for which security has

been given in the first instance is insufficient to satisfy the costs which have been incurred by the defendant. *Alison v. Furnival*, 3 Law J. (N.S.) Exch. 140, s. c. 2 C. & M. 555; 4 Tyr. 370.

A rule nisi, for security for costs, may be obtained without any previous application to the attorney or agent of a plaintiff residing out of the jurisdiction of the Court, but will not be a stay of proceedings, unless such previous application be made.

As the defendant makes the motion for security for costs at his peril, should it be too late, his affidavit need not state in what stage the proceedings are; but it is for the plaintiff to shew that the application is out of time. *Jones v. Jones*, 1 Law J. (N.S.) Exch. 77, s. c. 2 C. & J. 207; 2 Tyr. 216; 1 Dowl. P.C. 313.

If a plaintiff becomes bankrupt in the course of a cause, it is not necessary for the defendant to apply immediately for security for costs, but he may wait until he has ascertained that the assignees are proceeding with the action.

The plaintiff might have gone to trial in Michaelmas term, if no order for time to plead had been obtained; and after two orders for time to plead on the usual terms, by giving short notice of trial, he might have gone to trial at the Sittings after that term. On the 10th of January, the plaintiff was gazetted as a bankrupt, and on the 29th the issue was delivered:—Held, that an application for security for costs made on the 31st was not too late. *Walkinshaw v. Marshall*, 3 Law J. (N.S.) Exch. 207.

Where the plaintiff resides abroad, the Court, by the 98th rule of H. T. 2 Will. 4, has a discretionary power to require security for costs, notwithstanding that the defendant has proceeded in the cause after he knew that the plaintiff resided abroad. So it may be required after issue joined, *semble*. *Fletcher v. Lew*, 5 N. & M. 351, s. c. 3 Ad. & E. 551.

A rule nisi for security for costs, with a stay of proceedings, will not be allowed on the last day of term. *Gronow v. Pointer*, 3 Dowl. P.C. 571.

A plaintiff ordered to give security for costs, on the ground of her having gone to reside some time in America, and having on her bill mis-stated her place of abode. *Havers v. Brown*, 4 Law J. (N.S.) Chanc. 245.

Security for costs will not be directed by reason of one only of two plaintiffs being out of the country. *Anonymous*, 1 Law J. (N.S.) Exch. 39, s. c. 2 C. & J. 88; 1 Dowl. P.C. 300.

If a plaintiff, after leaving this country, commences an action, he will be compelled to find security for costs. *Wells v. Barton*, 2 Dowl. P.C. 160.

Where the plaintiff resides permanently abroad, the Court will stay proceedings till security is given for costs. *Elan v. Rees*, 3 Doug. 382.

If a plaintiff be permanently resident abroad, and is only occasionally in this country, he will be liable to give security for costs. *Gurney v. Key*, 3 Dowl. P.C. 559.

A plaintiff cannot be required to give security for costs, unless it appears that he is gone abroad for more than a mere temporary absence. *Taylor v. Frazer*, 2 Dowl. P.C. 622.

Where the plaintiff is out of the jurisdiction, a defendant is at liberty to require the security of solvent persons to be given, for costs. *Cliffe v. Wilkinson*, 4 Sim. 122.

A peer of the realm, who is resident abroad, cannot be required to give security for costs. *Earl Ferrers v. Robins*, 3 Law J. (N.S.) Exch. 220, s. c. 2 Dowl. P.C. 636.

A plaintiff, who is a peer and out of the jurisdiction, must give the usual security for costs. *Lord Aldborough v. Burton*, 2 M. & K. 401.

A commissioner of the Ionian Islands, filling his office out of this country, cannot be compelled to find security for costs when plaintiff. *Lord Nugent v. Harcourt*, 2 Dowl. P.C. 578.

Where it appears, upon the bill, that the plaintiff is an officer in His Majesty's service, and out of the jurisdiction, the defendant will be entitled to the usual security for costs, unless it be distinctly stated, that the plaintiff is an actual service. It is not sufficient to state, that the plaintiff is an officer of a particular regiment, and residing at a particular place out of the jurisdiction, although the regiment may, in fact, be stationed at that place. *Lillis v. Lillis*, 2 M. & K. 404.

The Court will compel a plaintiff, executrix, who is out of the jurisdiction, to give security for costs; but such security will be confined to those costs only for which she would be liable. *Chamberlain v. Chamberlain*, 1 Dowl. P.C. 366.

Where a plaintiff, on the face of his bill, makes a false statement as to the place at which he resided at the time of filing his bill, the Court will order him to give security for costs. *Sandys v. Long*, 4 Law J. (N.S.) Chanc. 88, s. c. 2 M. & K. 487.

The Court will not require security for costs from a plaintiff in a penal action on account of his poverty, or by reason of his having commenced a number of similar actions. *G. — v. Elridge*, 3 Law J. (N.S.) Exch. 1, s. c. 2 C. & M. 336; 4 Tyr. 235.

The mere poverty of the defendant, who has removed a plaintiff in replevin, is no ground for compelling him to give security for costs. *Heakett v. Beddle*, 4 Law J. (N.S.) C.P. 242, s. c. 3 Dowl. P.C. 634.

In *quo warranto* informations, the Court will not force an indigent relator to give security for costs, when it does not appear, that the fact of indigence had not come to the defendant's knowledge before issue joined. *Rez v. Day*,—*Rez v. Patterson*, 1 Dowl. P.C. 32.

If an insolvent debtor proceeds with an action after executing his assignment, although no assignees are appointed, the Court will compel him to find security for costs. *Doyle v. Anderson*, 2 Dowl. P.C. 596.

Where security for costs has been given, the defendant will not be entitled to fresh security, if the sureties become insolvent. *Jones v. Jacobs*, 2 Dowl. P.C. 442.

Before applying to the Court to compel a party to give security for costs, application should be made to the party. *Adams v. Brown*, 1 Law J. (N.S.) C.P. 167, s. c. 9 Bing. 81; 1 Dowl. P.C. 273; 2 Mo. & Sc. 154.

A suit instituted for the purpose of regulating and apportioning a rate levied on the inhabitants of a parish, under an act of parliament, ought to be by information and bill, and not by bill only; therefore, a person who had filed a bill for this purpose on behalf of himself and all other the rated inhabitants of the parish, upon affidavits being made of

his insolvency, was ordered to give security for costs. *Tradwell v. Byrch*, 1 Y. & C. 476.

When the whole interest of a party in an award is assigned to another, the Court will not compel the latter to give security for costs in an action brought by the former upon the award. *Day v. Smith*, 1 Dowl. P.C. 460.

Where a bill is filed by a person claiming as legatee and next of kin, and the legacy is found due by a separate report, and is in court, the Court will reserve part of the legacy as a security for costs, until the right of the plaintiff as one of the next of kin is ascertained. *Green v. Challenger*, 3 Law J. (N.S.) Chanc. 67.

#### (M) SET-OFF.

[See *post*, Taxation of Attorneys' Bill, (b); and see SET-OFF.]

#### (N) TAXATION OF.

##### (a) In general.

[See COGNOVIT—ERROR.]

There is no appeal from the Master's taxation of costs, on the matter of fact, nor on the question of the amount of compensation, though there may be an appeal in respect of some abstract principles applicable to the special circumstances of the particular case.

Where, according to the usage of the profession, a matter is usually effected for a country solicitor by his town agent, the solicitor in the country cannot make any extra charge for doing such agency business in person, beyond the amount of the charge which would have been made if it had been done in the usual way, unless, after explaining the professional usage, the client makes a special request that the business should be done by the solicitor in person.

The examination of title deeds in London, is a matter to be intrusted to the solicitor's town agent, and can only be charged for as if it were done in the usual way, without a special request proved. *Alsop v. the Earl of Oxford*, 2 Law J. (N.S.) Chanc. 174, a.c. 1 M. & K. 564.

On a plea of the general issue to several counts, the defendant is entitled to deduct the costs of counts upon which he has obtained a verdict, as "costs of issues found for the defendant," under rule 74, Hilary term, 1 Will. 4, in the same manner as if he had pleaded a separate plea to each count.

The above rule applies to costs incurred previously to the first day of Easter term, 1 Will. 4, if the taxation has taken place subsequently. *Cox v. Thomson*, 1 Law J. (N.S.) Exch. 187, a.c. 2 C. & J. 498; 2 Tyr. 411; 1 Dowl. P.C. 572.

In an action for a bill of costs, it is no answer to a motion to review the taxation, proceeding upon the principle, that the defendant is liable only for costs out of pocket, that the plaintiff has permitted the Master to inquire into the question of liability, and has answered an affidavit of the defendant's upon that point. *Evans v. Taylor*, 3 Law J. (N.S.) Exch. 89.

In an action on the case, containing several counts in the declaration, some issues were found for the plaintiff, and some for the defendant:—Held, that the Master, in taxing the costs, was

correct in deducting the costs of defendant's issues from the plaintiff's costs; and that the lien of the plaintiff's attorney was only upon the balance coming to the plaintiff:—Held, also, that the expense of a witness called by the defendant, whose evidence was substantially directed towards the issues found for the defendant, was properly allowed to the defendant, although he gave some evidence upon the other issues. *Eades v. Everatt*, 3 Dowl. P.C. 687.

Under the directions to taxing officers promulgated in Hilary term, 4 Will. 4, it is not necessary for the Judge, who certifies to enable a plaintiff to obtain full costs, to hear the cause throughout. *Nokes v. Fraser*, 3 Dowl. P.C. 339.

A defendant cannot object to the taxation of a plaintiff's bill of costs, on the ground of costs being allowed for the period of the cause, during which it was conducted by a person not an attorney, or being an uncertificated attorney. — *v. Sexton*, 1 Dowl. P.C. 180.

The Master is, in general, sole judge of what witnesses shall be allowed on taxation; and, therefore, where he had, in an action for libel, disallowed all witnesses to prove innuendoes, the Court refused to interfere to make him review his taxation. *Skelton v. Seward*, 1 Dowl. P.C. 411.

Where there have been two trials, and the successful party is entitled to the costs of the second trial only, the Master in taxing costs may allow fees on the second trial with reference to those given on the first. *Wilkinson v. Malin*, 2 Dowl. P.C. 65.

Where, by the practice of the Courts, costs need not be taxed, it is unnecessary to give the notice required by 12 Reg. Gen. T.T. 1 Will. 4. *Griffiths v. Liveredge*, 2 Dowl. P.C. 143.

Where a London agent has been employed to attend the trial of a cause, it is a matter within the discretion of the Master, whether the costs of a journey to London, by the country attorney, to attend the trial of the cause, shall be allowed. *Parloe v. Foy*, 2 Dowl. P.C. 181.

An attorney, who is a party to a suit, is not entitled to charge a guinea a-day for attending the trial, though he acts as his own attorney; unless it appears that it was necessary that he should attend in person. *Leaver v. Whalley*, 2 Dowl. P.C. 80.

It is a question for the discretion of the Master, whether a witness ought to be allowed for the whole time of his attendance at the assizes, or only a portion of it; but, where the Master has decided upon it, the Court will not review his decision. *Platt v. Greene*, 2 Dowl. P.C. 216.

The plaintiff is bound to have his witnesses in attendance from the commencement of the assizes, and may, therefore, have the costs of their attendance previous to the trial. *Cosgrave v. Eoans*, 2 Dowl. P.C. 443.

If an attorney shew cause on his own behalf against a rule for a new trial, or a *set processus*, his client not appearing, the costs of the attorney are not costs in the cause, but must be made the subject of a special application to the Court; and, if that application is not made when the rule is disposed of, the Court will not afterwards amend the rule as to them. *Southee v. Terry*, 2 Dowl. P.C. 522.

If, by an alteration in the state of the pleadings, after notice of trial, certain witnesses are unnecessary, the party who *subpoenaed* them must make reasonable efforts to prevent their attendance, or their expenses will not be allowed on taxation. *Allport v. Baldwin*, 2 Dowl. P.C. 599.

Affidavits used before the Master on the taxation of costs, cannot be read on shewing cause against a rule for reviewing the taxation, unless they are referred to in the rule; a notice that they will be used is sufficient. *Cliffe v. Prosser*, 2 Dowl. P.C. 21.

A motion to review the Master's taxation must be supported by an affidavit, that the Master has made his allocatur. *Cleaver v. Hargrave*, 2 Dowl. P.C. 689.

The Master, in taxing the expenses of witnesses, according to a certain scale, cannot allow more than is actually paid for their travelling expenses. *Radcliffe v. Hall*, 3 Dowl. P.C. 802.

In order to review a taxation by the Master, for disallowing the expenses of detention of a foreign witness in this country, it should be shewn, that the Master did not exercise his discretion on the subject, after special grounds for the allowance had been laid before him. *White v. Mayor*, 5 Tyr. 487.

Three defendants being sued in trespass for assault and false imprisonment, appeared by the same attorney, but severed in pleading. The same evidence was adduced for all, with the exception of one witness, who was called for one of them separately. That one being acquitted, the Master taxed him 40s. costs only:—Held, that he was entitled on taxation to receive from the plaintiff his aliquot proportion of the costs incurred by the three on their joint retainer, as well as the costs he had separately incurred, on satisfying the Master that he was not indemnified by the other defendants. *Griffiths v. Kynaston*, 2 Tyr. 767; s.c. as *Ridley v. Harris*, 2 Law J. (N.S.) Exch. 89.

#### (b) *Attornies' and Solicitors' Bills.*

[See *BANKRUPT, Solicitor.*]

The assignees or executors of a bankrupt are not, under the statute, liable to pay the costs of taxation, if more than one-sixth of the bill of costs of the solicitor is deducted on taxation. *Willasey v. Mashiter*, 3 M. & K. 293.

In allowing the set-off upon judgments had by contending parties, the costs for which the attorney has a lien by the 93rd rule of Hil. term, 2 Will. 4, are to be taxed as between attorney and client, not as between party and party. *Watson v. Maskall*, 4 Law J. (N.S.) C.P. 266, s.c. 1 Bing. N.C. 727; 1 Sc. 658.

A bill of costs between solicitor and client, where the amount of it has been ascertained by an arbitrator, under an agreement for a reference, cannot afterwards be referred to the Master for taxation—the award of the arbitrator being final as between the parties. *Marrie v. Camac*, 2 Law J. (N.S.) Chanc. 120.

A charge for searching for judgments is not a charge or disbursement in law or equity, within 2 Geo. 2, c. 23.

The Court will not exercise a paramount jurisdiction in referring an attorney's bill, containing

no taxable item, for taxation. *In re Bowles's Trustees*, 4 Law J. (N.S.) C.P. 203, s.c. 1 Bing. N.C. 632; 1 Sc. 583.

An attorney's bill of costs will be referred to the Master to be taxed after the payment thereof, if the application for that purpose be made to a Judge at chambers, or to the Court, within a reasonable period, without shewing circumstances of fraud or imposition.

Thus, where, after an attachment for not bringing in the body, the sheriff had paid the costs, the Court, as no unnecessary delay appeared to have taken place, on the application of the party, referred the bill of costs to the Master for taxation. *Glasscott v. Castle*, 1 Law J. (N.S.) Exch. 103, s.c. 2 C. & J. 355; 2 Tyr. 302; 1 Dowl. P.C. 317.

A person having paid the costs of a party, as between solicitor and client, under an agreement, without first requiring that the bills should be referred to the Master for taxation, may apply to the Court afterwards and get the bills taxed.

An agreement generally to pay costs is an agreement to pay taxed costs. *Vincent v. Verner*, 2 Law J. (N.S.) Chanc. 49, s.c. 1 M. & K. 212.

The Court will allow the reasonable expenses of serving a country defendant, who has no attorney, with a notice of taxation, by means of an attorney resident in the adjacent post town, and a messenger sent from thence to serve the notice. *Thorp v. Worthy*, 1 Law J. (N.S.) Exch. 177, s.c. 2 C. & J. 488; 2 Tyr. 489; 1 Dowl. P.C. 575.

Where, by agreement between the plaintiff and defendant, the action is settled, and the defendant agrees to pay the plaintiff's costs as between attorney and client, the defendant becomes the party chargeable by the bill of the plaintiff's attorney, within the statute 2 Geo. 2, c. 23, s. 23; and, if more than one-sixth is taken off, he is entitled to the costs of taxation. *Sadler v. Palfreyman*, 3 Law J. (N.S.) K.B. 179, s.c. 1 Ad. & E. 717; 3 N. & M. 698.

The mere receiver of costs due to an attorney, cannot, in a bill wherein he is debited for such receipt as costs received, treat this as a taxable item, and obtain the taxation of the bill thereon. *Haggett v. Brand*, 2 Law J. (N.S.) Exch. 23.

An *ex parte* application by a defendant to have his solicitor's bill taxed after an action had been commenced to recover the amount of it, and to have proceedings at law stayed in the meantime, allowed to be regular. *Hooper v. Holdway*, 2 Law J. (N.S.) Chanc. 185.

Where a party cannot obtain an order to tax an attorney's bill before action commenced, he is entitled to the costs of taxation if more than one-sixth be taxed off after the commencement of the action.

Thus, a Judge at chambers having refused to make an order on the assignees of an attorney to tax his bill delivered to the plaintiff, the defendant, after the assignees had commenced an action, on taxation, took off more than one-sixth:—Held, that the Master was wrong in allowing the assignees the costs of taxation. *Featherstonhaugh v. Reece*, 2 Law J. (N.S.) Exch. 232, s.c. 1 C. & M. 495; 3 Tyr. 540; 2 Dowl. P.C. 30.

It is doubtful whether charges for business done in suing out and prosecuting a commission of lunacy are taxable.

But in an action by an attorney for such charges, the application to refer the bill for taxation should be made to the Chancellor, rather than to the Court in which the action is brought. *Jones v. Bywater*, 1 Law J. (N.S.) Exch. 135, s.c. 2 C. & J. 371; 2 Tyr. 402.

In an action by the surviving partner of a banking firm, for money paid by the firm in discharge of bills of costs due to the plaintiff and another, as attornies,—the Court will refer those bills for taxation, although no gross error, fraud, or imposition be pointed out, and the defendant has paid the amount of the bills into court. *Grover v. Weedon*, 3 Law J. (N.S.) Exch. 20.

On a summons by one of two defendants, after an action commenced on an attorney's bill, to have such bill referred to the Master for taxation, the Judge in his discretion has power, by common law, to order the taxation without requiring the defendant who has obtained the summons, or his attorney, to enter into an undertaking to pay what shall appear to be due on such taxation. *Watson v. Postan*, 1 Law J. (N.S.) Exch. 131, s.c. 2 C. & J. 371; 2 Tyr. 406.

The Court will not direct the taxation of a solicitor's bill, on the undertaking of a client, who is living abroad, to pay what may be found due. *Bodicoats v. Bestock*, 4 Law J. (N.S.) Chanc. 238.

If less than a sixth be taken off an attorney's bill on taxation, it is discretionary with the Court to allow him the costs of taxation, and they will not do so if very nearly one-sixth be taxed off, as 42% from a bill of 272*l*. *Baker v. Mills*, 3 Law J. (N.S.) Exch. 92, s.c. 2 C. & M. 415; 4 Tyr. 279.

On taxation of an attorney's bill, the Prothonotary refused to allow the attorney the costs of taxation, although a sixth part had not been taken off. The Court refused to interfere, because the deductions amounted to nearly one-sixth part. *Elwood v. Pearce*, 1 Law J. (N.S.) C.P. 41, s.c. 8 Bing. 83; 1 Mo. & Sc. 159.

An attorney's bill, set up by him as a defence by way of set-off, was, after action brought against him, referred to be taxed. The amount exceeded the plaintiff's demand; but, more than a sixth being taken off, the attorney was ordered to pay the costs of the taxation; these costs, when deducted from his bill, left a balance in favour of the plaintiff:—Held, that the plaintiff was not entitled to call those costs in aid, so as to bear down the set-off, and thus to turn the verdict. *Felder v. Besant*, 2 Law J. (N.S.) K.B. 193, s.c. 2 N. & M. 209; 5 B. & Ad. 357.

Where an attorney's bill was reduced one-sixth on taxation by the disallowance of the costs of an action which he had brought improperly,—Held, that he was bound to pay the costs of taxation. *Morris v. Parkinson*, 4 Law J. (N.S.) Exch. 220, s.c. 2 C. M. & R. 178; 3 Dowl. P.C. 744.

Where an attorney's bill, for business in various courts, is referred to the proper officer of one of them for taxation, that officer is the person who is, in practice, considered as dealing with, and disposing of the whole of the bill, although, by arrangement with the officers of the different courts, the part for business done in each court is examined, and taxed by the officer of that particular court.

This rule is so established, that where such a bill was referred to the Prothonotary of the Common Pleas, who sent the King's Bench part of the business to the Master; and while it was under discussion before him the Court of Common Pleas made a rule, and a Judge of the King's Bench made an order, treating that portion of the business as before the Master,—the Court of King's Bench refused to make any rule upon the matter, considering it as entirely before the officer of the Common Pleas. *In re R. H. Jones*, 1 Law J. (N.S.) K.B. 243.

The Court has no direct power to order an attorney's bill to be taxed, independently of 2 Geo. 2, c. 23. The Court cannot direct a bill to be taxed at the instance of any person but the client. If various matters form but one transaction, some being at law, and others for conveyancing, one bill only ought to be made out. *Doe d. Palmer v. Roe*, 4 Dowl. P.C. 95.

On a general reference to taxation of an attorney's bill, the Prothonotary cannot take into consideration the question of retainer. *Nelson v. Slack*, 2 Mo. & Sc. 820.

Although the Master on taxation has not jurisdiction to determine whether acts done by the attorney were useful, he may determine what was necessary. *Heald v. Hall*, 2 Dowl. P.C. 163.

An application to tax an attorney's bill ought to be made at chambers. *Bassett v. Gblett*, 2 Dowl. P.C. 650.

When several bills are taxed, the one-sixth is calculated on the aggregate amount. *Ex parte Barrett*, 1 M. & A. 447.

Where an attorney's bills are referred for taxation to the Prothonotary of the Common Pleas, he may refer items for business done in the King's Bench, to be taxed by the Master of the latter court; and the King's Bench has no jurisdiction to interfere with that taxation of the Master, nor is the Prothonotary bound by it. *In re Jones*, 1 Dowl. P.C. 424.

It is no answer to an application to tax an attorney's bill, that an agreement has been made that the attorney shall receive one-half the proceeds of a suit carried on at the instance of the client. *Masters re —*, 4 Dowl. P.C. 18.

An attorney employed to defend an action, and receiving from his client the debt and costs, for the purpose of being paid over to the plaintiff, is not entitled to make that sum an item in his bill, so as to increase the amount of it. *Woolison v. Hodgson*, 2 Dowl. P.C. 360.

Where several defendants defend separately and apparently by different attornies, but all the business is virtually done by one, they are not entitled to charge by separate bills of costs, but must make a joint charge. *Nanny v. Kenrick*, 3 Dowl. P.C. 334.

Where a rule for the review of the Master's taxation of an attorney's bill has been disposed of, the Court will not afterwards entertain a motion impugning the bill on the ground of certain charges having been improperly introduced into it instead of the cash account. An attorney has a right to introduce into his bill disbursements made by him for his client, although he has no discretion as to their amount, if there is no specific appropriation

of money paid by his client to him to such disbursements. *Harrison v. Ward*, 4 Dowl. P.C. 39.

A Court has no power to order the bill of any attorney to be taxed, unless it appear that some part of the business was done in the court to which application for the order is made. *Ex parte King*, 3 N. & M. 437.

If, on taxation of an attorney's bill, as between attorney and client, the Master strike off a part of the charges, on the ground that the client is not the person liable for such part, the sum upon which the sixth is to be calculated, under statute 2 Geo. 2, c. 23, s. 23, is the original bill reduced by the part so disallowed; and the disallowance of such part is not a reduction upon taxation, within that clause.

Costs in a suit were taxed as between party and party, and the residue, after taxation, paid to the attorney of the successful party. The attorney afterwards delivered his bills to his client, under an order of court for such delivery, and for a general reference of the bills for taxation. They included, among other matters, the above costs as reduced, for which the attorney gave credit:—Held, that he was entitled to insert the reduced, and not the original amount of costs; and that, on taxation of the bills, the client could not add the sum formerly deducted from these costs to the sum taxed off from the general amount of the bills, in order to make the whole reduction exceed one-sixth of such amount.

Although the statute 2 Geo. 2, c. 23, s. 23, directs, that where an attorney's bill on taxation has been reduced by less than a sixth, the Court "in their discretion," shall charge the attorney or client with the costs of taxation, the proper course in such cases is, that the client be charged with the costs:—Held, per Taunton and Williams, Js.; Littledale, J. *dubitante*. *Mills v. Revett*, 1 Ad. & E. 856, s. c. 3 N. & M. 764.

Where there appears to be negligence or ignorance of law on the part of an attorney, which creates unnecessary costs, the Court will order those costs to be disallowed on taxation, without prejudicing his right to bring an action for them. *Cliffe v. Prosser*, 2 Dowl. P.C. 21.

An order was made for the taxation of four several bills of a solicitor for various business done for the same assignee, under which more than a sixth part was taken off the gross amount of the four bills, but not off the amount of every one of the bills:—Held, that as all the bills were incurred by the same person, in the same right, there was no need for a separate order of taxation for each bill, and that, as more than a sixth was taken off from the whole amount, the solicitor must pay the costs of taxation. *Ex parte Barrett*, 3 D. & Ch. 781.

It is no ground for disallowing to the plaintiff's attorney his costs of conducting the action, that he was not on the roll of attorneys of this court, if it appears that he conducted the proceedings in the name of a London attorney, who was an attorney of the Court. *Goodner v. Cover*, 3 Dowl. P.C. 424.

The Court has no direct power to refer an attorney's bill for taxation, except under the authority of 2 Geo. 2, c. 23. An attorney does not waive his right to object to the jurisdiction of the Court directly to refer his bill for taxation by attending its

taxation before the Master, on which, according to the statute, he would be liable to pay the costs of taxation, the client not having given the undertaking required by the statute to pay what should be found due. He will, however, be liable to refund what should be found overpaid on such taxation. *Howard v. Groom*, 4 Dowl. P.C. 21.

The Court of King's Bench does not exercise any common law jurisdiction in taxing attorneys' bills.

The Court, in the exercise of its statutory jurisdiction, refused to order an attorney's bill to be taxed at the instance of a third person, where the client had before admitted the account to be due, and declined taxing the bill; such client having since become bankrupt, and the application being made for the purpose of reducing his claim so as to prevent his being a good petitioning creditor. *Clutterbuck v. Coombes*, 5 B. & Ad. 400, s. c. 2 N. & M. 209.

A defendant, who, upon compromising a suit, has undertaken to pay the plaintiff's costs as between attorney and client, is entitled to the costs of taxing the attorney's bill, under statute 2 Geo. 2, c. 23, s. 23, if upon such taxation had under the plaintiff's authority, more than one-sixth has been deducted. *Chambers v. Sadler*, 1 Ad. & E. 717.

The proper charges in respect of an abstract of title are 6s. 8d. per folio for drawing, 3s. 4d. for copying. *Broadhurst v. Darlington*, 2 Dowl. P.C. 38.

#### (O) ALLOCATUR.

An *allocatur* is the property of the person in whose favour it is made. *Doe d. King v. Robinson*, 2 Dowl. P.C. 503.

#### (P) PAYMENT OF, HOW ENFORCED.

[See ATTACHMENT—ATTORNEY AND SOLICITOR, Remedy for Costs.]

Where a judgment, irregularly signed by the plaintiff, is set aside with costs, it is competent to a Judge to stay the proceedings until such costs are paid. And it is no ground for rescinding such order, that the defendant has since issued an attachment for such costs. But *semble*, that if the plaintiff were actually taken upon such attachment, the Court would relieve him from the stay of proceedings. *Wenham v. Downs*, 5 N. & M. 244.

Where a party absconds to avoid personal service of a subpoena for costs, and a motion is made that service at his house may be good service, such motion cannot be made *ex parte*, but notice must be served on his clerk in court. *Carter v. Dean of Ely*, 4 Law J. (N.S.) Chanc. 241.

Where the plaintiff has been *non prossed* in the Exchequer, and afterwards brings an action in the King's Bench, that Court will stay the proceedings till the costs of the former action are paid. *Nevill v. Lade*, 3 Doug. 869.

#### (Q) IN THE HOUSE OF LORDS.

[See PRACTICE, in the House of Lords.]

#### (R) IN COMMITTEES OF THE HOUSE OF COMMONS.

The Court of K.B. will not grant an application to enter up judgment in an action to recover costs on the Speaker's warrant, under 9 Geo. 4, c. 22, where it appears that the committee appointed to hear the



merits of a petition proceeded in the inquiry contrary to the provisions of the act.

Thus, where the defendant petitioned against a return, and did not appear within an hour after the time fixed to take the petition into consideration, either by himself, his counsel, or agent; but the committee, nevertheless, proceeded with the petition, and reported it frivolous and vexatious, and the examiners taxed the costs incurred, upon which the Speaker granted his certificate,—the Court refused the application to enter up judgment, as, by the 3rd section of the act, the order on the petition ought not to have been proceeded with. *Bruyeres v. Halcomb*, 4 Law J. (N.s.) K.B. 228, s.c. 5 N. & M. 149; 3 Ad. & E. 381.

#### (S) IN THE PRIVY COUNCIL.

Costs given to appellants from the judgment of a colonial court of error, confirming, upon a bill of exceptions, the judgment of a court of common law, on the ground, that the points of law involved in the appeals had previously been determined, in two previous appeals against the same respondents, and that they, by not consenting to an amicable compromise, had put the appellants to unnecessary expense. *Needham v. Simpson*, 2 Kn. 1.

A superior court having affirmed the decree of an inferior court, with costs, against the appellant, but not until they had required and taken much additional evidence to what had been taken below:—Held, that they ought not to have given costs against the appellant; and their decree so far reversed, although affirmed in other respects. *Baboo Ultuck Sing v. Beny Persad*, 2 Kn. 265.

Costs given against an appellant for having attempted to make use, on the appeal, of a conviction for perjury of one of the witnesses against him in the court below, which was partly obtained on the appellant's own evidence. *Canepa v. Larios*, 2 Kn. 276.

#### (T) IN THE ECCLESIASTICAL COURTS.

##### [See PROHIBITION.]

When understanding sufficient to comprehend the act, and an intention to exclude the next of kin, and to give the property to a stranger in blood, were proved, and an attempt to shew that the intention to exclude the former was produced in the mind of the deceased by the fraud and contrivance of the latter, failed, the Court pronounced for the will, condemned the next of kin, (who appeared by separate proctors,) the one who did not appear by counsel at the hearing, in the costs of, and subsequent upon, an allegation given by him, and charging fraud and incapacity; and the other, in the costs of separate interrogatories to the witnesses on the responsive allegation; of two allegations tendered by him, and of the final hearing: but gave no costs as to the interrogatories addressed to the witnesses on the *condidit*. *Grindall v. Grindall*, 4 Hag. Ec. 10.

Hostility in conducting a suit, unfounded charges, and unnecessary interrogatories, are a ground for refusing costs out of the estate, especially where those costs would, in effect, fall upon minors, no parties to the expense. *Coppin v. Dillon*, 4 Hag. Ec. 375.

A sole executor and a legatee in a pretended will having been cited to propound the same, admitted to sue *in forma pauperis*, though the paper was not produced till after a long lapse of time, and other circumstances of suspicion and vexation had appeared. On the merits, the Court pronounced against the will, and condemned the pauper in costs; but intimated that he should not proceed to enforce a monition for payment thereof, unless he ceased to be a pauper. *Rind v. Davies*, 4 Hag. Ec. 394.

Costs given on the ground of unsustained attacks upon the character of the party establishing a will. *Constable v. Tufnell*, 4 Hag. Ec. 508.

#### (U) IN THE COURT OF BANKRUPTCY.

##### [See BANKRUPT, Costs.]

#### (X) IN CRIMINAL CASES.

A party was bound over to prosecute at the sessions, in a case within 7 Geo. 4, c. 64, s. 23, but prosecuted at the assizes. Witnesses were called on subpoenas from the clerk of assize:—Held, that the witnesses were entitled to an order for their costs under the statute. *Dubitatur*, whether the prosecutor was so entitled. *Rex v. Jeyes*, 5 N. & M. 101.

Upon an indictment for a riot, removed by the prosecutors by *certiorari* into the Court of King's Bench, and tried at Nisi Prius, the prosecutor and witnesses are not entitled to costs under 7 Geo. 4, c. 64. *Rex v. Johnson*, 1 R. & M. C.C. 173.

#### COTTON WOOL.

Reduction of duty on, 3 & 4 Will. 4. c. 10; 11 Law J. Stat. 30.

#### COUNSEL.

[See ATTORNEY—LIBEL, Action for—SPECIAL CASE—COMMISSION OF REVIEW—PRACTICE, Trial, Withdrawing the Record.]

No affidavit required from counsel as to what passes between them. *Iggulden v. Terson*, 2 Dowl. P.C. 277; s.c. 4 Tyr. 309.

Whether, in a *civil case*, if a party conduct his own cause, and examine the witnesses, he can be allowed to have the assistance of counsel to argue points of law—*quare*; but *semble* that he cannot. *Moscatti v. Lawson*, 7 C. & P. 32. [Alderson]

A party present in court is bound by the consent of his counsel to a verdict, although he has expressly told the counsel he will not agree to a compromise, if his refusal be communicated only in private, and is not made known to the opposite side. *Wright v. Soresby*, 3 Law J. (N.s.) Exch. 207, s.c. 2 C. & M. 671; 4 Tyr. 434.

This Court will not interfere in questions of retainers of counsel. A motion to restrain a particular counsel from acting for the opposite side, by whom he had been retained, refused. *Baylis v. Martin*, 4 Law J. (N.s.) Chanc. 78, s.c. (*Baylis v. Groat*) 2 M. & K. 316.

## COUNTY—DIVISIONS OF.

Where an order for altering the arrangements of the parishes, townships, &c. of any county for the convenience of holding special sessions has been made under the 9 Geo. 4, c. 43, s. 2 & 4, there is no appeal against it—sections 8 & 9 of that act, applying to orders made under the authority of section 7 only. *Rez v. Derbyshire (Justices)*, 1 Dowl. P.C. 386.

## COUNTY COURT.

[See PRACTICE, Pleading several Pleas—SHERIFF, Duties and Liabilities.]

Plea, that the action is brought for 40s., and that the defendant resided in Middlesex, and was liable to be summoned in the county court—Held, bad on demurrer, for not negating, that the plaintiff's freehold, or an act of bankruptcy, would principally come in question. *Quere*, whether that is a matter available as a plea in bar, in any way—*Semble*, not. *Sandal v. Bennett*, 4 Law J. (N.s.) K.B. 8, s. c. 2 Ad. & E. 204; 4 N. & M. 89.

The defendant pleaded payment of 1l. 18s. into court, in satisfaction of the cause of action sued on, which the plaintiff accepted:—Held, that the defendant could not then enter a suggestion on the roll to deprive the plaintiff of his costs, on the ground that the action was for less than 40s. and therefore recoverable in the county court. *Tarrant v. Morgan*, 4 Law J. (N.s.) Exch. 222, s. c. 3 Dowl. P.C. 792.

An affidavit in support of an application for double costs under the 23 Geo. 2, c. 33, s. 9 (the Middlesex County Court Act), must state the defendant to be summoned to the county court. *Unwin v. King*, 2 Dowl. P.C. 492.

In order to deprive a plaintiff of his costs under the Middlesex County Court Act, the application must be made before judgment. *Unwin v. King*, 2 Dowl. P.C. 593.

In an affidavit supporting an application for double costs, under 23 Geo. 2, c. 33, s. 19 (the Middlesex County Court Act), it must be stated, that the defendant is liable to be summoned to the county court. *Fossett v. Godfrey*, 2 Dowl. P.C. 587.

## COUNTY RATE.

[See RATE.]

## COURTS.

[Colonial—See JURISDICTION.]

A remonstrance or petition is presented to a Court, consisting of ten members, praying that a certain "acte" or decree of that Court might be annulled, or for such other relief as the Court might deem fit. Four of the members were of opinion that the remonstrance ought not be received; three, that the "acte" ought to be annulled:—Held, that the remonstrance ought to have been received. *Le Gros v. Le Breton*, 2 Kn. 181.

## COURT BARON.

[See COPYHOLD.]

Where the balance on a bill of exchange originally drawn for 17l., and accepted payable in London, had been reduced by previous payment to less than 5l., and the drawer (the plaintiff) and acceptor (the defendant) both resided within the jurisdiction of the Halifax Court Baron:—Held, that such balance was a debt under 5l., and recoverable in that court, under 17 Geo. 3, c. 15, s. 30. *Walker v. Watson*, 1 Law J. (N.s.) C.P. 121, s. c. 1 Mo. & Sc. 674.

## COURT LEET.

[See CUSTOM—MANDAMUS.]

## COURT MARTIAL.

[See PROHIBITION.]

## COVENANT.

- (A) IN GENERAL.
- (B) CONSTRUCTION.
- (C) VALID OR VOID.
- (D) WHAT SHALL RUN WITH THE LAND.
- (E) ACTION OF, WHERE MAINTAINABLE.
- (F) PLEADINGS, EVIDENCE, DAMAGES, AND BREACH.
- (G) WHERE ENFORCED OR RELIEVED AGAINST IN EQUITY.

## (A) IN GENERAL.

The Monmouthshire Canal Act provided, that, upon auxiliary railroads made by private individuals under the authority of the act, the tolls should not exceed the rate charged by the canal company, which, for the articles of limestone and ironstone, was restricted to 2d. a ton per mile; and it also empowered the canal company, by agreement with the landowners, itself to construct auxiliary railroads, on which tolls not exceeding 5d. a ton per mile might be charged. Certain landowners and owners of ironworks, and, among others, the lessees of the Beaufort works, formed a joint-stock company, and, under the power given by the act, constructed a railroad, connecting a lime quarry, called the Trevil quarry, with the several ironworks and with the railroads of the canal company. In the partnership deed of the railroad company, the lessees of the Beaufort works covenanted for themselves, their heirs, executors, administrators, and assigns, with the other shareholders, their executors, administrators, and assigns, so long as the covenants, their executors, administrators, or assigns, should occupy the Beaufort works, to procure all the limestone used in the said works from the Trevil quarry, and to convey all such limestone, and also all the ironstone from the mines to the said works along the Trevil railroad, and to pay a toll of 5d. a ton per mile for the same. Upon a bill filed by the

shareholders of the railroads to enforce this covenant, against a person who had purchased the Beaufort works, with a notice of a partnership deed:—Held, first, that the covenant did not run with the land, so as to bind assignees at law; and that a court of equity would not, by holding the conscience of the purchaser to be affected by the notice, give the covenant a more extensive operation than the law allowed to it: secondly, that the covenant, securing a toll of 5d. a ton per mile to the shareholders of the Trevil railroad, was a fraud upon the canal company and the legislature, and therefore ought not to be specifically enforced by injunction.

Some of the shareholders having been made co-plaintiffs in the bill without their privacy or consent, on their application an order was made, with costs, that their names should be struck out as plaintiffs. *Keppel v. Bailey*, 2 M. & K. 517.

#### (B) CONSTRUCTION.

[*Naylor v. Wetherell*, 2 Law J. Dig. 92, s.c. 4 Sim. 114; and see *Pitt v. Williams*, post, 179.]

If there be a covenant by the letter of cabins on board ship to permit and suffer the hirer to stow away the baggage of the passengers in a particular part of the hold of a ship:—Held, that this fairly imports that there shall be some demand or request made by the hirer for the clearing of the space agreed on. *Corbyn v. Leader*, 6 C. & P. 32, s.c. 10 Bing. 275; 3 Mo. & Sc. 751.

Covenant by the lessee not to carry on the trade and business of a baker, butcher, slaughterer, &c. (specifying other trades of a similar kind), or any offensive trade whatever:—Held, that the keeping of a private madhouse was not the carrying on of an offensive trade within the meaning of the latter part of the covenant; but that that must be taken to apply to trades *ejusdem generis* with those enumerated. *Doe d. Wetherell v. Bird*, 4 Law J. (N.S.) K.B. 52, s.c. 2 Ad. & E. 161; 4 N. & M. 285.

Quære, whether carrying on the trade of a retail brewer, under 5 Geo. 4, c. 54, is a breach of covenant in a lease executed long before the passing of that statute, not to carry on the trade of a "common brewer, victualler, or retailer of beer, ale, or spirituous liquors." *Simons v. Farren*, 4 Law J. (N.S.) C.P. 41, s.c. 1 Bing. N.C. 126; 1 Sc. 105.

Covenant by the lessees of a farm, that they would use all the hay and straw which should arise or be gathered from the premises, upon the premises; nor should the same, nor any part thereof, be at any time removed from off the premises, on pain to forfeit, as and for liquidated damages, the sum of 5*l.* for every ton of hay, &c. or cart-load of dung sold or carried off:—true construction held to be, that he should not remove any of the hay without paying 5*l.* per load.

The six days' notice required by the 1 Will. 4, c. 70, is not a condition annexed to the plaintiff's right to recover; but if there be any irregularity in the notice, if not waived by appearance, the proper mode to take advantage of it is to move to set aside the judgment. *Doe d. Antrobus v. Jepson*, 1 Law J. (N.S.) K.B. 154, s.c. 3 B. & Ad. 402.

A deed recited that the grantor owed certain debts, which it was agreed that the grantee should pay, in consideration of the assignment by that deed of certain property. The deed subsequently con-

tained a covenant by the grantee, to indemnify and save harmless the grantor against those debts:—Held, that this was a covenant to pay the debts themselves, as well as to save harmless the grantor against the payment.

The administratrix of the above grantor was sued by one of the creditors, who obtained judgment against her, of assets *quando acciderint*. *Carr v. Roberts*, 2 Law J. (N.S.) K.B. 183, s.c. 2 N. & M. 42; 5 B. & Ad. 78.

In a deed for the dissolution of partnership between the plaintiff and L, reciting an assignment of debts due to the partnership from the plaintiff to L, in consideration of a sum of money to be paid to the plaintiff, L, A, and the defendant covenanted, severally and respectively, that they, or some one or more of them, or of their executors, &c. would pay the said sum by instalments:—Held, that this was an absolute covenant, on the part of the defendant, to pay such sum at all events; and therefore, to an action to recover instalments due subsequently to his discharge as an insolvent, under 7 Geo. 4, c. 57, s. 46, that such discharge was a good defence. *Guy v. Newsom*, 3 Law J. (N.S.) Exch. 18, s.c. 2 C. & M. 140; 4 Tyr. 31.

The defendant, assignee and mortgagee of certain premises, in June 1826, at the request and with the permission of the mortgagor, demised and leased to the plaintiff, for the term of nine years, as and from the 25th of December 1836, being the expiration of the term granted by the existing lease, at a certain yearly rent. The indenture contained a covenant for quiet enjoyment by the plaintiff, his executors, administrators and assigns, paying the rent, and observing, performing, and keeping the covenants, and for their lawfully (during the term demised), peaceably, quietly holding, &c., without any let, suit, or disturbance from or by the defendant, or his executor, administrator, or assign, or of any person claiming by, from, or under, &c. Upon forfeiture of the lease by the defendant, for non-payment of rent,—Held, that the plaintiff could not maintain an action for the breach of the covenant for quiet enjoyment during the term commencing in the year 1836; it being the intention of the parties that the covenant was not to operate until the time for entering into possession. *Ireland v. Bircham*, 4 Law J. (N.S.) C.P. 305, s.c. 2 Bing. N.C. 90; 2 Sc. 207.

A tenant for life, and his eldest son, the remainder-man in tail, granted premises to E S for ninety-nine years, and gave E S the leasee, who knew their title, a bond conditioned for the due observance of this covenant for quiet enjoyment; E S underlet the premises to W for sixty years, and covenanted with him against eviction by any one claiming under him E S, or by his acts, means, consent, neglect, default, privity, or procurement. The tenant for life and remainder-man having died without issue, and W having been evicted by the next remainder-man in tail,—Held, that E S was not liable on his covenant to W, the eviction having been by title paramount, which E S had no means of defeating. *Woodhouse v. Jenkins*, 2 Law J. (N.S.) C.P. 38, s.c. 9 Bing. 430; 2 Mo. & Sc. 699.

A covenant which is unqualified in itself, and unconnected with one that is qualified, is not controlled or restrained by the latter, but is a general covenant.

Therefore, where the covenant for title was general, but was followed by a covenant for quiet enjoyment, without the let, hindrance, &c. of the covenantor or those claiming under him,—it was held, that the former was not restrained by the latter, but that the plaintiff was entitled to recover on a breach, alleging title in a stranger.

Accordingly by indenture, reciting a power vested in A B to dispose of certain premises, and that C D had contracted to purchase them, A B appointed and conveyed them to the use of C D, his heirs, &c., and covenanted, that the power in A B was then in force and not executed; and also that he, A B, then had in himself good right, title, power, and authority to limit and appoint, and to grant, bargain, sell, &c. the premises to the said uses; and further, that the premises should be held and enjoyed to the said uses, without the let or interruption of A B, or any claiming under or in trust for him; and also for further assurance by A B and all so claiming:—Held, that the second covenant was absolute, for good title against all persons, and not to be qualified by reference to the other covenants, inasmuch as there were no words, either in the second covenant itself or in preceding or subsequent ones, to connect it with them. *Smith v. Compton*, 1 Law J. (N.S.) K.B. 43; s.c. 3 B. & Ad. 189.

By indenture of lease, reciting that L had agreed to take premises of C, and that it had also been agreed that R should enter into the covenant after mentioned for securing payment of rent, it was witnessed, that, in consideration of the covenants after mentioned on the part of L to be performed, and particularly of the covenant thereafter entered into by R, the said C, at the request of R, demised to L, &c. And L and R covenanted to C, that they would pay him the rent on the appointed days, and further, that L, his executors, &c. should and would keep the premises in repair. There were other covenants similarly framed to this last, for matters to be performed by L, and a proviso for re-entry if the rent should be in arrear, or if L, his executors, &c. should not perform the covenants in the indenture contained on his and their part to be performed, and there was a covenant by C to L for quiet enjoyment, L, his executors, &c. paying the rent and performing the covenants in the indenture before contained:—Held, that R was jointly bound with L, by the covenant to repair, as well as the covenant to pay rent. *Copland v. Laporte*, 3 Ad. & E. 517.

In the conveyance of an estate, there was a covenant that the premises were free from incumbrances, except particular leases. *Quare*—whether these words affirm the leases, and whether parol evidence is admissible to shew it was so intended? *Mount v. Roberts*, 4 Doug. 306.

#### (C) VALID OR VOID.

[See INFANT, Rights and Incapacities.]

*Quare*, as to the validity of a covenant in a lease, that the lessee shall not employ any servant, male or female, who may, by such employment, acquire a settlement in the parish. *Blount v. Pearman*, 4 Law J. (N.S.) C.P. 149, s.c. 1 Bing. N.C. 408; 1 Sc. 55.

To covenant for rent, plea, that defendant, with the consent of lessor, carried on the business of a

retail brewer and retailer of beer, whereupon a forfeiture was incurred, and he was evicted by B; C having good right and title to the premises, as heir of C, with whom defendants had covenanted not to carry on the business of a retailer of beer without the consent of C,—Held ill. *Simons v. Farren*, 1 Bing. N.C. 272, s.c. 4 Mo. & Sc. 672.

#### (D) WHAT SHALL RUN WITH THE LAND.

[See *Keppel v. Bailey*, ante, 177; and *Pitt v. Williams*, post, 179.]

Covenant by lessor against assignee of lessee, on a covenant by the lessee for himself, his executors and administrators, to pay to the lessor the amount of fruit-trees, &c. to be planted by the lessee according to the appraisement to be made by two persons, one to be chosen by each of the parties. Breach, that the defendant refused to name a person to make the appraisement. *Demurrer*:—Held, that this covenant did not run with the land, and that the assignee was not bound. *Grey v. Cuthbertson*, 4 Doug. 351.

Covenant by the lessees of a theatre to repay a sum of money lent, provided certain persons were alive on a particular day, and that the lender should have the free use and enjoyment of two private boxes in the theatre during that period:—Held, that this was altogether a personal covenant, and that the latter part of it did not bind the assignee. *Flight v. Glassop*, 4 Law J. (N.S.) C.P. 268, s.c. 2 Bing. N.C. 125; 2 Sc. 220.

#### (E) ACTION OF, WHERE MAINTAINABLE.

Premises were demised for a term, at a certain rent, with a proviso for re-entry if the rent should be in arrear twenty-one days; the lessee covenanted to pay the rent, and the landlord covenanted that he, paying the rent at the appointed times, should quietly enjoy, &c.:—Held, that the lessee, having been disturbed in his possession, might bring covenant against the landlord, though at the time when the cause of action accrued the rent had been in arrear more than twenty-one days; for that the payment of the rent was not a condition precedent to the performance of the covenant for quiet enjoyment. *Dawson v. Dyer*, 5 B. & Ad. 584, s.c. 2 N. & M. 559.

Covenant by the defendant with the plaintiff, that he is lawfully seised of certain lands in New York. Breach, that he is not seised, in consequence of an act of attainder:—Held, that the defendant does not covenant against revolution or unlawful force; judgment for the defendant. *Watkeys v. De Lancey*, 4 Doug. 354.

A, seised in fee, demises for a term to B; the indenture contains covenants for treating the lands in a husband-like manner, and imposes penalties upon the tenant for every rod of living fence and every tallow or tree which he should cut down or spoil during the term. The lessor dies, having devised the demised premises to the plaintiff in fee. The latter seeks to recover penalties for tellows, trees, and hedges, cut down and spoiled during the term:—Held, upon demurrer to pleas alleging that the tellows, trees, and hedges were cut down and spoiled in the lifetime of the lessor, that such pleas were a good answer to the alleged breaches; and that the devisee of the reversion could not recover the penalties. *Daubuz v. Rickman*, 3 Law J. (N.S.) C.P. 14.

## (F) PLEADINGS, EVIDENCE, DAMAGES, AND BREACH.

[See VARIANCE, Between Pleadings and Evidence; and see DAMAGES.]

Covenant, on a coal-lease, to pay a certain proportion of the value of nine hundred weight of the coals to be raised, unless prevented by unavoidable accident from working the pit. Plea, that the defendant was prevented by unavoidable accident. It appeared in evidence that the accident might have been remedied at a greater expense than the value of the coals to be raised:—Held, that the plaintiff was entitled to recover. *Morris v. Smith*, 3 Doug. 279.

Covenantor and covenantee submitted the amount of damages accruing from a breach of covenant to an arbitrator:—Held, that in action on the covenant, the arbitrator's award was conclusive as to the amount of damages, unless the award itself could be impeached. *Whithead v. Tattersall*, 1 Ad. & E. 491.

The plaintiffs, who were assignees of a lease containing a covenant not to carry on, or permit, or suffer to be carried on, a certain trade upon the demised premises, without the licence in writing of the lessor, &c., granted a sub-lease to the defendant, subject to the covenants of the original lease, and gave him a licence to follow a trade (alleged by the original lessor to be the prohibited trade) subject to a proviso, that such licence should not exempt the defendant from payment of rent in consequence of the interference of the original lessor. The heir of the original lessor brought ejectment for a forfeiture, by reason of a breach of this covenant, by carrying on the trade, pursuant to the licence, and the defendant suffered judgment by default. In an action of covenant by the plaintiffs, for non-payment of rent, the defendant pleaded the leave and licence by the plaintiffs to carry on the trade—that he entered the premises, and was using and carrying on the trade, when by reason, and on the ground that he so carried on the trade, and the forfeiture of the lease thereby, "one R C having good right and title to the said demised premises as eldest son and heir-at-law to M A" (the original lessor), before any part of the rent became due, brought an action of ejectment, and recovered judgment against the casual ejector, whereby, before any rent became due, the defendant was evicted:—Held, that this plea was bad, as it did not negative the leave and licence of the superior landlord in writing, and did not shew any sufficient title in him to enter and evict the defendant.

*Seemle*, that a replication to this plea, stating that the licence by the plaintiffs, in the plea mentioned, contained a proviso, and setting forth the licence, was good. *Simons v. Farren*, 4 Law J. (N.s.) C.P. 41; s. c. 1 Bing. N.C. 126; 1 Sc. 105.

In an action of covenant, by surviving covenantees of a joint and several covenant, against the executors of a surviving covenantor, a plea that one of the covenantees did not execute the deed, was held bad on demurrer; and it is no objection to the plaintiffs' recovering on such a covenant, that one of the covenantors was likewise a covenantee (he being dead)—a plea, therefore, stating that fact, was likewise held bad on demurrer. *Rose v. Poulton*, 1 Law J. (N.s.) K.B. 5, s. c. 2 B. & Ad. 822.

An annuity was granted to the plaintiff payable out of a moiety of certain mines, which moiety was conveyed to a trustee, with a power of sale in case of arrears for a certain time. By articles of agreement, the Earl of A agreed to grant to T G certain lands which were essential to the working of the mines, and which lands T G (T F, C B, and T G being entitled at that time to one-fourth part of and in the profits and produce of the mines) agreed to hold for the joint use and benefit of himself, G B, T F, and C B, as tenants in common. The moiety of the mines was afterwards conveyed by the plaintiff to T F, G B, and T G, with a several covenant, on their parts, to pay to the plaintiff a certain annuity out of the profits of the three-fourths share after payment of the rents, &c., with a power of entry to take the profits in case of the rent being in arrear, and a power of sale; and they also gave a several covenant not to do any act whereby the annuity might be in any way impeached:—Held, in an action to recover damages for the breach of that covenant, that it was not necessary to allege that there were any profits arising from the mines.—Held, secondly, that the taking of a lease by the covenantor, from the Earl of A of the lands mentioned in the articles of agreement, in trust for other persons, and not for the plaintiff, did not operate as a breach of the covenant not to do any act to impeach the annuity: that the lands, when so leased, were capable of being used for the working of the colliery: and that the covenantors could not have set up, that the lease differed from the articles; so that the security remained for which the plaintiffs contracted.—Held also, that an allegation that the covenantors had assigned those lands to a third person (*inter alia*), was an act by which the annuity was impeached, whatever might have been the case, had the declaration contained a positive averment that those lands were separated from the colliery.—Held also, that whether those lands and the colliery were separated or not, the covenantors were responsible, under their covenant for the payment of the annuity out of the profits in the hands of the assignee; and that the power of entry to take the profits and of sale might be put in force against the assignee. *Quere*, whether the covenant to pay the annuity is personal or runs with the land. *Pitt v. Williams*, 4 Law J. (N.s.) K.B. 131, s. c. 2 Ad. & E. 419; 4 N. & M. 412.

Defendant, captain of a ship, covenanted to promote the comfort of the passengers engaged by the plaintiff: plaintiff covenanted not to interfere with the navigation of the ship, and to defray the expense of putting into port if it should be necessary, for the convenience and at the request of plaintiff:—Held, that defendant was bound to put into port for the convenience and at the request and expense of the plaintiff, unless defendant could shew that putting in would be dangerous.—Held also, that a breach alleging refusal to promote the convenience of the passengers, and to put into port at plaintiff's request and expense, was sufficient after verdict. *Corbin v. Leader*, 10 Bing. 275, s. c. 3 M. & Sc. 751; 6 C. & P. 32.

In an action of covenant or debt for rent against executors, as assignees of a term of years, they are liable to so much of the rent reserved as the premises are really worth.

Where, therefore, the defendants in such case

pleaded that the premises were of much less value than the reserved rent of 26*l.*, that is to say, of no value whatever, and the plaintiff replied that they were of the value of 26*l.*, and the jury found that they were of the value of 20*l.*—it was held, that the substance of the plea was, that they were of no value; and that the substance of the replication was, they were not of the value of 26*l.* or any part thereof—that therefore, the plaintiff after verdict, although he had pleaded informally, was entitled to recover. *Ruberry v. Stevens*, 2 Law J. (n.s.) K.B. 46, a.c. 1 N. & M. 182; 4 B. & Ad. 241.

The declaration in covenant stated certain breaches on particular days, and also stated the death of the covenantor as happening on a particular day subsequent to some of the breaches. The plea alleged, that before any part of the debt became due, the covenantor died:—Held, that this was a traverse of the declaration, if the latter was to be taken as alleging the facts to have occurred on the days there stated; but that if the declaration did not mean that, it was insufficient. *Farley v. Briant*, 3 Law J. (n.s.) K.B. 246, a.c. 5 N. & M. 42, 57.

Declaration referred to a certain deed, by which the plaintiffs and another, deceased, advanced a sum of money to the defendants, upon the security of certain premises, which were to be reconveyed to the defendants upon the payment of the sum advanced upon an appointed day. It then alleged that, subsequent to the making of the indenture, one of the mortgagees died, and that neither in his lifetime, nor afterwards, did the defendants pay the money, nor any part thereof, at the time, nor in the manner required by the deed, and that the same, with interest, still remained due. Upon special demurrer, assigning for causes that it did not appear by the declaration at what time or in what manner the payment was appointed by the indenture, or whether the time, if appointed, happened in the lifetime or since the death of one of the mortgagees; and that the breach assigned varied from the covenant, inasmuch as it did not appear from the latter that any interest was payable:—Held, that the breach was in substance well laid, and that the demurrer could not be supported. *Tindasley v. Stephenson*, 3 Law J. (n.s.) C.P. 204, a.c. 10 Bing. 545; 4 M. & Sc. 442.

(G) WHERE ENFORCED OR RELIEVED AGAINST IN EQUITY.

Where land is conveyed in fee, by deed of feoffment, subject to perpetual ground-rent, and the feoffee covenants for himself, his heirs and assigns, with the feoffor, the owner of the adjoining lands, his heirs, executors, administrators, and assigns, not to use the land in a particular manner, with a view to the more ample enjoyment by the feoffor of such adjoining lands, and the subsequent acts of the feoffor, or of those claiming under him, have so altered the character and condition of the adjoining lands, that, with reference to the land conveyed, the restriction in the covenant ceases to be applicable according to the intent and spirit of the contract, a court of equity will not interpose to enforce the covenant, but will leave the parties to law.

Whether upon such a covenant there could be any remedy at law against the assigns of the covenantor, *quære*? *Duke of Bedford v. the Trustees of the British*

*Museum*, 2 Law J. (n.s.) Chanc. 129, a.c. 2 M. & K. 552.

A, having a leasehold estate on which he had covenanted to erect buildings within a certain time, bequeathed it and also his personal estate, subject as to the latter to the payment of his debts to trustees, for B for life, with several limitations over. A died before the time expired, leaving the covenant unperformed in part:—Held, that his general personal estate was liable to the performance of the covenant. *Marshall v. Holloway*, 5 Sim. 196.

COVENANT TO STAND SEISED.

[See SETTLEMENT, Marriage.]

CREDITORS.

Act to facilitate payment of, in Scotland. 2 Will. 4, c. 35; 10 Law J. Stat. 54.

Continuation of 54 Geo. 3, c. 137, for facilitating payment of, in Scotland. 4 & 5 Will. 4, c. 74; 12 Law J. Stat. 149.

CRIMINALS.

Abolition of the practice of hanging, in chains. 4 & 5 Will. 4, c. 26; 12 Law J. Stat. 43.

Explanation of 1 Will. 4, c. 70, as far as relates to the execution of, in Chester. 5 Will. 4, c. 1; 13 Law J. Stat. 1.

CRIMINAL INFORMATION.

[See INFORMATION—JUSTICES, Actions against.]

CROSS REMAINDERS.

Devise to a daughter of A for life, remainder to her children equally, to be divided between them share and share alike, as tenants in common, and not as joint tenants, and for want of such issue, to another daughter for life, remainder to her children, (in the same manner,) and for want of such issue to the husband of the first daughter in fee:—Held, that, under this devise, the children of A took estates for life, with cross-remainders between them for life. *Ashley v. Ashley*, 3 Law J. (n.s.) Chanc. 61, a.c. 6 Sim. 358.

CROWN.

Enemies' goods coming into this country may be seized for the use of the Crown. *Land v. Lord North*, 4 Doug. 266.

The Crown has no claim as against the surviving husband of an illegitimate woman. *Hawkins v. Hawkins*, 4 Law J. (n.s.) Chanc. 9.

CROWN LANDS.

[See EJECTMENT, Where maintainable.]

CROWN OFFICE.

[See INDICTMENT, Certificate of.]

## CRUELTY TO ANIMALS.

Consolidation and amendment of laws relating to. 5 & 6 Will. 4, c. 59; 13 Law J. Stat. 122.]

## CURATOR, INTERIM.

[See LUNATIC, Committee.]

## CURATE.

[See CLERGY.]

## CURRENCY.

After the repeal of a decree of confiscation of all debts due to British subjects, the debtor paid into the national treasury of the confiscating state, in the name of his British creditor, the amount of his debt, in the currency of the time, which, however, was very much depreciated since the date of his declaration of his debt, under the decree of confiscation:—Held, that the confiscating state having entered into a treaty to make compensation for all undue confiscations and sequestrations, was answerable for the debt in the currency at the time of the debtor's declaration, it not being a case between a debtor and creditor, but a reparation for a wrongful act by a wrong-doer. *Pilkington v. the Commissioners for Claims on France*, 2 Kn. 7.

Under the same treaty a British subject was held entitled to compensation for the difference between the real value of the money he paid in consequence of a forced loan, and of the depreciated currency in which he nominally received a full repayment of it. *Johnston's Case*, 2 Kn. 336.

## CURSITORS.

In Court of Chancery—Office of, abolished. 5 & 6 Will. 4, c. 82; 13 Law J. Stat. 175.

## CURTESY.

[See BARON AND FEME.]

## CUSTOM.

[See BELLMAN — BILL-BROKER — CHURCHWARDENS AND OVERSEERS, Rights and Duties—CORPORATION, Election of Officers and Members.]

A custom in a manor for the leet jury to break and destroy measures found by them to be false, is lawful.

In a plea of justification grounded on such custom, it is enough to say that the measures were found by the jury to be false, without alleging that they were so. A court-leet holden on the 28th of May, was adjourned after the jury had been sworn in, till the 15th of December, which day was given them to make their presentments:—Held, that an adjournment of such duration (which was admitted to be according to the custom of the manor), was not necessarily unreasonable. *Willcock v. Windsor*, 3 B. & Ad. 48.

A custom restraining "any artificer or handicraftsman, or other shopkeepers or traders by retail, free of the city, from employing, hiring, or

setting to work in any such handicraft or manual occupation, or in buying or selling, or in exposing to sale by retail, any wares or merchandises, within the said city or the liberties thereof," is a reasonable and good custom; and a bye-law imposing a penalty upon a freeman employing a foreigner contrary to the custom, is a valid bye-law. *Shaw v. Poynter*, 4 Law J. (N.S.) K.B. 16, s. c. 4 N. & M. 290.

A custom for all the inhabitants, for the time being of a particular parish, occupying messuages and lands within the parish, to take sand which had been drifted upon the plaintiff's close from the sea shore, is a bad custom. *Blewitt v. Tregonning*, 3 Law J. (N.S.) K.B. 223, s. c. 5 N. & M. 234; 3 Ad. & E. 554.

The statute 11 Geo. 4, & 1 Will. 4, c. 64, for permitting the general sale of beer by retail in England, does not supersede the custom of a borough, that no person shall carry on the trade of an ale-house keeper therein, who is not a burgess. *Mayor of Leicester v. Burgess*, 5 B. & Ad. 246, s. c. 2 N. & M. 131.

A custom for the jurors of a court-leet holden for a borough and manor, to present persons to be admitted burgesses of the borough, and for the persons so presented to be admitted and sworn in burgesses, was held, on motion in arrest of judgment, to be valid in law. *Rex v. the Duke of Beaufort*, 5 B. & Ad. 442, s. c. 2 N. & M. 315.

## CUSTOMS.

[See INFORMATION—REVENUE.]

## CUSTODY, DISCHARGING OUT OF.

[See PRISONER.]

## CUTTING AND MAIMING.

[See MALICIOUS INJURY.]

## DAMAGES.

[See COVENANT, Damages—DISTRESS—NEW TRIAL, Amount of Damages—WARRANTY.]

In trespass for meane profits after ejectment for the recovery of a house used as an inn, the plaintiff cannot recover the loss which he has sustained by the defendant shutting up the inn, and destroying the custom, unless the damage be specially stated in the declaration. *Dunn v. Large*, 3 Doug. 335.

In order to take a case out of the Statute of Limitations, a payment of 12s. as interest money was proved; this does not justify a verdict finding a debt of 13l. 16s. A verdict for nominal damages only could upon this evidence have been sustained—semble. *Leeson v. Smith*, 4 N. & M. 304.

The Court refused to increase the damages found by the jury to the amount of damages proved, and not contradicted or impeached at the trial. *Cann v. Facey*, 5 N. & M. 405.

In an action on a special contract for work done under the contract, and for work, labour, and materials generally, the defendant may give in evidence that the work has been done improperly, and not agreeably to contract, and the plaintiff in

that case will only be entitled to recover the real value of the work done, and the materials supplied. *Chapel v. Hickes*, 3 Law J. (N.A.) Exch. 38, s. c. 2 C. & M. 214.

In assumpsit, for non-delivery of linseed pursuant to a contract of sale, the plaintiffs proved that they had paid part of the purchase-money to the vendors in advance, which had not been returned, but had been paid into court, with interest up to the time when so paid in, as a condition for a commission to examine witnesses abroad, and was only received by plaintiffs a short time before trial:—Held, that in estimating the amount of damages, the plaintiffs were not entitled to take the price of linseed at the time of the trial; and that as the plaintiffs did not prove any special damage from the non-delivery of the seed, and the non-repayment of money, the verdict was not wrong, where the jury considered that the plaintiffs had been satisfied by the payment of the purchase-money, and simple interest upon it, and of the difference between the contract price and the price at the time stipulated for the delivery. *Startup v. Cortazzi*, 4 Law J. (N.A.) Exch. 218, s. c. 2 C. M. & R. 165.

In trover to recover the value of certain goods claimed by the defendant, and verdict for the plaintiff, the former will, upon motion, be allowed to reduce the damages by a certain sum to which the goods were liable, and for which a distress was levied upon them. *Plevin v. Henshall*, 2 Law J. (N.A.) C.P. 253, s. c. 10 Bing. 24; 3 M. & Sc. 403.

In an action for breach of covenant of title, the plaintiff is entitled to recover a sum paid to the person claiming, by way of compromise, as also the costs which he has incurred with his own attorney in settling it. *Smith v. Compton*, 1 Law J. (N.A.) K.B. 146, s. c. 3 B. & Ad. 407.

Assumpsit for necessities supplied to the defendant's wife. The writ was sued out in June, the declaration being in November, and the record dated in November:—Held, that the plaintiff might recover for things supplied up to the date of the record. *Joll v. Fisher*, 5 C. & P. 514. [Tindal]

In assumpsit the plea was, as to 20*l.* payment, and a set-off as to the residue. No evidence was given of the set-off, and payments to the amount of 12*l.* 12*s.* were proved:—Held, that the plaintiff could recover only 7*l.* 10*s.* as the part of the payment unproved; and 1*s.* for the residue: although the pleas were pleaded after particulars of demand, which claimed a large amount. *Cozhead v. Hutsh*, 7 C. & P. 63. [Parke]

Where special damage is alleged that C declined to deal with the plaintiff, because his bill was dishonoured, the letter which C received, announcing to him the dishonour of the bill, may be read in evidence to shew that he received such a letter, but is no proof of the statements contained in it.—Held, also, that C might be asked questions to shew, that other causes in addition to the letter induced him to cease to deal with the plaintiff; and that other witnesses might be asked, whether other bills of the plaintiff had been dishonoured, but that they could not be asked as to any particular bill without its being produced. *Whitaker v. the Bank of England*, 6 C. & P. 700. [Parke]

## DEAN, FOREST OF.

Extension of time for ascertainment of boundaries of, and of the rights and privileges of the free miners of St. Briavell's, &c. 3 & 4 Will. 4, c. 38; 11 Law J. Stat. 89.

Extension of the term of 1 & 2 Will. 4, c. 12, 4 & 5 Will. 4, c. 59; 12 Law J. Stat. 115.

## DEATH.

Abolition of punishment of, in certain cases. 2 Will. 4, c. 62; 10 Law J. Stat. 129.

Abolition of punishment of, in certain cases of forgery. 2 & 3 Will. 4, c. 123; 10 Law J. Stat. 317.

Abolition of punishment of death for breaking, and entering, and stealing in a dwelling-house. 3 & 4 Will. 4, c. 44; 11 Law J. Stat. 104.

Abolition of punishment of, in case of returning from transportation. 4 & 5 Will. 4, c. 67; 12 Law J. Stat. 140.

Abolition of punishment of, in cases of letter stealing and sacrilege. 5 & 6 Will. 4, c. 81; 13 Law J. Stat. 175.

Absence of a person abroad, without having been heard of for seven years, is presumptive evidence of such person's death, but is no evidence of the time of his death; and no presumption arises, that he died at the end of the seven years. Therefore, where the lessor of the plaintiff in ejectment brought in 1832, claimed, as grantee in reversion on the death of M K, and it appeared that M K sailed for America in 1807, and had not since been heard of:—It was held, that there was not sufficient evidence to shew that the ejectment was brought within twenty years from the time of the death of M K. *Doe d. Knight v. Nepean*, 2 Law J. (N.A.) K.B. 150, s. c. 2 N. & M. 219; 5 B. & Ad. 86.

## DEBT.

[See ASSUMPSIT, Pleadings and Evidence—WORK AND LABOUR.]

The mere drawing of a cheque in favour of another is not evidence of a debt. *Pearce v. Davis*, 1 Mo. & Ro. 365.

W died, leaving a will, but without disposing of certain bank notes which she was supposed to have had, and which were seen in the possession of A some few days before the testator took to her bed. Upon inquiry being made, after her decease, by the executor, A produced a packet of notes, saying at the same time, that "W had given them to her, about a fortnight before her death;" upon which the executor replied, that he would keep them,—(and some of the witnesses added) until A required them. In an action brought by A against the executor, to recover the value of the notes:—Held, that although the acquiescence by the defendant in the plaintiff's account of the matter, in itself amounted to very little, as he could know nothing about the matter, yet, accompanied with the fact, that the plaintiff had been in possession of the notes before the testatrix was taken ill—and her conduct upon the inquiry as to the notes made by the defendant—it was evidence to go to the jury



of plaintiff's title. *Hayship v. Gymer*, 3 Law J. (N.S.) K.B. 149, a. c. 1 Ad. & E. 162; 3 N. & M. 479.

A count, in the form of a count in debt, but alleging that the defendant "undertook and agreed" to pay the plaintiff as much as he reasonably deserved, &c. is a good count in debt.

The sum demanded at the commencement of a declaration in debt, and for the non-payment of which the breach is assigned, need not correspond with the aggregate amount of the sums demanded in the several counts. *Gardiner v. Bowman*, 3 Law J. (N.S.) Exch. 161, s. c. 4 Tyr. 412.

The Court will not set aside a final judgment by default, in an action of debt, by reason of no writ of inquiry having been executed, unless it appear clearly that the action was not for a sum certain. *Woolf v. Brown*, 1 Law J. (N.S.) Exch. 253, s. c. 2 C. & J. 672; 2 Tyr. 672.

A paper as follows:—"I hold of M T 37L, to put into a savings bank for her," signed and dated, is evidence of a legal debt of 37L from the party signing to M T, the money not having been put into a savings bank, but partly paid to the use of M T; and does not shew a mere trust; and M T may recover in debt, though parol evidence be given that the party signing had received the money to be applied, at his discretion, to the use of M T. *Remon v. Hayward*, 4 Law J. (N.S.) K.B. 64, s. c. 2 Ad. & E. 666.

A covenant to pay B 270l. on the 15th of December, with interest up to that time. He did not do so, and B brought an action of debt, laying his damages at 10l.:—Held, that he could not recover any more than the principal, the interest up to the 15th of December, and 10l. more, although the interest up to the time of the action amounted to a larger sum; and the Judge at the trial would not order the declaration to be amended, by inserting a larger sum than 10l. as damages. *Watkins v. Morgan*, 6 C. & P. 661. [Littledale]

[What are "good debts," see *Toulmin v. Copeland*—PARTNERSHIP.]

## DEBTOR AND CREDITOR.

[See ASSIGNMENT.]

### (A) CREDITOR.

(a) *Rights and Liabilities.*

(b) *Priority of Payment.*

### (B) COMPOSITION.

#### (A) CREDITOR.

(a) *Rights and Liabilities.*

[See PARTNER, Liabilities.]

To a creditor's bill, the defendants pleaded a decree obtained by other creditors in a prior suit. Plea overruled: the decree being less beneficial to the plaintiffs than they might obtain in their own suit. *Pickford v. Hunter*, 5 Sim. 122.

The eleventh section of 1 Will. 4, c. 47, extended to a case where the decree in the cause was made up prior to the Act. *Chapman v. Tenant*, 2 R. & M. 74.

The executor of a creditor, who is plaintiff in a creditor's suit, must take out a prerogative probate, before he obtains the usual decree for an account. *Young v. Elworthy*, 1 M. & K. 215.

A debtor conveyed certain of his estates to trustees, in trust to raise a fund for payment of his creditors named in a schedule, and to raise an annual sum for his own benefit. Several of the creditors executed the conveyance; but the trustees did not sell the estates, the creditors having received sums in or towards satisfaction of their debts, out of other estates conveyed by the debtor upon the same trusts. A judgment creditor, whose name was not mentioned in the schedule, filed his bill against the trustees of the first-mentioned estates, and the debtor stating as above, and that the trustees had entered into the receipt of the rents of those estates, the value of which greatly exceeded the scheduled debts, and praying that his debt might be raised and paid out of such parts of those estates as should not be sold for payment of the scheduled debts, and that an account might be taken of the receipts and payments of the trustees, and for a receiver, and an injunction to restrain the trustees from paying any part of the rents or produce of the estates to the debtor. The trustees demurred, because the scheduled creditors who had executed the conveyance, were not parties to the bill. Demurrer allowed. *Cocker v. Lord Egmont*, 6 Sim. 311.

A debtor executed a deed, by which, after reciting that he was owner of the lease of his house of business, and of the fixtures and stock in trade and furniture, he purported to assign the property to trustees, in trust for the benefit of creditors, parties to the deed; and the deed contained a general release from the creditors of all claims against the debtor. Certain creditors who had notice of the deed, and, after such notice, made use of a mortgage security, which had been previously given them by the debtor in respect of a debt due at the time of the execution of the deed, were not permitted to take advantage of the deed, after having claimed in opposition to it by asserting their title as mortgagees in respect of a debt prior to the execution of the trust deed. *Perret v. Latreille*, 3 Law J. (N.S.) Chanc. 121.

#### (b) *Priority of Payment.*

C brought an action against F in the Lord Mayor's Court, for the recovery of a debt, and issued an attachment against B, who had in his hands funds belonging to F; W filed a bill against C, B and F, claiming a lien on the funds, and obtained an injunction *ex parte* to restrain proceedings in the action: Whilst the injunction was in force, F became bankrupt:—Held, that though C might, but for the injunction, have sued out execution long before F became bankrupt, yet he was not entitled to be paid otherwise than ratably with the other creditors. *Ullock v. Barber*, 6 Sim. 300.

A and B were co-obligors in a bond to C; A dies, appointing B his executor, and C dies also, appointing executors. To secure a part of what was due upon the bond, B, on his own account, and as executor of A, executes a bond to the executors of C, in which bond D was joined with him as surety. B becomes a bankrupt; the executors of C prove under the commission and receive certain dividends. Afterwards D (B's surety) dies, and his widow and executrix pays out of D's estate, and out of her own monies, the greater part of what remained due upon

the bond; and an assignment is then made of the first bond to E, in trust, to pay what remained due to the executors of C, and what was due to the executrix of D, for what she had advanced out of her own monies, and the remainder to D's estate.

In a suit for the administration of A's estate, the executrix of C and E were declared entitled to rank in respect of the assignment and the payments made upon the first bond, as specialty creditors upon the estate.

Where two bonds are executed to secure a debt, the first by the principal debtor, the second by a third person as surety,—the surety, on paying the latter bond and taking an assignment of the first bond from the obligee, is entitled to stand as a specialty creditor against the estate of the principal debtor.

*Secus*—if he had been a co-obligor in the same bond, and paid it; he would then rank only as a simple contract creditor. *Hodgson v. Shaw*, 3 Law J. (n.s.) Chanc. 190, s. c. 3 M. & K. 183.

A specialty creditor by bond, under a decree for the administration of a testator's assets, established his claim before the Master, and afterwards obtained payment of his debt, in equal moieties, from the two sureties in the bond, one of whom was the executor of the principal debtor:—The executor only a simple contract creditor of the testator, in respect of the moiety which he had paid. *Tyler v. Lord Romney*, 3 Law J. (n.s.) Chanc. 131.

#### (B) COMPOSITION.

Upon a composition, the original debt revives upon failure of the debtor in performing his undertaking, or upon *bond fide* reviving the old debt. *Ex parte Brosbie*, 2 Mont. & A. 393.

When a creditor compounds with his debtor under a false impression, in which the debtor knowingly leaves him, as to the extent of the debtor's estate, the creditor is not estopped from suing for the balance of his debt. *Fine and another v. Mitchell*, 1 Mo. & R. 337 [Tindal].

One of several creditors, who accepts a composition from an executor, under a misrepresentation of the state of the assets of the debtor, is not prevented thereby from maintaining an action against the executor, for the residue of his demand. *Vickers v. Humphrey*, 2 Law J. (n.s.) Exch. 186.

Where a plea to a declaration on bills of exchange stated, that the plaintiffs, with the view of inducing and enabling the defendant to induce other creditors to accept a composition of one moiety of their debts, agreed to accept that composition upon their debts, and that the defendant, with their knowledge and assent, communicated their agreement to one other large creditor, who was lured and induced thereby to accept that composition, and had not since received payment of more than that composition:—it was held to be bad in arrest of judgment, because it did not shew that all, or at least the great body of the defendant's creditors, had come into the arrangement, and had assented to take the composition.

*Semble*—per Lord Abinger, C.B., that all the creditors must assent to take a composition, or the agreement will not be binding upon any one.

Assignment, in March 1821, of certain property

for benefit of creditors who should execute (without limiting a time). The attorney who prepared the deed and solicited signatures, was a creditor. The assignor died insolvent. The deed was taken out of his hands by a trustee in December 1822, and he never executed, nor applied to do so; but when the property was divisible in 1830, he claimed a benefit under the deed, as having acquiesced under it.—Held inadmissible; he not having done any unequivocal act of acquiescence, binding him to the terms of it. *Tapster v. Place*, 1 Law J. (n.s.) Chanc. 19.

The plaintiffs, with other creditors, entered into an agreement with the defendant, whereby he agreed to pay them a composition of 15s. in the pound, by two instalments; and a surety, in consideration of the creditors' discharging the defendant from all debts and demands, on receiving such 15s. in the pound, agreed to pay a sum of money, in part of the first instalment, and to accept a bill of exchange, drawn by the defendant, in part payment of the second; the creditors agreeing "to exonerate and discharge the defendant, on payment of the said 15s. in the pound." It was further agreed, that several bills of exchange, the amount of which was equal to the residue of the sum payable on the composition, before indorsed by the defendant and handed over to the plaintiffs, should "be considered as in part payment of the said 15s. in the pound":—Held, that the bills left in the hands of the plaintiffs were not, under the agreement, to be considered an absolute payment, but that the liability of the defendant thereon still continued. *Constable v. Andrew*, 3 Law J. (n.s.) Exch. 55, s. c. 2 C. & M. 298; 4 Tyr. 206.

The plaintiffs and other creditors of the defendants having agreed to accept a composition for their debts by notes payable at stipulated periods—upon an account being sent to them by the defendants, claimed a larger balance, but said they would arrange with the defendants, and do as the other creditors did. The other creditors received the composition, and signed a release; but the balance between the plaintiffs and defendants was not adjusted before the time stipulated for payment of the notes; and, the plaintiff's attorney having made a demand for the original debt, the defendants' attorney offered to pay the composition upon the balance claimed by the plaintiffs, but did not tender either cash or notes to that amount. The plaintiffs' attorney refused to accept less than the whole debt:—Held, that an actual tender was not necessary, and that the plaintiffs could only recover the amount of the composition on the balance. *Reay v. White*, 2 Law J. (n.s.) Exch. 229, s. c. 1 C. & M. 748; 3 Tyr. 596.

To prove the plea, the defendant put in the letter of one of the plaintiffs, wherein he agreed to accept the composition:—Held, that evidence of a previous conversation, in which he made inquiries respecting the conduct of the other creditors, was admissible to prove the motive which induced him to write the letter, and the object for which his consent was given. *Reay v. Richardson*, 4 Law J. (n.s.) Exch. 236, s. c. 2 C. M. & R. 422.

Certain creditors agreed, in writing, to take a composition of six shillings in the pound on their debts, to be secured by the joint notes of the debtor,

and a third person, the notes to be given within fourteen days, the creditors assenting thereto within that time.

Held, that the delivery of the notes to the creditors, within the fourteen days, was a condition to be performed by the debtor; failing which, the creditors were remitted to their original rights.

*Semble*—that the assent of the creditors who had not signed the agreement, would also have been necessary to render it binding on those who had. *Oughton v. Trotter*, 2 Law J. (N.S.) K.B. 185, s.c. 2 N. & M. 71.

If a party obtains the benefit of a trust-deed, executed by his creditor, and in it is contained a consideration, that he shall make a full disclosure of his property, but he conceals a portion of it, the creditors signing the deed may still proceed against him. *Wenham v. Fowle*, 3 Dowl. P.C. 48.

A, a creditor of a firm, held securities from one of its members for monies advanced by him, at different times, to the firm, but claimed a balance beyond what those securities would cover. All the creditors of the firm agreed to accept a composition "of 7s. for every 20s. due to the said creditors respectively." A was the first to sign this deed; but, added to his signature the words, "without prejudice to any securities whatever that I hold." The other creditors signed, in their respective order, under A's signature:—Held, that such a composition, thus accepted, did not affect the rights of A upon his previous securities, but only related to the balance beyond the sum they would cover, and that he might afterwards enforce securities in equity. *Duffy v. Orr*, 1 Cl. & F. 258, s.c. 5 Bligh, N.S. 620.

A advanced 100*l.* to B, on the joint and several promissory note of B and C, the latter at the time owing A 65*l.* on his own account; C failed, and, at a meeting of his creditors, A and others entered into a resolution, that C should assign certain property for the benefit of his creditors, and that his creditors should give him a release. A, at this meeting, stated his debt to be 65*l.*, and he afterwards received a dividend on that sum; subsequently to this B failed:—Held, that A could not then sue C on the promissory note. *Seager v. Billington*, 5 C. & P. 466. [Denman]

A, being a creditor of B, had executed a composition deed, in which it was stipulated, that the debt should be paid at 6*s.* in the pound by promissory notes. After executing this deed, A obtained payment from B in full:—Held, that B could not recover back the difference between the full amount, and 6*s.* in the pound, without proving that the composition notes had been paid, or giving some evidence that would be equivalent to such proof. *Ward v. Bird*, 5 C. & P. 229. [Parke]

The plaintiff and other creditors of the defendants signed resolutions for entering into a composition deed with the defendants, upon their property being assigned to trustees for the payment of the creditors. The defendants and their trustees having refused to allow the plaintiff to come in as a creditor under the deed,—Held, that he might sue the defendants, notwithstanding the execution of the resolutions. *Garrard v. Woolner*, 8 Bing. 258, s.c. 1 Mo. & Sc. 327.

## DECEIT.

[See FALSE REPRESENTATION.]

## DEED.

- (A) EXECUTION AND DELIVERY.
- (B) CONSTRUCTION AND OPERATION.
- (C) VALIDITY OF, AND WHERE SET ASIDE.
- (D) REGISTRATION.

### (A) EXECUTION AND DELIVERY.

A having received monies belonging to B privately, and without any communication with B, prepared and executed a mortgage to him for the amount. A retained the deed in his custody for twelve years, and then died insolvent. After his death, the deed was discovered in a chest containing his title-deeds:—Held, that the deed was not an escrow, there being no evidence to shew that it was executed conditionally; but that it took effect from its execution, and was good against A's creditors. *Exton v. Scott*, 6 Sim. 31.

*Semble*—that in *cujus rei testimonium* is no part of the deed, and that the execution of a counterpart by the defendant, in which it was alleged, that to one part of which said indenture the said trustees had affixed their hands and seals, would not estop the defendant from calling on the plaintiffs to prove that the lease was executed by the trustees.—Per Taunton, J. and Patteson, J. *Pearce v. Morris*, 4 Law J. (N.S.) K.B. 21, s.c. 2 Ad. & E. 84; 4 N. & M. 48.

### (B) CONSTRUCTION AND OPERATION.

[*Fausset v. Carpenter*, 2 D. & Cl. 232; 2 Law J. Dig. 97, s.c. 5 Bl. N.S. 76.]

By a recovery deed of 1816, W M, tenant in tail of the Cefn Coch estate, declared his intention to convey "the property thereafter particularly mentioned;" and then conveyed "all those, the capital mansion-house, messuage, or tenement, with the several out-offices, gardens, plantations, and hereditaments thereunto belonging, commonly called or known by the name of Cefn Coch, situate," &c.; and also eight fields, particularly named, "parts and parcels of the demesne land of Cefn Coch, together with all and singular houses, &c. lands, &c. hereditaments and appurtenances whatsoever, to the said capital messuage appertaining, &c. or therewith set, let," &c. The Cefn Coch estate consisted of the capital mansion-house, the eight fields, named in the recovery deed, and five other fields, containing in quantity about thirty-four acres, and also of two mills, called Melin Cefn Coch, and Pandi Cefn Coch, with the lands thereunto belonging. Melin Cefn Coch was surrounded by the five fields, and the lands belonging thereto consisted of about eleven acres. On the death of W M, T M took possession of the property not comprised in the recovery deed of 1816; and in 1824 conveyed "all that water-corn-mill, with the appurtenances, called Melin y Cefn Coch, and the lands thereunto belonging, &c., called or known by the name of Tyddyn y felyn Cefn Coch; and all that fulling-mill, with the appurtenances, commonly called by the name of Pandi Cefn Coch, &c.; and all those

five fields, closes, or parcels of land, or ground, part of Tyddyn y felin Cefn Coch aforesaid, situate, &c., containing by estimation thirty-four acres, or thereabouts:—Held, that the mansion-house and eight fields only passed by the deed of 1816, as the general words in that deed were limited and qualified by the particular description and enumeration; and that the other five fields, parcel of the estate of Cefn Coch, passed by the deed of 1824, under the description of "all those five fields," &c. *Doe d. Meyrick v. Meyrick*, 1 Law J. (N.S.) Exch. 73, s. c. 2 C. & J. 223; 2 Tyr. 178.

Where a deed demising certain property gives a clear specific description of the parcels by abutments, and in the outset describes the property as being in the occupation of A, whereas only a part was in his occupation, the specific description by abutments shall prevail, and the parcels shall not be limited by the additional inaccurate description of the occupation. *Doe d. Smith v. Galloway*, 2 Law J. (N.S.) K.B. 182, s. c. 5 B. & Ad. 43; 2 N. & M. 240.

By the recitals contained in a settlement, the intention of the settlor was plain that a son, then *in esse*, should only take absolutely in the event of his surviving both his parents, and also attaining twenty-one; by the subsequent limitations, an absolute interest vested in such son on his attaining twenty-one, though dying in the lifetime of one of such parents:—Held, that the intention must prevail, and that no vested interest passed under such limitations. *Law v. Davey*, 2 Law J. (N.S.) Chanc. 82.

A way not strictly appurtenant, will not pass under the words "together with all ways thereto belonging, or in anywise appertaining," unless it can be collected that the parties intended to use those words in a sense more extensive than their ordinary legal signification. *Barlow v. Rhodes*, 2 Law J. (N.S.) Exch. 91, s. c. 1 C. & M. 439; 3 Tyr. 280.

Land subject to a jointure rent-charge were sold with consent of the jointress, and part of the purchase-money invested in navy 5 per cent. stock to satisfy the jointure; and the jointress in the declaration of trust of that stock, agreed to accept the dividends on that stock "in full discharge or satisfaction of her jointure rent-charge."—Held, that this was a particular intention, which was to give way to the general intention expressed in other parts of the deed, that she should receive her jointure. *Arundell v. Arundell*, 2 Law J. (N.S.) Chanc. 77, s. c. 1 M. & K. 316.

Where, by a deed, were granted "all that iron-foundry, together with the said dwelling-houses and appurtenances thereto belonging, and the dwelling-houses and buildings erected thereon; and all and singular other the hereditaments, &c.: together with all gates, boilers, bells, and other fixtures *in and about the said dwelling-houses*, and the brewhouses thereto belonging;"—it was held, that the fixtures of the iron-foundry did not pass. *Hare v. Horton*, 3 Law J. (N.S.) K.B. 41, s. c. 5 B. & Ad. 715; 2 N. & M. 428.

Payment to trustees, of a sum of money, upon trust, during the life of J D H, or during such part thereof as the trustees should think proper, to pay the interest in such sums as they shall think proper, to J D H, or in procuring for him necessaries; but so that he should have no claim to the interest,

other than as the trustees should think fit, and so as that no creditor of J D H might have any claim thereon; and if he should marry and leave a widow, to pay the interest to her for her sole and separate use, and from her death the principal and all savings or accumulations of interest, to be in trust for their children at twenty-one, &c. J D H became bankrupt. His assignees held to be entitled to the interest during his life. *Snowdon v. Dales*, 3 Law J. (N.S.) Chanc. 188.

Where the words of a second deed are sufficient to pass the whole of the property conveyed by a former deed, and the intention to do so is clear, a mistake in describing the occupation will not vitiate. *Wilkinson v. Malin*, 1 Law J. (N.S.) Exch. 234, s. c. 2 C. & J. 636; 2 Tyr. 544.

B devised to his only son E for life, remainder to his issue in tail, remainder to B's two daughters, remainder to B's right heirs; the two daughters suffered recoveries to the use of E; and by an act of parliament reciting the will, the recoveries, and that E had no issue, trustees were empowered to sell the estates devised, and to lay out the purchase-money in the purchase of other estates to be settled to such of the uses in the will of B as should be existing undetermined or capable of taking effect at the time of the sale. The trustees sold, and with the purchase-money purchased an estate, which, by a conveyance reciting the will of B and the act, was conveyed to them to such of the uses in the will of B as were then existing undetermined and capable of taking effect:—Held, that, under the conveyance, the trustees took a fee. *Wortham v. Mackinnon*, 8 Bing. 564, s. c. 1 Mo. & Sc. 543.

Where the words of a release, executed according to the directions of an award, might extend to a matter the parties did not intend the arbitrators to adjudicate upon, and on which they did not adjudicate, the generality of the words will be restrained by the intention of the parties. *Upton v. Upton*, 1 Dowl. P.C. 400.

#### (C) VALIDITY OF, AND WHERE SET ASIDE.

[*Maccabe v. Hussey*, 2 D. & Cl. 440, s. c. 2 Law J. Dig. 98; s. c. 5 Bl. N.S. 715.]

#### (D) REGISTRATION.

[*Warburton v. Loveland*, 2 D. & Cl. 480, s. c. 2 Law J. Dig. 99; 6 Bl. N.S. 1.]

#### DEER STEALING.

On an indictment on 42 Geo. 3, c. 107, s. 1, though there must be some evidence to negative the owner's consent, the owner need not be called for the purpose; his non-consent may be inferred from other circumstances, or proved by his agents. *Rex v. Allen*, 1 R. & M. C.C. 154.

#### DEFAMATION.

[See ECCLESIASTICAL COURT.]

#### DE INJURIA.

[See ASSUMPSIT, Pleadings—PLEADING, Replication.]

## DELEGATES, COURT OF.

Powers of, transferred to the King in council.  
2 & 3 Will. 4, c. 92; 10 Law J. Stat. 246.

## DEMAND.

[See ACCORD AND SATISFACTION—BOND, Action on.]

## DEMURRER.

[See PRACTICE, Issuable Pleas—PRACTICE IN EQUITY—SCIRE FACIAS.]

(A) WHERE ALLOWED.

(B) FORM.

(C) PRACTICE.

(D) COSTS.

(A) WHERE ALLOWED.

[*Colclough v. Evans*, 2 Law J. Dig. 100, s. c. 4 Sim. 76.]

Demurrer by a witness to answering interrogatories, on the ground that he might subject himself to penalties, allowed. Such a demurrer may be allowed partially. A demurrer, by a witness, to two interrogatories was allowed as to one, and overruled as to the other. The Court gave the witness half the costs of the demurrer. *Davies v. Reid*, 5 Sim. 443.

Bill by a residuary legatee against executors. Demurrer for want of equity, on the ground that the bill did not allege that the testator died without revoking his will, or that the executors had proved the will. The demurrer was overruled, with liberty to the defendants to plead, and for the plaintiff to amend. *Blewitt v. Blewitt*, 1 Yo. 541.

Where a necessary party to a bill is living out of the jurisdiction of the Court, it is not sufficient merely to state that fact on the face of the bill, but process must be prayed against him when he shall come within the jurisdiction; such an omission is a good ground of demurrer. *Taylor v. Fisher*, 4 Law J. (n.s.) Chanc. 95.

If, in a bill of discovery in aid of an action at law, a party be made a co-plaintiff, who is not a party to the record at law, such bill is demurrable.

The Courts of this country take judicial cognizance of who are sovereigns of foreign states, by the recognized acts of this country; and any statements to the contrary on the face of a bill, are utterly immaterial, even on demurrer.

Whether the joinder of a co-defendant having no interest, is a ground of demurrer by another defendant—*quære*. *Glyn v. Soares*, 4 Law J. (n.s.) Chanc. 250, s. c. 3 M. & K. 450.

Devise of real estate to wife for life, with power to sell any part thereof to pay off incumbrances or repairs, and an annuity of 50*l*. charged on the real estate, to testator's daughter, to be paid from the time of attaining twenty-three. The daughter, being twenty-two, filed a bill for an account of the real and personal estate, not charging any breach of trust. A demurrer to the inquiries respecting the real estate, overruled. *Cowie v. Hodson*, 4 Law J. (n.s.) Chanc. 49.

(B) FORM.

The rule 2 Hil. term, 4 Will. 4, which requires the causes of demurrer to be stated in the margin, does not apply to a demurrer by the Attorney General at the suit of the Crown.

Demurrer delivered on behalf of the Crown must be signed by the Attorney General at the time of the delivery: otherwise it is irregular. *Res v. Woollett*, 4 Law J. (n.s.) Exch. 136, s. c. 2 C. M. & R. 256; 3 Dowl. P.C. 694.

A statement in the margin of a demurrer to a plea, that the matters disclosed in the plea contain no answer to the declaration—Held insufficient within the meaning of R. G. 2 Hil. term, 4 Will. 4. *Ross v. Robeson*, 3 Dowl. P.C. 779.

If the ground of demurrer stated, pursuant to 2 R. G. Hil. term, 4 Will. 4, (practice rules,) in the margin appears sufficient, the Court will not set the demurrer aside as frivolous. *Tyndal v. Ulleshorpe*, 3 Dowl. P.C. 2.

A declaration stated a promise to the plaintiff, and A B (now deceased) in his lifetime; and in a second count stated, that the defendant was indebted to the plaintiff and the said A B in his lifetime; but did not aver that he was deceased. The defendant, having demurred to the second count.—Held, that the demurrer was frivolous within the Rule 2, Hil. term, 4 Will. 4. *Undersell v. Fuller*, 1 C. M. & R. 900, s. c. 5 Tyr. 392.

A defendant, after having had time to plead, demurred to the declaration, which was in debt on a bill of exchange, with the common counts, in this form: "The defendant, by his attorney, says, that the declaration is not sufficient in law; and also that an action of debt will not lie, and that the bill should have been stated to be for value received."—Held, that the plaintiff was not justified in signing judgment as upon a sham demurrer. *Lyons v. Cohens*, 3 Dowl. P.C. 243.

(C) PRACTICE.

The defendant may demur specially after a general imparlance. *Finn v. Woodman*, 1 Law J. (n.s.) Exch. 132, s. c. 2 C. & J. 464; 2 Tyr. 492.

The general rule is, that a party who demurs, will not be allowed, after argument, to withdraw the demurrer and plead; and the Court will not make an exception to the rule, where it appears to them, that the decision upon the demurrer is just, according to the facts; or, *semble*, in any case without an affidavit of merits. *Bramah v. Baker*, 4 Law J. (n.s.) C.P. 81, s. c. 1 Bing. N.C. 481; 1 Sc. 364.

Where a defendant, after his time for pleading has expired, delivers a general demurrer, obviously for delay, the Court will grant a *consilium* on the morning of the last day of term, for argument at the rising of the Court. *Wilson v. Tucker*, 2 Law J. (n.s.) Exch. 286, s. c. 1 C. & M. 795; 3 Tyr. 938; 2 Dowl. P.C. 83.

A demurrer to a declaration on a promissory note, on the ground that it does not appear that the note is expressed to be for value received, will not be set aside for irregularity, under Reg. Gen., Hil. term, 4 Will. 4, 2, by reason of the statement of the matter of law intended to be argued being frivolous. *Cresswell v. Crisp*, 3 Law J. (n.s.) Exch. 184, s. c. 2 C. & M. 634.

If it be alleged by affidavit that a party has made default in delivering a demurrer book in time, and it appear that both parties have delivered demurrer books to the same Judges,—in order to entitle one party to insist on the costs being paid or deposited with the clerk of the rules, before the adverse party can be heard, pursuant to rule 14, Hil. term, 4 Will. 4, the adverse party must have notice and an opportunity of answering the affidavit. *Sandal v. Bennett*, 4 Law J. (n.s.) K.B. 8, s. c. 2 Ad. & E. 204; 4 N. & M. 89.

The Court refused, at the instance of the plaintiff, to allow a demurrer to be struck out of the paper, on the ground that, since it had been set down, the defendant had become bankrupt, and his assignees refused to take up the defence, or to give security for costs. *Flight v. Glossop*, 2 Sc. 224.

A plea having been demurred to, because it was dated 1832 instead of 1833, the Court ordered the demurrer to be set aside, with costs. *Neal v. Richardson*, 2 Dowl. P.C. 89.

Where a demurrer is frivolous, and a motion is made to set it aside, the Court will grant a rule for that purpose to be absolute, unless cause is shewn on a particular day. *Kinsear v. Keane*, 3 Dowl. P.C. 155.

Proposed rules as to demurrers not intended for argument. See *Harvey v. King*, 3 Dowl. P.C. 780.

Where the defendant has neglected to deliver his demurrer books, and does not appear at the argument to support his pleadings, but has offered to give a cognovit, the Court will not give judgment for the plaintiff, without requiring the delivery of the defendant's demurrer books. *Scott v. Robson*, 2 C. M. & R. 29.

Where a defendant pleaded a frivolous demurrer, so late in the term that there was not sufficient time to set it down for argument, and a motion was made to set it aside, the Court would only let the defendant in to plead on an affidavit of merits, pleading instant, and paying the costs of the demurrer and the application. *Underhill v. Hurney*, 3 Dowl. P.C. 495.

A rule obtained on R. G. Hil. term, 4 Wil. 4, No. 2, for setting aside a demurrer as frivolous, must be drawn up on reading the pleadings demurred to, with the demurrer and marginal statement, or will be discharged. *Howarth v. Hubbersty*, 5 Tyr. 391.

If one party neglects to deliver his demurrer books to the Judge, the other party should do so for him, and then he will be entitled to judgment; but otherwise the case will be struck out. *Abraham v. Cook*, 3 Dowl. P.C. 215.

If a general demurrer is overruled, but leave is given to amend, and the bill is amended by adding a party merely, the defendant may, nevertheless, put in a general demurrer to the amended bill. *Boanquet v. Marsham*, 4 Sim. 573.

Defendant, on the expiration of his time for answering, lodged a petition at the Rolls for further time, and gave notice of his having so done to the plaintiff's clerk in court. Afterwards, without revoking the notice, he filed a demurrer:—Ordered, that the demurrer should be taken off the file. *Murray v. Cauty*, 5 Sim. 230.

If, on demurrer *ore tenus* for want of parties, the plaintiff wishes to have permission to amend his

bill more extensively than by merely adding parties, he must pay the costs of the demurrer. *Newton v. Earl of Egmout*, 4 Sim. 574.

If a demurrer accompanied by an answer is overruled, the Court does not grant leave to amend the bill, before the exceptions have been taken to the answer. *Cowie v. Hodson*, 4 Law J. (n.s.) Chanc. 49.

#### (D) COSTS.

Plaintiff or defendant obtaining judgment upon demurrer, shall have judgment also for his costs. See 3 & 4 Will. 4, c. 42; 11 Law J. Stat. 98.

By the practice of the Exchequer, where a general demurrer to the whole bill is allowed, and liberty is given to amend the bill on payment of costs, the plaintiff only pays the costs of the demurrer and of amending the defendant's copy of the bill, and not the costs of the suit, as in Chancery. *Bond v. Northover*, 4 Law J. (n.s.) Exch. Eq. 60, s. c. 1 Y. & C. 221.

If a party seeks to make his opponent pay the costs of copies of demurrer books, pursuant to 7 R. G., Hil. term, 4 Will. 4, he must deliver them on the day after the time for his opponent's delivering them expires. *Fisher v. Snow*, 3 Dowl. P.C. 27.

No costs allowed for appearing to support a demurrer, which has been entered in the paper before joinder, and without delivering demurrer books to the Judges. *Howarth v. Hubbersty*, 5 Tyr. 391.

Where, on argument, a demurrer is allowed on a ground not stated on the record, but urged *ore tenus*, the defendant does not obtain costs. *Taylor v. Fisher*, 4 Law J. (n.s.) Chanc. 95.

#### DEODAND.

[See SHERIFF.]

#### DEPOSIT.

[See DOCUMENTS—INTEREST—MORTGAGE.]

Money deposited with a third party to abide the result of an arbitration, which subsequently became impossible, by the death of one of the arbitrators, before the arbitration was commenced, and no proceeding afterwards taken,—ordered to be returned to the party who made the deposit. *Royle v. Williams*, 4 Law J. (n.s.) Chanc. 113.

#### DEPOSITIONS.

[See EVIDENCE.]

Publication of. See PRACTICE IN EQUITY.

#### DETERMINATION OF SUIT.

[See PRACTICE, Common Law, and In Equity.]

#### DETINUE.

[See PRINCIPAL AND AGENT.]

In detinue the plaintiff must shew a right to have the goods delivered to him. One of several defendants may pray that the plaintiffs and the other defendants shall interplead. *Land v. Lord North*, 4 Doug. 266.

In an action of detinue for deeds, the Court will, on the delivering up of a portion of them, either stay proceedings, or put the plaintiff under terms, if he insists on proceeding, in order to prevent his obtaining an undue advantage. *Phillips v. Hayward*, 3 Dowl. P.C. 362.

If in an action of detinue against an attorney for not delivering up papers to his client after his bill has been paid, the defendant plead *non detinet*, the plaintiff must prove that the papers were in the defendant's possession; but evidence that they were produced by his agent before the Master, on the taxation of his bill, is sufficient proof of his possession.

If a defendant, in an action of detinue for papers, set up as a defence, that he delivered up the papers to K, in pursuance of a notice from the plaintiff's attorney to that effect, the plaintiff's counsel may call K, as a witness in reply, to prove that he received the papers in another right, and not on behalf of the plaintiff; and K is a competent witness to prove that he has a lien on the papers as against the defendant.

If A has employed B as his attorney, and has paid his bill, A has a right to have his papers delivered up to him; and it is no defence to an action of detinue brought by A against B, for B to shew that his London agent detains the papers, he having a lien on them as against B for a balance of account for business done.

In an action of detinue for papers, the jury must find the value of each paper separately; and it is the duty of the plaintiff to prove the value of the articles he sues for. *Anderson v. Pashman*, 7 C. & P. 193. [Coleridge]

A plea in detinue traversing the delivery, is bad. *Walker v. Jones*, 3 Law J. (N.S.) Exch. 208, s.c. 2 C. & M. 672; 4 Tyr. 915.

#### DEVIATION.

[See INSURANCE.]

#### DEVISE.

[See CROSS REMAINDERS—EVIDENCE, PAROL and Secondary—POWER—HEIR.]

- (A) CONSTRUCTION OF, IN GENERAL.
- (B) OF THE DEVISEE.
- (C) WHAT PROPERTY PASSES.
- (D) WHAT INTEREST VESTS.
- (E) ESTATES IN FEE.
- (F) ESTATES IN TAIL.
- (G) ESTATES FOR LIFE.
- (H) ESTATES PUR AUTRE VIE.
- (I) COPYHOLD ESTATES.
- (K) JOINT TENANTS AND TENANCY IN COMMON.
- (L) CONDITIONAL AND CONTINGENT DEVISES, AND LIMITATIONS OVER.
- (M) EXECUTORY DEVISES.
- (N) DEVISES FOR PAYMENT OF DEBTS.
- (O) DEVISES TO SEPARATE USE.
- (P) DEVISES TENDING TO PERPETUITY.
- (Q) LAPSED OR VOID.
- (R) REVOCATION.

#### (A) CONSTRUCTION OF, IN GENERAL.

The supposed rule, that, in construing a will, the particular intent must give way to the general intent, is only to be applied to cases falling within the rule in *Shelley's case*.

*Semble*, that the rule is better expressed, by saying, that that construction will be put upon a will which gives effect to the greatest part of it.

Devise to trustees in trust, as to part, to permit the eldest son to receive the profits for his life; and, as to the other parts, to permit the daughters to receive the profits for life, and during the lives of the children, to preserve contingent remainders. And, after the decease of any or either of the children, the estate so limited for life was devised unto all and every his, her, or their child or children living at the time of his, her, or their parents' decease, or born in due time afterwards, for their lives, as tenants in common, but nevertheless, with an equal benefit of survivorship among the rest of the said children, if more than one; and if any of them should die without leaving issue, the child or children of each of the said son and daughters taking the rents of his, her, or their parents' estate only.

And from and after the decease of all the children of each of the said sons and daughters without issue, the estates were devised unto and among all and every the lawful issue of such child or children, during their lives, as tenants in common, and to descend in like manner to the issue of the said sons and daughters respectively, so long as there should be any stock or offspring remaining.

And, for default or in failure of issue of any of the said sons and daughters, the estates so limited to them dying without issue were devised unto the survivors of the said sons and daughters during their respective lives, in equal shares, as tenants in common with such benefit of survivorship as aforesaid; and, after the decease of all them, to the issue of such children, in like manner as the previous devise, of the original devise to each of them. And, for default or in failure of issue of all the children except one, all the estates were devised to that survivor in fee:—Held, that the eldest son did not take an estate tail in possession, but an estate for life only; but that his children took several estates tail in undivided shares, as tenants in common. *Dee d. Gallini v. Gallini*, 3 Law J. (N.S.) K.B. 71, s.c. 5 B. & Ad. 621; 2 N. & M. 619; s.c. (in error) 4 Law J. (N.S.) Exch. 87; 3 Ad. & E. 349.

The Court will not raise an implication to bequeath property, unless there are words of gift, or a manifest intention. *Davis v. Davis*, 1 Law J. (N.S.) Chanc. 164.

Where a devise in a will is clear and express by itself, the subsequent parts of the will cannot be looked at for the purpose of creating a doubt on what is clear and plain in itself, but it is to be construed so that it may stand with the express devise in the former part of the will.

Devise of real and personal estate to trustees, in trust to pay the interest and yearly produce to A for life, and after her death to convey the same to all and every the child and children of A, and their heirs, as tenants in common, and not as joint tenants; but in case A shall happen to die without leaving any child or children, or issue of such child

or children, and on failure thereof, then over:—Held, that A took a life estate, and the children the remainder in fee, with an executory devise over, in case of the death of A without children or issue of children. *Coltman v. Blankley*, 2 Law J. (N.s.) Chanc. 102.

Devise of real estate and trust monies to the children of S, who should live to attain twenty-one, and the issue of such as should die under age, and their respective heirs, executors, &c. as tenants in common; and if there should be no child of S, who should live to attain twenty-one, [or dying without leaving issue,] or dying under that age, should not leave such issue, [or such issue dying under age as aforesaid,] then over: S had one child who attained twenty-one, and died without issue:—Held, that the devise over did not take effect, the words within brackets being insensible, and therefore rejected. *Lynn v. Osborne*, 3 Law J. (N.s.) Chanc. 233.

The testator, seized of certain lands in tail male, with remainders over, and the ultimate reversion in fee in himself, made his will; and after making certain bequests to his daughters, devised all his real estates whatsoever and wheresoever, over which he had any disposing power, to trustees, to uses, and upon trusts for certain terms, for the payment of debts, annuities, and carrying into effect various other family arrangements:—Held, that testator's reversion in fee in the lands in question passed under this devise to the devisee; inasmuch as the words of the devise were sufficient to include such reversion, and no intention to exclude it was expressed in, or necessarily to be implied from any other part of the will. *Mostyn v. Champneys*, 4 Law J. (N.s.) C.P. 55, a. c. 1 Bing. N.C. 341; 1 Sc. 293.

A testator directs his trustees, of whom his wife was one, to permit his wife to receive the rents and profits of his real estates, and thereout in the first place to retain to herself an annuity of 400*l.* a year, and to pay annuities of 100*l.* a year to each of his daughters:—Held, that these words do not give a priority to the wife in respect of her annuity over the daughters. *Jenkins v. Briant*, 3 Law J. (N.s.) Chanc. 169.

Lands were devised, to the use, among others, that M A F should take, from and out of the same premises, an annuity or yearly rent-charge of 500*l.* a year, to be paid clear of all taxes and deductions, remainder to S for life, subject to the annuity:—Held, that the annuity was to be paid clear of legacy duty, and was a charge upon the land; and, consequently, that S, who had entered into possession under the devise to him, and been compelled to pay the legacy duty on the annuity, pursuant to 45 Geo. 3, c. 28, s. 5, could not recover it again from the annuitant. *Stow v. Davenport*, 5 B. & Ad. 359, s. c. 2 N. & M. 305.

Bequest in trust for A for life; and, at her death, the principal to be paid "to such children or representatives of children as she might leave; and if she should leave no children or representatives of children, then over:—Held, that "representatives of children" meant descendants. *Herbert v. Forbes*, 1 Law J. (N.s.) Chanc. 118.

Testator devised to E W for life, and after her decease to J C or his male heir; remainder to "the first male heir of the branch of his uncle R C's family, paying to the daughters of R C, which should

be then living, 100*l.* at the time of taking possession of the estate."

At the time of the devise, and of testator's death in 1787, his uncle R C was dead, leaving five daughters and children of each, with whom testator was acquainted. The first daughter died in 1799, leaving a daughter, who had a son born in 1795.

The second died in November 1820, leaving a son, born in 1770. The third died in 1813, leaving a son, born in 1773. The fourth died in 1806, leaving a son, born in 1768. The fifth, alive in 1822, had a son, then alive, born in 1772. J C died without issue in 1808, and E W in July 1820:—Held, by Taunton, J. and Bosanquet, J., that, upon her death, the son of R C's eldest daughter's daughter took under the above devise: by Bayley, J., the son of his second daughter: by Littledale, J., the son of the fourth daughter; and by Tindal, C. J., that the devise was void for uncertainty. *Doe d. Winter v. Perrott*, 10 Bing. 198, a. c. 3 Mo. & Sc. 586.

The testator devised to trustees, in trust, as to one-fourth part of his estate, that they should pay or permit and suffer his wife to have and receive the clear yearly rents and profits thereof, for and during the term of her natural life. The will contained a similar devise to the trustees, as to his two daughters; the several parts and shares of the wife and daughters to be for their sole and separate uses whilst under coverture, and to be paid into their own hands. As to the other fourth part, a similar devise to the trustees to permit and suffer his son to receive the clear yearly rents and profits during his life. The trustees were also, out of the rents and profits, to pay taxes, and keep the premises in repair, to let, &c. for the best improved rents for seven years, and to retain their own expenses:—Held, in an action of covenant, that the entire estate was vested in the trustees, and that one-fourth was not executed in the son, the *cestui que trust*.—Held, also, where the testator directed, that upon the death or refusal to act of one trustee, another should be appointed; and where, upon the death of one, the surviving trustees conveyed the estate to the defendant by a deed of lease and release, to which the *cestuis que trust* were parties, to hold to himself and heirs, not jointly with the co-trustee, that the legal estate passed by such conveyance to the defendant. *White v. Parker*, 4 Law J. (N.s.) C.P. 178, a. c. 1 Bing. N.C. 573; 1 Sc. 542.

D D, by his will, gave to trustees 6,000*l.* upon trust, if his daughter J (a minor) married without consent, to apply the income in such manner as they should think fit, for the benefit of her and her children; and to apply the principal or any part thereof in such manner, for the benefit of his said daughter, and such husband, and their children, or any of them respectively, as the trustees should in their discretion think fit. Bequest also of the testator's share of the profits of the partnership he was engaged in, accruing during a certain period, to his trustees, in trust for his daughters (including J), equally, share and share alike, as tenants in common, but to and upon the like provisos, &c., as the 6,000*l.* Bequest also to the trustees of residue in similar terms. J married under age, without consent; and the trustees applied a part of the interest to her benefit, but not the whole, and made no set-



tlement as to the principal. The daughter, after marriage, attained twenty-one and died; then her child died; and the husband administered to both.—Held, that there was no gift which gave the daughter any greater interest than the trustees in their discretion should think fit; and as they had exercised none as to the principal of the fund, no part vested in the wife, her child, or her husband as representing them:—That the husband was entitled to the interest of each part of the fund, during his wife's life; but the principal of 6,000*l.*, and of the partnership profits, fell into the residue; and as to the residue, he was entitled to the interest of it during his wife's life; and the principal of that share of residue was undisposed of, and would go to the next-of-kin, of whom J, the daughter, being one, her husband and administrator would take her share. *Connell v. Masson*, 1 Law J. (N.S.) Chanc. 140.

#### (B) OF THE DEVISEE.

The testator devised as follows—"I give and devise to my right and lawful heir-at-law (for the better finding out of whom I direct advertisements to be published, &c.) his heirs, executors, &c. all my manors for ever, subject to, and chargeable with, the payment of my just debts, funeral charges, bonds, annuities," &c. He then gave legacies to his friends, servants, and provided for his relations on the side of his father's mother, and added—"But should it so happen that no heir-at-law is found, I then and hereby constitute and appoint W L my lawful heir, on condition that he change his name to S, and I give him the estates, manors, &c., subject to, and chargeable nevertheless with, the legacies, annuities, &c. before mentioned:"—Held, that the general words used by the testator were cut down and restricted, and were consequently applicable to an heir of the blood of S. *Davies v. Lowndes*, 4 Law J. (N.S.) C.P. 214, a.c. 1 Bing. N.C. 597, 620; 2 Sc. 71, 78.

A man devised copyhold lands to his widow for life, remainder to his nephew and his nephew's wife, for life, remainder to the daughter of his said nephew, for life, to revert to his next male heirs for ever:—Held, that on the determination of the estates for life, the next customary heir male of the body was entitled to the estate in remainder, and not the general common-law heir, who was a male, but the descendant of a female. *Doe d. Eustace v. Easley*, 4 Law J. (N.S.) Exch. 87, a.c. 1 C. M. & R. 823; 5 Tyr. 450.

#### (C) WHAT PROPERTY PASSES.

Devise "of all my tenements, &c., situate at, in, or near Snigg Hill, which I lately bought of the Duke of Norfolk or his trustees." Testator had four houses within twenty yards of Snigg Hill, between which and Snigg Hill, there were no houses, and two houses about three hundred and ninety yards off Snigg Hill all bought of the Duke of Norfolk or his trustee. The land-tax of all these houses was likewise redeemed for one consideration, and by one and the same contract:—Held, that the four houses only passed, and not the other two. For where there is some land, whereof all the demonstrations in a will are true, and some whereof part are true and part are false, those whereof all are true shall pass, but the latter not. *Doe d. Ash-*

*forth v. Bowyer*, 1 Law J. (N.S.) K.B. 156, a.c. 3 B. & Ad. 453.

Devise of all lands situate in Leverington. It appeared that the parish of Leverington included a hamlet called Leverington Parson Drove, and that the testator had lands situate in Leverington Parson Drove:—Held, that the land so situate passed under the will, although the testator himself, in his will, described himself as of Leverington, and one of the trustees, in his will, as of Leverington Parson Drove. *Doe d. Edwards v. Johnson*, 4 Law J. (N.S.) K.B. 242, a.c. 5 N. & M. 281.

"Purchased," in a devise of land, if unexplained by other parts of the will, may be taken in its extended legal signification, as including lands acquired in any other way than by descent.

Therefore, lands acquired by exchange for part of the family property which was to go to another person, held to pass under a devise of "all lands which I have purchased." *Doe d. Meyrick v. Meyrick*, 2 Law J. (N.S.) Exch. 259, a.c. 1 C. & M. 820; 3 Tyr. 916.

In a devise, the words, "all my real and personal estate" will pass estates held by the testator as a trustee. *Baring v. Booth*, 1 Law J. (N.S.) Chanc. 204.

A testator devises freehold and copyhold at A, and elsewhere, to his son in fee upon attaining twenty-one;—but if he die under age and without issue, then to trustees, in trust to sell, and to pay the widow half the proceeds, and to apply the other half for daughter, same as 4,000*l.* (post). He then gives his personal estate to trustees; as to 4,000*l.*—dividends to daughter for life, independent, and principal for her children; and all the residue of his estates, real and personal, to his said son, absolutely, upon attaining twenty-one. And if his son or daughter should die under age and without issue, survivor to take deceased's portion, real and personal, as deceased would, and as if specifically devised to survivor, his or her heirs, executors, &c. and in same manner, and upon same trusts, as before mentioned concerning same:—Held, that the residuary clause did not supersede the first devise, nor did the clause of survivorship affect the devise over to the trustees; therefore, such devise in trust took effect; and that the daughter and her children took the son's interest in the personality, in the same manner as the 4,000*l.* *Blankley v. Cromwell*, 1 Law J. (N.S.) Chanc. 21.

A testator devised his messuages or tenements, with their appurtenances at A, in conjunction with other freehold estates specifically described, and "also all other my freehold messuages, lands, tenements, and hereditaments, with their rights, members, and appurtenances," to certain trustees, their heirs and assigns, to certain uses, which uses were applicable only to real estates. The testator's property at A consisted of houses partly freehold and partly leasehold; the leasehold parts being originally distinct from the freehold, but afterwards so united as to make together only one tenement, and these premises were used for carrying on business, and the only entrance to the leasehold parts of the property was through the freehold houses:—Held, that on principle as well as upon the presumed intention of the testator, the leaseholds passed by the devise. *Hobson v. Blackburn*, 2 Law J. (N.S.) Chanc. 168, a.c. 1 M. & K. 571.

A mortgagee in fee of certain lands and farm-houses, makes his will, and devises his messuages, dwelling-houses, buildings, chattels real, ready money, securities for money, debts to him owing, and personal estate of any nature or kind whatever, to trustees, their heirs, executors, administrators, and assigns, upon certain trusts:—Held, that by such devise the legal estate in the lands of which the testator was mortgagee, passed to the trustees. *Mather v. Thomas*, 2 Law J. (N.S.) C.P. 234, a. c. 10 Bing. 44; 3 Mo. & Sc. 684.

Testator being seised of freehold lands, and possessed of leasehold lands, for the remainder of a term of 1000 years, devised "all his manors, advowson, donation, rights of patronage and presentation, and all his several lands, tenements, and hereditaments, whatsoever, whereof he was seised of, interested in, or entitled to," &c.:—Held, that, under this devise, the leasehold did not pass. *Pistol d. Randal v. Richardson*, 3 Doug. 361.

#### (D) WHAT INTEREST VESTS.

A bequest to certain persons, during their lives, and in case of the death of any, without legitimate issue, their proportion to be divided equally amongst the survivors:—Held, not to give an absolute interest; the words construed to mean, failure of issue living at the death of the legatees. *Ranelagh v. Ranelagh*, 1 Law J. (N.S.) Chanc. 188, a. c. 2 M. & K. 441.

Devise to testator's children and their lawful issue in tail general, with benefit of survivorship among the issue as tenants in common:—Held, that the children took estates for life, and the grandchildren contingent remainders in tail general, it appearing from the whole will, that the testator had used the word "issue of children" as synonymous with sons or daughters of children. *Cursham v. Newland*, 2 Bing. N.C. 58, a. c. 2 Sc. 105.

Devise of estates to trustees, upon trust to stand possessed thereof until A B attains the age of twenty-four years, and then to convey same to him upon his giving security to the satisfaction of the trustees, for the payment of annuities, &c. charged on that estate by the will:—Held, that this is a condition precedent, and that A B takes nothing until he attains twenty-four, and gives the required security; and that the interim rents between the death of the testator and the time when A B attains twenty-four, belong to and descend upon the heir-at-law, there being no clause for accumulating them.

Devise of estate to trustees, upon trust to convey to C D when and so soon as he attains twenty-one; but, in case he shall die under twenty-one without leaving issue, then the estate to fall into the residue:—Held, that C D took a vested estate on the death of the testator, and was, therefore, entitled to the rents and profits between the time of the death of the testator and the time when he attained twenty-one. *Phillips v. Williams*, 1 Law J. (N.S.) Chanc. 96, a. c. 5 Sim. 44.

Residuary bequest to James, John, David, and Frances, equally, to be paid, assigned, &c. at their respective ages of twenty-one; and if Frances should marry, the executors should settle at least three-fourths of her income on her for life, with remainder to her children. Frances attained twenty-one unmarried:—Held, that she took a vested interest in

the whole share absolutely at twenty-one, she not having married before that time. *Lumsden v. Shaw*, 1 Law J. (N.S.) Chanc. 115.

Devise of lands to several for their lives and the life of the survivor, and after the decease of all of them "to the male heir-at-law of me, the said (testator,) his heirs and assigns for ever":—Held, that this was a remainder vested in the person who filled the character of heir male of the testator at the time of his death, and was not a remainder contingent on the question of who might be the heir male of the testator, on the expiration of the estates for life. *Doe d. Pilkington v. Spratt*, 3 Law J. (N.S.) K.B. 53, a. c. 5 B. & Ad. 731; 2 N. & M. 524.

Devise of leaseholds to testator's daughter for life, remainder to her two sons for life; and, in case she should not have a son or sons to attain the age of twenty-one, and of such sons dying without lawful issue, then to her daughters, their executors, administrators and assigns, and if such daughters should die without issue, remainder over; all the residue of testator's estate to his daughter:—Held, that the testator's daughter took an estate for life in the leaseholds, with remainder to her two sons for life, with the ultimate remainder on certain contingencies to herself. *Bradshaw v. Skilbeck*, 2 Bing. N.C. 182, a. c. 2 Sc. 294.

#### (E) ESTATES IN FEE.

[See *ante*, Construction in general.]

A devises a house, &c. "to B, his heirs and assigns, for ever, with the intention, that he may enjoy the same during his life, and by his will dispose of the same as he thinks proper." B takes an estate in fee, and not an estate for life, with a testamentary power of appointment. *Doe d. Herbert v. Lewis*, 4 N. & M. 696, a. c. 3 Ad. & E. 123.

Devise to N H and H, and the survivors and survivor, and heirs of survivor, upon trust to the use of testator's nephews and their assigns during their lives and the life of the longest liver, and after determination of those estates by forfeiture or otherwise, upon trust to preserve uses, but to suffer the nephews to take the rents for their own use, and after the decease of the nephews, to the use of their children, and if only one child, to such child and his heirs, but if there should be no child, or if there being children, such children should die in the lifetime of the nephews without issue, then to N H and H, and their heirs, upon the like trusts as directed with respect to testator's residuary estate:—Held, that N H and H took an estate in fee. *Cursham v. Newland*, 2 Bing. N.C. 64, a. c. 2 Sc. 113.

A made a will, containing these words:—"I leave and bequeath unto the said William George Lester all the property, freehold, leasehold, and of whatever description I am possessed of or have claim to:"—Held, that that was a bequest of all A's estate, whatever it was, and that A being possessed of the fee, it was a bequest of such fee, and not of an estate for life merely. *Doe d. Pile v. Wilson*, 6 C. & P. 301. [Denman]

Testator devised to W N, W H, and H H, and the survivors and survivor of them, and the heirs of such survivor, upon trust to the use of his nephews and their assigns during their lives and the life of the longest liver of them, and after the determination of those estates by forfeiture or otherwise

in the lifetime of his nephews or the survivor of them, to the use of the trustees, &c. during the natural lives of his nephews and the life of the survivor, upon trust to preserve the uses thereafter limited from being defeated, but nevertheless to permit and suffer the nephews to take the rents, &c. for their own use; and from and after the decease of the testator's nephews, to the use of their children, their heirs and assigns, as tenants in common, and if only one child, to such child, his heirs or assigns, for ever; but, in the event of there being no such child, or there being children of the nephews, or such only child, and they, or he, or she, dying in the lifetime of the nephews or the survivor of them, without leaving lawful issue, then from and after the decease of the nephews, and the survivor of them, to the trustees and the survivor of them, their heirs and assigns, upon the like trusts, and to and for the same uses, &c. as directed, as to the disposal of the testator's residuary real and personal estates and effects:—Held, that under this devise, the trustees took an estate in fee in the freehold and copyhold lands, and an absolute interest in the leaseholds. *Falcon v. Newland*, 3 Sc. 113.

Testatrix directed that her land at M should, as the rents became due, be equally divided amongst the youngest of her son's children: the son left four daughters (one of whom was his eldest child), and a son:—Held, that the daughters, including the eldest, took an estate in fee in the land, it appearing, by the context of the will, to be the testatrix's intention to exclude an eldest son only. *Hall v. Luckup*, 4 Sim. 5.

A testator R P devises an estate to T P for life, and gives him power to appoint to any male relation of the testator of the name of P, and in default of appointment devises to his (the testator's) next or nearest relation or nearest of kin of the name of P, being a male, or if there should be more than one, in equal degree to the eldest of such male relations who should be living at his (the testator's) death. T P made no appointment, and happened to answer the description of nearest relation of R P at the time of his decease. On a case sent to the Exchequer, the Judges certified, that T P took an estate in fee simple. The Master of the Rolls held, that T P was excluded, but refused to give a final decision till he had sent the case again to a court of law (the Common Pleas). *Pearce v. Vincent*, 2 Law J. (n.s.) Chanc. 187, a.c. 2 M. & K. 800.

Testator devised certain real estates to his cousin J P for life, and after J P's decease, his real and personal estate, and all accumulations, to such of testator's next of kin, being a male, as J P should by deed or will appoint, and, in default of such appointment, to such of testator's relations of the name of P, being a male, as T P should adopt for the purpose of education, if he should be living at the time of the decease of T P; and in case T P should not have adopted such male relation, or he should not be living at the time of the decease of T P, then unto the next and nearest of kin of the testator, being a male or the elder of such male relations, in case there should be more than one of equal degree who should be living at the testator's decease, his heirs, &c.; he then gave the second and other presentations to a rectory to T P during his life, and his plate, books, furniture, &c. to his executors, in trust, to suffer T P to use the same during his life,

and, after his decease, in trust for the persons who should succeed to or inherit his real estates, under and by virtue of his will; and he also gave T P a leasing power, for a term of seven years, at the best and most improved annual rent, and without taking any fine or premium.

At the death of the testator T P was his next of kin, except a brother of the testator's, who had gone to sea, and had not been heard of for many years:—Held, that if the testator's brother died without issue in the lifetime of the testator, T P took, under the ultimate limitation contained in the will, an estate in fee simple in the testator's real estates, and an absolute interest in his personality. *Pearce v. Vincent*, 2 Law J. (n.s.) Exch. 194, a.c. 1 C. & M. 598; 3 Tyr. 663.

"As to the rest of my estate, the two houses, one in A the other in B, I give to my wife for life; after her decease, that in A to my daughter, the other between my two sons. The rest of my estate of what nature soever, one-third to my wife, the rest equally among the three children." The testator had no real property but the two houses:—Held, that the daughter took a fee in the house in A. *Gall v. Esdaile*, 1 Law J. (n.s.) C.P. 95, a.c. 8 Bing. 323; 1 Mo. & Sc. 466.

Devise to A and B for life, and during the life of the survivor; remainder to C, D, and E, "share and share alike, they paying out of the same to four children of T P 10 $\frac{1}{2}$ ; to be paid them by my executrixes hereinafter named, when they shall attain their several ages of twenty-one years." C and D only appointed executors:—Held, that the devise to C, D, and E was in fee by reason of the payment charged. *Dee d. Thorn v. Phillips*, 1 Law J. (n.s.) K.B. 187, a.c. 3 B. & Ad. 753.

Testator devised in general words *all his goods, chattels, estate, and effects* of what nature, sort, kind, quantity or quality (not hereby otherwise disposed of) whatsoever and wheresoever, upon certain trusts: first, for the payment and discharge of his just debts, funeral expenses, &c.; and that whatsoever should remain after such discharge of his personal effects should be appropriated to the use, interest, and benefit of his family. He also willed, that when his youngest son came of age, the said trustees should sell or dispose of his estate, the produce of which was to be divided into three equal parts, &c.:—Held, that upon the failure of the personal estate to pay the debts, it was competent to the trustees to sell and dispose of the lands to make up the deficiency. *King v. Shroves*, 2 Law J. (n.s.) C.P. 241, a.c. 10 Bing. 238; 4 Mo. & Sc. 149.

A devise which does not in terms import an estate in fee, will not carry such an estate by reason of a previous charge upon such part of the testator's property as may be necessary and adequate for the payment of his debts. *Dee d. Clarke v. Clarke*, 2 Law J. (n.s.) Exch. 37, a.c. 1 C. & M. 89; 3 Tyr. 120.

An estate in fee will not pass by a will, without express words, although the preamble states an intention to dispose of the whole of the testator's estate.

Thus, where, after the preamble, "As for such temporal estate as God hath given me, I give, devise, and dispose of it in the following manner," testatrix gave a house and premises to J R, to come into possession at the age of eighteen, and S R,

widow, two other houses and premises, (without using any express words which would pass the fee therein); to whom, also, she bequeathed the residue of her estate, which was limited by enumeration to personalty, and then gave S R the rent of the house before given to J R till J R was eighteen years old; and directed, that if he died before that time, all that was left to him should descend and go to S R; it was held, that S R did not take an estate in fee, in the two houses and premises devised to her. *Doe d. Knoch v. Ravell*, 1 Law J. (N.S.) Exch. 254, s. c. 2 C. & J. 223; 2 Tyr. 719.

#### (F) ESTATES IN TAIL.

[See, *ante*, Construction in general. And see WILL, Construction of; *Langston v. Langston*, 2 Cl. & F. 194, s. c. 8 Bl. N.S. 167. And see *Doe d. Gallini v. Gallini*, 3 Law J. (N.S.) K.B. 71, s. c. 5 B. & Ad. 621; 3 Ad. & E. 340; 2 N. & M. 619 (*ante*, A).]

Devise to the first and eldest son of the body of J C lawfully issuing or issued; and for default of such issue, and then likewise to the second, third, and every other son, of J C successively, and in remainder, the one after the other as they shall be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of such second, third, or other son or sons, &c.; and in case of such issue male failing by the said J C, then, &c.:—Held, that the eldest son of J C took an estate tail. *Clements v. Paske*, 3 Doug. 384.

Devise to R P and his assigns for and during the term of his natural life, and from and after his decease to the use and behoof of the heirs male of the body of the said R P, lawfully to be begotten, and of the heirs of the body of such heir male lawfully issuing; and for want of such issue male of the said R P, or in case such issue male should not live to attain his age of twenty-one years, then," &c.:—Held, that R P took an estate tail. *Goodwright v. Herring*, 4 Doug. 298.

R N, by will, devised to trustees, and the survivor, and the heirs of such survivor, in trust for Fo. W till he arrive at the age of twenty-one, upon his legally taking the name of N, and then upon his attaining that age, and legally taking the name N, to hold to him the said Fo. W during his natural life, and, from and after his decease, to the trustees, and the survivor, and the heirs of such survivor, to preserve contingent remainders in trust for the heirs male of the body of the said Fo. W lawfully issuing; and in default of such issue, to Fr. W in the same terms:—Held, that Fo. W took an estate tail. *Nash v. Coates*, 1 Law J. (N.S.) K.B. 137, s. c. 3 B. & Ad. 839.

A testator, after expressing, in general terms, a strong desire to entail his property, devised to trustees all his real estates, but to permit his daughter "not only to receive the rents and profits to her own use, or to sell or mortgage any part, if occasion required; but also to settle on any husband she might take, the same or any part thereof for life, should he survive her." But, should she have a child, he devised it to the use of such child, from and after his daughter's decease, with a reasonable maintenance for the education of such child in the meantime. Should none of these cases happen, then he devised his said real estate after his daughter's

decease, unto the said trustees in fee, in trust to preserve contingent remainders for the use of his nephew:—Held, that the daughter took an estate tail.

And, having, while in possession, suffered a recovery, without the trustees joining, the same was held to be a good bar. *Doe d. Jones v. Davies*, 1 Law J. (N.S.) K.B. 244, s. c. 1 N. & M. 664.

Testator devised the residue of his freehold, copyhold, and leasehold estates, &c. to his wife for life; and from and immediately after her decease to his son and daughters, naming them, "and their lawful issue respectively, in tail general, with benefit of survivorship to and amongst the issue respectively, as tenants in common, and not as joint tenants:"—Held, that the children of the testator took estates for their respective lives, as tenants in common in the freehold and copyhold lands, and the grand-children contingent remainders in tail general, by purchase in the shares of their respective parents in the same lands, with cross-remainders in tail among such grand-children respectively, and cross-remainders in tail among their parents, the testator having used the words "issue of child or children" as synonymous with "sons or daughters of a child or children;" and that the children and grand-children respectively took corresponding interests in the leaseholds. *Falcon v. Newland*, 2 Sc. 106.

#### (G) ESTATES FOR LIFE.

[See, *ante*, Construction in general. And see WILL, Construction of; *Thornhill v. Hall*, 2 Cl. & F. 22.]

Devise to S N for life, remainder to trustees, &c., remainder to the first and other sons of the body of S N, and of the heirs male of their respective bodies; and for default of such issue, to all and every the daughters of S N begotten or to be begotten; and for default of such issue, to the right heirs of T N for ever:—Held, that the daughters of S N took life estates only. *Denn v. Buddon*, 3 Doug. 294.

A class of devises commenced "as touching my worldly estates." Then followed several devises to persons, with words of inheritance added; and one to a person without such words:—Held, that he took only an estate for life. *Doe d. Gwillim v. Gwillim*, 2 Law J. (N.S.) K.B. 194, s. c. 2 N. & M. 247; 5 B. & Ad. 122.

Devise thus—"My desire is, that my son Robert shall live in that part of my house as he now doth, and at the same yearly rent which he now gives, as long as my son John shall enjoy or own the same. And all other my estate I give to John and his heirs:"—Held, that Robert took an estate for the life of John, defeasible; and that residence on the premises forty days after the death of the testator conferred a settlement. *Rex v. the Inhabitants of Cassington*, 1 Law J. (N.S.) M.C. 8, s. c. 2 B. & Ad. 874.

A testator bequeathed 1,200*l.*, being the amount of a certain bond, "and also all my chambers in the Albany, for which I paid six hundred guineas, with all my furniture:"—Held, that this gave an estate for life only in the chambers in the Albany. *Doe d. Sewell v. Parratt*, 1 Law J. (N.S.) K.B. 160, s. c. 3 B. & Ad. 469.

A testator directed by his will, that his just debts

and funeral charges should be paid and charged by his executrix thereafter named. He then gave a legacy to his heir-at-law, and other legacies, and concluded thus—"Also I give to E S, whom I likewise constitute, make, and ordain the sole executrix of this my last will, all and singular my lands, &c., by her truly to be possessed and enjoyed:"—Held, that E S took only an estate for life. *Doe d. Ashby v. Baines*, 4 Law J. (N.S.) Exch. 141, s. c. 2 C. M. & R. 23.

By will, testator gave unto his wife his freehold estate called Pouncetts for her natural life. He gave her also his stock, goods, and chattels for her life. He gave unto his heir 10*l*, and then proceeded, "all the above bequeathed lands, goods, and chattels, after the death of my wife, I give and devise unto my children, share and share alike, equally to be parted between them":—Held, that the children took only an estate for life in the testator's lands as tenants in common. *Doe d. Norris v. Tucker*, 1 Law J. (N.S.) K.B. 161, s. c. 3 B. & Ad. 473.

#### (H) ESTATES POUR AUTRE VIE.

[See, *post*, (Q) Lapsed or Void.]

#### (I) COPYHOLD ESTATES.

Under a devise of a copyhold estate, and of all the rest, residue, and remainder of the testator's estate and effects, whatsoever and wheresoever, real and personal, upon trust for the testator's widow for life, and then upon trusts wholly applicable to the personal estate, copyhold property held to pass, and to be subject to the trusts of the residuary estate, and not to be confined to the trust for the life of the widow. *Marks v. Marks*, 2 Law J. (N.S.) Chanc. 110.

#### (K) JOINT TENANTS AND TENANCY IN COMMON.

[See, *post*, (Q) Lapsed or Void, 3 Dougl. 313.]

#### (L) CONDITIONAL AND CONTINGENT DEVISES, AND LIMITATIONS OVER.

[See NAME, Change of.]

"My house in A to such son of mine as shall first attain twenty-one years, when he shall attain such age, and his heirs; but in case I depart this life without leaving a son, or leaving such, none shall attain twenty-one, to my daughter Jane, if she shall attain twenty-one, and her heirs; but should I depart this life without leaving issue, to L and his heirs."

Testator left one child, his daughter Jane, who died without issue under the age of twenty-one:—Held, that L took nothing by the devise to him. *Doe d. Rew v. Lacraft*, 1 Law J. (N.S.) C.P. 109, s. c. 3 Bing. 386; 1 Mo. & Sc. 573.

A testator devised certain freehold premises to his wife during widowhood, and, after her death or marriage, to his nephew R B R for life, and after his decease unto and equally between all and every the children of his said nephew R B R, their heirs and assigns respectively, as tenants in common, if more than one; and if there should be but one child, then the whole to such only child, his or her heirs and assigns; but in case there should be no child or children of his said nephew R B R living at the time of the decease or marrying again of the

testator's said wife, then over; and he devised the residue of his real estate to certain other persons in fee. The testator, by a codicil bearing even date with, and executed at the same time as the will, directed, "That neither the said R B R, nor any or either of his issue, shall by virtue of this my will, take or be considered as entitled to a vested interest or interests, unless and until they shall respectively attain the age of twenty-one years; and in case of the death of any one or more of such children under such age, then the share or shares of such children so dying shall go to the surviving brother or sisters," &c. R B R during the life of the testator's widow attained the age of twenty-one, and upon her decease took possession of the devised premises, and at his death left several children all under the age of twenty-one:—Held, that the devises to the children, and the substituted devises over, failed, and that the heir-at-law was entitled to the devised estate. *Russell v. Buchanan*, 3 Law J. (N.S.) Exch. 194, s. c. 2 C. & M. 561; 4 Tyr. 384.

W G, in 1775, devised his manor-house and estates to his nephew for life, remainders to the nephew's first and other sons in tail male. The nephew's son, T G, took under the will; and upon his marriage, in 1801, suffered a recovery, and conveyed the estates to the use of himself for life, remainder subject to a term in S H F and another, for securing a jointure, and raising portions for younger children, to the use of the settlor's first and other sons by the marriage, in tail male. Power was given to the trustees to sell and exchange the lands, and invest the monies. In 1804, S H F, the termor and trustee under the settlement, devised his own estates, in trust for the second son of T G, the settlor, in tail male; and in like manner to the third and other sons, &c., with a power to the trustees, if at any time the person entitled to the possession or to the rents and profits of the said estates should be a minor, to receive and apply such rents and profits during the minority. Proviso, that in case and so often as the manors, lands, &c. devised by the will of W G for an estate in tail male should descend to, or devolve upon, any son of the said T G (the settlor) or heir male of the body of such son, and the person on whom the same should so descend or devolve, should, under the trusts of the present will, be tenant in tail male of the messuages, lands, &c. devised by this will, so as to be then actually in possession or entitled to the rents, issues, and profits thereof, and there should at the same time be any other son, &c. of the said T G, then the estate, by this will declared to be in trust for the person so becoming entitled under the will of W G, should cease and determine, and the now devised premises should be in trust for the person who would be entitled, if the forfeiting party were dead, and there were a failure of issue in tail male. No express reference was made in this will to the settlement of 1801.

S H F died in 1813, and his devised estates vested in the trustees for the second son of T G. The eldest son of T G died in 1816, and T G himself in 1828; whereupon his estates vested in the same second son: he was still a minor. Several children of T G, by the marriage of 1801, and likewise the widow, survived him. Many parts of the

settled estates had been sold and exchanged by the trustees under the settlement:—Held, by Denman, C.J., Parke, J., and Patteson, J., Taunton, J. dissentients, that, under these circumstances, the estate devised by S H F to the second son of T G did not go over by the shifting clause. *Faxakerly v. Ford*, 1 A. & E. 897.

#### (M) EXECUTORY DEVISES.

A limitation by way of executory devise, which is not to take effect until after the determination of a life or lives in being, and a term of twenty-one years as a term in gross, and without reference to the infancy of any person, who is to take under such limitation, or of any other person, is a valid limitation. *Secus*, if to the term in gross of twenty-one years be added the number of months equal to the period of gestation. *Cadell v. Palmer*, 10 Bing. 140, s. c. 3 Mo. & Sc. 571.

So far as limitations of real estate, in a will or settlement, are illegal and void, the estate remains subject to the subsequent limitations, or if not affected by them, it belongs to the settlor or testator, and the insertion of the illegal limitations has no effect on the subsequent limitations in the same instrument; therefore, where an estate is limited to A, in fee, but if he dies under twenty-one, and without issue, then to an after-born illegitimate son, in fee; but in case there should be no such, or, being such, he should die under twenty-one, and without issue, then to B in fee:—Held, that the executory devise to B is good, and on the death of A, and the happening of the contingency of the death of the after-born illegitimate child, under twenty-one, and without issue, the estate would vest in B; but if there should be no such child, or if such child should attain twenty-one, the heir takes the estate as undisposed of. *Lomas v. Wright*, 3 Law J. (N.S.) Chanc. 68, s. c. 2 M. & K. 769.

A testator devises freehold and copyhold estates to trustees in fee, upon certain special trusts, and subject thereto, upon trust to apply such part of the rents and profits of his freehold and copyhold estates as should be necessary to the maintenance of his grandson S W, till he should attain twenty-one; and, upon attaining that age, to transfer, assign, and pay unto his said grandson the rest of such rents and profits; and to release and surrender his said real and copyhold estates unto and to the use of the said grandson, his heirs, and assigns; and, in case of the death of S W without leaving any child or children living at his decease, the testator gave the real and copyhold estates to J S in fee.

At the time of the testator's death, S W was the testator's heir-at-law and customary heir. He attained twenty-one, and died seized of these estates intestate and without issue. To a bill filed by the heir-at-law and customary heir of S W, the heir *ex parte maternæ* put in a plea stating himself to be heir *ex parte maternæ* of S W, and alleging, that the property came to S W by descent, and not by devise:—Held, that a devise to an heir, with an executory devise over, does not alter the quality of the estate: therefore, the heir who takes the estate on the failure of the executory devise, is in by descent, and his heir *ex parte maternæ* takes such estate. *Wood v. Skelton*, 2 Law J. (N.S.) Chanc. 163, s. c. 6 Sim. 176.

#### (N) DEVISES FOR PAYMENT OF DEBTS.

Where a testator directs all his just debts, legacies, funeral expenses, and testamentary charges, to be paid by his executors after-named, the charge applies to all the property given to the executors by the will; but a devise of a real estate to one of the testator's sons, who is one of the executors named in the will, is not a gift to executors within the rule, so as to make that estate liable to payment of debts, not being a gift to executors jointly. *Warren v. Davies*, 2 Law J. (N.S.) Chanc. 203, s. c. 2 M. & K. 49.

Where a testator directs that all his debts, &c. shall be paid by his executors after-named, and devises parts of his real estates to the persons whom he afterwards names his executors, and devises the undisposed residue of his real and personal estates to T H, one of the executors, beneficially;—this is not sufficient to show an intention to make the debts a charge on the real estates devised to the executors. *Wasse v. Heslington*, 3 Law J. (N.S.) Chanc. 221.

After the testator's death, calls were made upon certain canal shares, which he had bequeathed to his wife:—Held, that these and all future calls were to be paid out of the residuary real estate. *Blount v. Hopkins*, 4 Law J. (N.S.) Chanc. 18.

#### (O) DEVISES TO SEPARATE USE.

Lands were settled upon trust, after the death of the settlor, to sell the same and distribute the proceeds among all the settlor's children, *nomination*; and as to the shares of two, who were married women, the trustees were directed to pay the same "into their own proper and respective hands, to and for their own use and benefit; but in case they should be then dead, to pay their shares to their respective husbands for their own use and benefit."—Held, that these shares did not vest in the married women to their separate use. *Tyler v. Lake* 2 Russ. & M. 183.

#### (P) DEVISES TENDING TO PERPETUITY.

[See LEGACY, *Tollemache v. Earl of Coventry*.]

A limitation, by way of executory devise, which is not to take effect until after the determination of a life or lives in being, and a term of twenty-one years, as a term in gross and without reference to the infancy of any person, is a valid limitation. *Secus*, if to the term in gross of twenty-one years be added the number of months equal to the longest or ordinary period of gestation. This being held to be the established rule, a decree of the Court below, declaring that a limitation by way of executory devise, which was not to vest until the expiration of a term in gross of twenty years from the decease of the survivor of twenty-eight persons, who were living at the testator's decease, and of whom seven only were to take interests under the devise, is a valid limitation, was affirmed accordingly. *Cadell v. Palmer*, 1 Cl. & F. 372, s. c. 7 Bl. N. 202.

#### (Q) LAPSED OR VOID.

Devise by R W to his eldest son S W and the heirs of his body lawfully begotten; and for default of issue of his said son S, then to his son H W and the heirs of his body. S W died in the lifetime

of the testator, leaving issue:—Held, that the devise to S W had lapsed, and that the remainder to H W vested in possession immediately on the death of the testator. *Whits v. Warner*, 3 Doug. 4.

Devise to G P for life, remainder to trustees to preserve, &c., remainder to the first son of G P and the heirs of the body of such first son, remainder to the other sons, in like manner; and for want of such issue male, then to the use of all and every the daughter and daughters of C P, and for default of such issue, to R C and the heirs of his body, he taking the testator's name. G P had only one son, who died without issue, and two daughters, who were the heirs-at-law of the testator:—Held, by Lord Mansfield and Buller, J., that the words "for default of such issue male" rendered the subsequent devises contingent on there being no son of G P, and that there having been a son, who died, the devises over were void, and the daughters took (as heirs) in fee:—Held, by Willes, J., that the daughters took joint estates for life, and (semble) remainders in tail. *Keene d. Pinnoke v. Dickson*, 8 Doug. 313.

A testator devised an estate to his son A for life, with remainder equally amongst all the children of A and their heirs, as tenants in common. He devised another estate to B and his children, in the same terms; and in case his son A died without leaving lawful issue, he gave the estate so previously devised to A unto B and his heirs, and made a similar devise *mutatis mutandis* if B died without leaving lawful issue; but if both his sons should die without leaving lawful issue, then he gave the estates over to C in fee. The testator's son A alone had issue, a son, and both the sons of the testator, and also the son of A, died in the lifetime of the testator:—Held, that the gift over to C did not take effect.

A similar decision made as to leaseholds. *Tar-buck v. Tarbuck*, 4 Law J. (n.s.) Chanc. 129.

#### (R) REVOCATION.

[See WILL.]

#### DILAPIDATIONS.

Over-cropping land and bad husbandry is not a ground of action for dilapidations against the executors of a deceased incumbent.

*Quere*—Whether they are liable for dilapidations, by reason of the deceased incumbent not having kept fences round a new inclosure in repair. *Bird v. Relpk*, 2 Law J. (n.s.) K.B. 99, s.c. 4 B. & Ad. 826; 2 A. & E. 773.

Where, by act of parliament, certain allotments were given to the vicar in lieu of tithes, and fences put up round these allotments by the commissioners:—Held, that the vicar was, by the common law and general custom of England, liable to keep those fences in repair; and that his executors were liable to an action on the case for dilapidations in respect of the vicar's omission to keep them in repair. 1b. 4 Law J. (n.s.) K.B. 128, s.c. 4 N. & M. 876; 2 A. & E. 773.

#### DIRECTOR.

[See COMPANY, Suits and Actions.]

#### DISCLAIMER.

[See DISTRESS—TRUST AND TRUSTEE.]

#### DISCONTINUANCE.

[See PRISONER, Discharge of. *Ryces v. Bunning*.]

A tenant in tail makes a feoffment; but feoffee never enters, nor obtains possession of the deed of feoffment or other muniments, which always remain in the possession of the feoffor. Feoffor dies seised, and is succeeded by his heir-at-law, who suffers a recovery of the lands in question, and enjoys the possession through his lessees for forty-six years:—Held, upon ejectment by the devisee of the heir-at-law of the feoffor, that a deed of reconveyance, from the feoffee to the feoffor, may be presumed; consequently, that the heir of the latter was remitted to his old estate tail; that the recovery was valid; and the ejectment well brought. *Tenny v. Jones*, 2 Law J. (n.s.) C.P. 219, s.c. 10 Bing. 75; 3 Mo. & Sc. 472.

A plaintiff who has issued a fiat of bankruptcy against the defendant after action commenced, is not entitled under s. 54 of 6 Geo. 4, c. 16, to discontinue without payment of costs. *Eicke v. Nokes*, 3 Law J. (n.s.) C.P. 256, s.c. 1 Bing. N.C. 69; 4 Mo. & Sc. 586.

The plaintiff cannot discontinue by a side bar rule after a general verdict for the defendant. *Goodenough v. Beetles*, 4 Law J. (n.s.) Exch. 223, s.c. 2 C. M. & R. 240.

To a declaration in assumpsit, containing a count on a bill of exchange, and other counts, concluding to the damage of 200*l.*, the defendant pleaded, as to 35*l.*, part of the money in the bill of exchange mentioned, that it was an accommodation bill, and as to 40*l.*, other parcel of the sums and promise in the declaration mentioned, payment of that sum into court, and no damages ultra that sum. And as to the residue, non assumpsit. The plaintiff traversed the averment, that the bill was an accommodation bill, and joined issue on the non assumpsit, but took no notice of the payment into court:—Held, on a motion to arrest the judgment, that there was no discontinuance on the record. *Fallows v. Bird*, 4 Law J. (n.s.) Exch. 248, s.c. 2 C. M. & R. 457.

A cause had been tried, and a verdict found for the plaintiff, which was afterwards set aside by the Court, on the ground that the contract, upon which the plaintiff sued, was illegal and void. After the rule for a new trial was made absolute, it appearing that the defence had been conducted by an attorney of the Court of King's Bench, acting in the name of one who had for some years ceased to be an attorney of this court, the Court permitted the plaintiff to discontinue without payment of costs, except as to so much money as might be found to have been paid by the defendant to his attorney on account of the suit. *Patterson v. Powell*, 3 Mo. & Sc. 195.

Taxation of costs, without payment of them after a summons to discontinue, is no discontinuance. *Edgington v. Proudman*, 1 Dowl. P.C. 152.

Where goods had been obtained by fraud, and the plaintiff commenced an action against the person who obtained the goods, and other persons represented as his partners, but who could not be found, the Court gave leave to discontinue the first action

without paying costs, and to detain the defendant in custody until the plaintiff had issued a new writ against him alone, and declared against him. *Ames v. Ragg*, 2 Dowl. P.C. 35.

The plaintiff cannot discontinue after a verdict for the defendant, with leave to the plaintiff to enter a verdict for himself. *Goodenough v. Butler*, 3 Dowl. P.C. 751.

### DISCOVERY.

[*Robertson v. Lubbock*, 2 Dig. Law J. 109, s. c. 4 Sim. 161.]

On a bill, which sought to charge a solicitor with a fraud practised on the plaintiffs in the course of proceedings on his client's behalf, the Court refused to order the production of entries and memorandums contained in the defendant's books, or of written communications, made or received by him, relating to those proceedings, and admitted by the answer to be in the defendant's custody.

And, generally, it seems that a solicitor cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge in the conduct of professional business for a client, even though such business had no reference to legal proceedings, either existing or in contemplation. *Greenough v. Gaskell*, 1 M. & K. 98.

### DISCRETION.

A trust "to levy and raise any sum or sums not exceeding 2,500*l.*, as the trustees shall think fit, for the purpose of forming a capital to enable B to commence business," is a discretion which the Court cannot exercise, and which cannot be taken advantage of by creditors on the insolvency of B. *Bellis v. Tooth*, 2 Law J. (N.S.) Chanc. 76.

Gift of all testator's real and personal property to his wife, and after her death, one-third to his daughter, and two-thirds to the disposal of his wife, "trusting that if she should not marry again, she should be induced to make her daughter her principal heir:"—Held, to give the two-thirds to the wife absolutely. *Hoy v. Master*, 3 Law J. (N.S.) Chanc. 134.

### DISPENSARIES.

[See INFIRMARIES.]

### DISSEISIN.

[See FEOFFMENT.]

### DISSENTING MINISTER.

If a dissenting minister be appointed minister of the chapel by some of the trustees of it, he cannot maintain an action against all the trustees for his salary; and the fact of all of them having signed a notice to him, demanding the possession of the chapel, will not make any difference. *Cooper v. Whitehouse*, 6 C. & P. 545. [Alderson]

### DISTRESS.

[See AGREEMENT, Construction of—CANAL ACT—LANDLORD AND TENANT—LAND-TAX—MONEY HAD AND RECEIVED, Where maintainable—PLATE—TRESPASS—TROVER—REFLEVING.]

- (A) IN GENERAL.
- (B) WHO MAY DISTRAIN.
- (C) WHAT MAY BE TAKEN.
- (D) WHEN, WHERE, AND HOW TO BE MADE.
- (E) HOW DISPOSED OF.
- (F) ACTION FOR AN EXCESSIVE DISTRESS.
- (G) ACTION FOR AN IRREGULAR DISTRESS.
- (H) FRAUDULENT REMOVALS.

#### (A) IN GENERAL.

The 1 & 2 Ph. & M. c. 12, s. 2, which enacts, "that no person shall take for keeping in pound, impounding, or poundage of any distress, above 4*d.* for any one whole distress that shall be so impounded," does not extend to cases where the goods are impounded on the premises, by virtue of the 11 Geo. 2, c. 19, s. 10. *Child v. Chamberlain*, 5 B. & Ad. 1049, s. c. 3 N. & M. 520.

#### (B) WHO MAY DISTRAIN.

[See RECEIVER.]

[*Pluck v. Digges*, 2 Law J. Dig. 110, s. c. 2 D. & Cl. A.C. 180; 5 Bl. N.S. 31.]

Where testator, seized in fee, devised to three trustees for certain trusts, and one disclaimed by deed:—Held, that such disclaimer was, without matter of record, sufficient to vest a complete title in the two others, and enable them to support a distress for rent upon the premises devised. *Begbie v. Crook*, 4 Law J. (N.S.) C.P. 264, s. c. 2 Bing. N.C. 70; 2 Sc. 128.

The assignees of a bankrupt, in consequence of an arrangement entered into between the bankrupt and his creditors, gave to the bankrupt an authority in writing, to receive the rents and arrears of rents due on certain premises, the property of the bankrupt previous to his bankruptcy, couched in the following terms:—

Mr. J S having completed an arrangement with Messrs. H & A, his assignees, for the five houses, &c. the premises in question, on the 21st day of May inst., and for the arrears of rent due thereon, the tenants on the respective premises are hereby authorized to pay their respective rents to the said J S, whose receipt shall be their discharge.

May 24, 1831.

Signed by the

Solicitors to the assignees.

Such authority does not contain a power to distress; and an action can be maintained against the party who levies a distress under such supposed power. *Ward v. Shew*, 2 Law J. (N.S.) C.P. 58, s. c. 9 Bing. 508; 2 Mo. & Sc. 756.

#### (C) WHAT MAY BE TAKEN.

[See TROVER, Pleading and Evidence.]

Held, that standing crops cannot be taken under a power to distress for the arrears of an annuity. *Miller v. Green*, 1 Law J. (N.S.) Exch. 51, s. c. 8 Bing. 92; 1 Mo. & Sc. 199.

A threshing machine is not privileged from being distrained for rent, if it be not in actual use at the



time of such distress, or unless it appear that there is a sufficiency of other distress to satisfy the demand. *Fenton v. Logan*, 2 Law J. (N.S.) C.P. 102, s. c. 9 Bing. 676; 3 Mo. & Sc. 82.

The goods of a stranger on the land are liable to be distrained unless he claim by title paramount. *Saffery v. Elgood*, 3 Law J. (N.S.) K.B. 151, s. c. 1 Ad. & E. 191; 3 N. & M. 346.

The sheriff sold to the plaintiffs, who were joint creditors of the tenant in possession, "so many acres of fallow wheat and so many of brush wheat," in consideration of the sum indorsed upon the writ to be levied. The landlord, before the corn was ripe, distrained it for rent due subsequent to the sale:—Held, that the distress was ill.

The statute of 56 Geo. 3, c. 50, which prevents a sheriff from selling "straw or straw of crops growing," except an agreement be entered into to consume them upon the premises, does not apply to such a case. *Wright v. Davis*, 3 Law J. (N.S.) K.B. 181, s. c. 1 Ad. & E. 641; 3 N. & M. 790.

In replevin, the defendant avowed for rent in arrear, as landlord of the granary or warehouse in which the goods on which he levied the distress were found. In his plea in bar to the avowry, the plaintiff alleged that the goods in question were deposited in the granary or warehouse with one W J, the keeper or proprietor of the said premises, which were then a public granary or warehouse, to be safely kept for the purposes of trade. On special demurrer, upon the ground that goods merely deposited with the keeper or proprietor of a public warehouse or granary, unless he exercised a public trade, and received them for the purposes of that trade, were not privileged from distress for rent, the Court advised an amendment in the pleading. *Farrast v. Robson*, 3 Law J. (N.S.) C.P. 146.

The carcass of an animal, sent by one butcher to another to be slaughtered, hanging in the shop of the latter, is protected from distress for rent by the latter's landlord. *Brown v. Shevill*, 4 Law J. (N.S.) K.B. 50, s. c. 2 Ad. & E. 138; 4 N. & M. 277.

Goods deposited for sale by auction on the premises of an auctioneer, are not liable to be distrained for rent in arrear, in respect of those premises.

Nor will a misrepresentation as to the ownership, made by the auctioneer, in advertising the sale, although it might vitiate the sale as between buyer and seller, destroy the exemption from distress.

Accordingly, a manufacturer sent goods to a public auction-room, to be sold by an auctioneer, who had hired the rooms for a short period, and who advertised the intended sale of these and other goods, received in the same way, as "under an assignment for the benefit of creditors." The goods having been distrained for rent due for the auction-room from the party of whom it was hired,—Held, that they were privileged from distress. *Adams v. Grane*, 2 Law J. (N.S.) Exch. 105, s. c. 1 C. & M. 880; 8 Tyr. 326.

#### (D) WHEN, WHERE, AND HOW TO BE MADE.

The statute Westminster 2, c. 37, which requires distresses to be made by brokers sworn and known, does not extend to distresses for rent. *Child v. Chamberlain*, 6 C. & P. 213. [Parke]

A demises a house to B for a year certain, with six months' notice to quit; the rent to be paid

quarterly, or half-quarterly if required. The landlord receives the rent for a certain period quarterly, and, upon the tenant's quitting before the expiration of a quarter, he distrains for the rent of that half quarter. In trespass for so doing,—held, that such distress was illegal, inasmuch as the landlord, by receiving the rent quarterly, had made his election, and could not distrain for the half quarter without giving reasonable notice. Under such circumstances the distress was not equivalent to a demand. *Mallam v. Arden*, 3 Law J. (N.S.) C.P. 48, s. c. 10 Bing. 299; 3 Mo. & Sc. 793.

By the statute 7 Geo. 4, c. 57, s. 31, "no distress for rent made and levied after the arrest of a person petitioning the Court of Insolvent Debtors under that act, shall be available for more than one year's rent:"—Held, that a distress for more than one year's rent, made before arrest, but not sold till after, was good for the whole. *Wray v. Earl of Egremond*, 2 Law J. (N.S.) K.B. 48, s. c. 1 N. & M. 188; 4 B. & Ad. 122.

Since the statute 57 Geo. 3, c. 93, where there is a distress for rent not exceeding 20l. in amount, there need be only one sworn appraiser. *Fletcher v. Saunders*, 6 C. & P. 747, s. c. 1 M. & Ro. 375. [Lyndhurst]

In making a distress for rent, circumstances may occur, which may require the presence of a police-officer; but to justify the landlord in calling him in, it must be shewn that his presence was necessary, either from threats of resistance, or the apprehension of violence, &c. *Skidmore v. Booth*, 6 C. & P. 777. [Tindal]

A landlord cannot justify making a distress after dark. *Aidenburgh v. Peaple*, 6 C. & P. 212. [Parke]

Seem, that it is necessary that goods seized under a distress for rent should be appraised by two sworn appraisers, under 2 Will. & Mary, sess. 1, c. 5, s. 2, notwithstanding the schedule of the statute 57 Geo. 3, c. 93, directs, that for an appraisal under 20l., whether "by one broker or more," shall be charged only 6d. in the pound on the value of the goods.

If goods are removed by the landlord, which were not taken originally under the distress, nor included in the inventory, because they were not discovered at the time, the tenant may maintain trover for them. *Bishop v. Bryant*, 6 C. & P. 484. [Tindal]

If goods be distrained for rent, the landlord must wait five whole days, i. e. five times twenty-four hours, before he sells; and, if he does not, he is liable to an action. Thus, where a distress was made on Friday at two P.M., and the sale was on the following Wednesday at eleven A.M., the sale was held to be wrongful. *Harper v. Tanwell*, 6 C. & P. 166. [Tindal]

A broker's man having taken possession of property under a distress for rent, after remaining two days, left the house in a state of excitement bordering on insanity. The landlord, thinking that his leaving had been procured by the drugging of his liquor by the parties in the house, but which was not proved, six days after broke into the house, and took away the goods, without any previous demand of admission:—Held, that he had no right to enter again after so long a delay, and that the owner of the goods might maintain trover for them. *Russell v. Rider*, 6 C. & P. 416. [Bosanquet]

## (E) HOW DISPOSED OF.

In an action on the case, for selling goods distrained, without appraisement, the plaintiff is not entitled to damages without deducting the amount of rent for which the distress was made. *Briggins v. Goude*, 1 Law J. (N.S.) Exch. 129, s.c. 2 Tyr. 447.

In case for selling goods under a distress, without appraisement, if the sum produced is less than the fair value to the tenant, he may recover the difference without any allegation of special damage. *Knotts v. Curtis*, 5 C. & P. 322. [Parke]

Upon account for not selling goods distrained at the best prices, the plaintiff may go into evidence to shew, that the goods were allowed to stand in the rain, and that they were improperly lotted. *Poynter v. Buckley*, 5 C. & P. 512. [Tindal]

## (F) ACTION FOR AN EXCESSIVE DISTRESS.

In an action for excessive distress, the question is, what the goods would have sold for at a broker's sale,—not what an incoming tenant would have given for them. *Wells v. Moody*, 7 C. & P. 59. [Parke]

An action on the case does not lie against a landlord, for distraining for more than the actual arrears of rent, unless the distress taken be of larger value than will satisfy the actual arrears. *Wilkinson v. Terry*, 1 M. & Ro. 377.

In an action against a landlord, for an excessive distress, it appeared that two several distresses for rent, and an intervening execution for a debt, were levied; a sale was afterwards effected, when the defendant, having retained what was due for rent, paid the remainder to the execution creditor:—Held, that he was justified in so doing, and that the sum, therefore, so paid over, could not be recovered in this action: Held, also, that the defendant and his broker were in the same situation as the sheriff's officer; and that the production of the writ and warrant, without proof of the judgment, was sufficient. *Taylor v. Harrison*, 1 Law J. (N.S.) K.B. 155, s.c. 3 B. & Ad. 320.

If a landlord, after tender of the rent due, sell the goods distrained for his arrears, case as well as trespass lies for the tenant; and a count in the declaration stating, in effect, that, notwithstanding the tender of arrears and costs to the defendant, he, the defendant, did not nor would restore or return the goods in question, is in substance and form a count in case, and may be joined to other counts of that nature and description. *Holland v. Bird*, 2 Law J. (N.S.) C.P. 201, s.c. 10 Bing. 15; 3 Mo. & Sc. 363.

Under the statute 24 Geo. 2, c. 44, s. 6, which protects an officer acting in obedience to a warrant of Justices, and requires that before action brought a demand of the warrant should be made, an officer who exceeds the warrant is not within the protection; therefore, where overseers seized the goods of the plaintiff, as a distress for poor-rates under a warrant, to a greater amount than was reasonably sufficient to satisfy the sum that was due,—Held, that they were liable to an action for an excessive distress, without any demand of the warrant.

The declaration alleged, that the defendant wrongfully distrained for 141l. 12s. 8d., pretended and alleged to have been duly rated, goods of a much greater value, and thereby, then and there took a great, unreasonable, and excessive distress:—Held,

sufficient, after verdict. But, *quære*, whether the declaration might not have been demurred to. *Stuart v. Clarke*, 2 Law J. (N.S.) K.B. 9, s.c. 1 N. & M. 671; 4 B. & Ad. 113.

## (G) ACTION FOR AN IRREGULAR DISTRESS.

[See TROVER.]

In an action on the case, under the statute 11 Geo. 2, c. 19, s. 19, for an irregularity in the conducting of a distress, it is necessary to state with correctness the party to whom the rent is due, and on whose demise the premises distrained upon are held. A variance between the allegation and proof in such respect will be fatal. *Ireland v. Johnston*, 3 Law J. (N.S.) C.P. 303, s.c. 1 Bing. N.C. 163; 4 Mo. & Sc. 706.

If the tenant, to save expense, requests that the appraiser may not be called in, and in consequence the broker who made the seizure values the goods, the tenant cannot, in an action, complain of that which was done as an irregularity. *Bishop v. Bryant*, 6 C. & P. 484. [Tindal]

In an action for an irregular distress, the only evidence at all affecting K, the landlord, was, that all the defendants appeared by the same attorney; and that the defendant's attorney had given the plaintiff notice to produce "the notice of distress for rent due to Mr. K;" and that the managing clerk of the defendant's attorney, when he seized it, had offered 10l. to settle the action:—Held, that this was not evidence to go to the jury as against K; and the Judge, therefore, directed the acquittal of K. *Crabb v. Killick*, 6 C. & P. 216. [Parke]

In actions for irregular distresses for rent, the correct practice is to make either the landlord alone, or the landlord and the broker defendants, and not to join appraisers, &c.; and if the plaintiff do join them, the Judge will oblige him to make out his case by strict rule, and not allow questions to be put to a witness who has been cross-examined, or a witness to be called back, with a view of fixing such appraisers, &c. *Child v. Chamberlain*, 6 C. & P. 213. [Parke]

If A, the tenant of B, has paid all his rent, and got his landlord's receipt for it; but, fearing that his goods will be taken on legal process, agree with the landlord to destroy the receipt, and that the latter shall put in a distress for rent to protect the goods; and the landlord do so, and sell the goods, and keep the proceeds:—This distress is good between A and B, though void against a third person, and A can maintain no action against B for it; but if B sold some articles not included in the inventory of the distress, A may maintain an action in respect of these articles. *Sims v. Tuffs*, 6 C. & P. 207. [Parke]

## (H) FRAUDULENT REMOVALS.

*Semble*, that under statute 11 Geo. 2, c. 19, s. 1, a landlord has no right to distrain goods, removed from the premises, for rent due subsequent to the removal. *John v. Jenkins*, 2 Law J. (N.S.) Exch. 83, s.c. 1 C. & M. 227; 3 Tyr. 170.

Statute 11 Geo. 2, c. 19, does not apply to cases where a tenant fraudulently and clandestinely removes his goods before rent becomes due; and, therefore, the landlord cannot follow and distrain such goods. *Rand v. Vaughan*, 4 Law J. (N.S.) C.P. 239, s.c. 1 Bing. N.C. 767; 1 Sc. 670.

A distress cannot be made upon goods fraudulently removed to avoid distress, unless rent was due at the time of the removal. *Northfield v. Nightingale*, 1 Law J. (N.S.) K.B. 219.

It is not necessary that a party seizing goods, fraudulently removing, (under stat. 11 Geo. 2, c. 19, s. 7,) should first call to his assistance an ordinary peace officer; it is sufficient, if he be assisted by a person appointed a special constable for the occasion. *Cartwright v. Smith*, 1 M. & R. 284.

A landlord has no right to follow, and take under a distress for rent the goods of a lodger, which have been taken off the premises, but only those of his own immediate tenant.

In trespass for taking goods under a distress for rent, if they have been clandestinely removed, and are afterwards seized, the defence must be pleaded specially, as the statute 11 Geo. 2, c. 19, s. 21, does not apply to such a case. *Postman v. Harrell*, 6 C. & P. 225.

An order of Justices, under 11 Geo. 2, c. 19, s. 4, adjudging a party to pay double the value of goods fraudulently and clandestinely removed to prevent a distress, must shew, on the face of it, that the party removing the goods was tenant; and that is not sufficiently shewn by stating, that, on complaint duly made, the party was charged with having fraudulently removed his goods from certain premises to prevent A B from distraining them for arrears of rent due to him for the said premises; and that, it appearing that he did so remove, &c., he is convicted thereof.

*Semble*, also, that the order should state that the complainant was the party's landlord, or the bailiff, servant, or agent of such landlord. *Rez v. Davis*, 3 Law J. (N.S.) M.C. 29, s. c. 5 B. & Ad. 551; 2 N. & M. 349.

#### DISTRIBUTION.

[See EXECUTOR AND ADMINISTRATOR.]

The deceased, (the son of a British subject, who resided for several years up to his death in Ireland, and had purchased property there,) though occasionally claiming the privileges of a British subject, and visiting England, but who was born, educated, and established as a merchant, and who died in Spain,—Held to be clearly domiciled in Spain, and, consequently, that the law of Spain was to govern the disposition of his property. *Moore v. Darell*, 4 Hag. Ec. 346.

#### DISTRINGAS.

[See PRACTICE.]

#### DIVIDENDS.

[Bequest of. See LEGACY, Residue.]

#### DIVORCE.

The wife going to a brothel with another man is evidence of adultery. *Wood v. Wood*, 4 Hag. Ec. 138.

In a suit for cruelty and adultery against the husband, and a recriminatory charge of adultery against the wife, the Chancellor of London, and,

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upon appeal, the Dean of the Arches, (affirming the sentence)—held, the husband's cruelty not proved, and the adultery of the wife proved by the evidence of a single witness only to any undue familiarity, proximate act, or fact of adultery, which evidence, though confused, was corroborated by the evidence of the conduct of the wife. *Kenrick v. Kenrick*, 4 Hag. Ec. 114.

A Scotchman domiciled in Scotland was married in England to an Englishwoman; and by marriage contract secured to her a jointure on his Scotch estates. They went to Scotland after their marriage, and resided there a short time, when they returned to England. They afterwards agreed to a separation, and articles of agreement were executed, by which the husband secured a separate maintenance to the wife during the separation. From the time of the separation the wife resided abroad, and the husband continued to be domiciled in Scotland, where he raised an action of divorce against her, on the head of adultery, alleged to have been committed abroad after the separation:—Held, by the House of Lords, affirming the interlocutor of the Court of Session, that the wife's legal domicile was in Scotland, where the husband's was, and that she was amenable to the jurisdiction of the Scotch court; that an edictal citation, with actual intimation by serving a copy of the summons personally, was a good citation; and that it is competent to the Scotch courts to entertain a suit to dissolve a marriage contracted in England. *Warrender v. Warrender*, 2 C. & F. 488.

#### DOCK.

[See TONNAGE DUES.]

#### DOCUMENTS.

[See EVIDENCE, Admissions—Costs, Proof of Documents.]

Where books, papers, and writings, mentioned in a schedule to the defendant's answer, are deposited by the defendant with his clerk in court, for the inspection and examination of the plaintiff, under the usual order for that purpose, the defendant is entitled to have them restored to him so soon as such inspection and examination have taken place; and the plaintiff is not entitled to have them retained in the custody of the clerk in court, notwithstanding it may be necessary that they should be produced before the Master in taking the accounts directed by the decree, or on the hearing of an appeal from the decree. *Small v. Attwood*, 1 Y. & C. 37.

#### DOG.

[See ANIMAL—PARK.]

#### DOMICILE.

[See DISTRIBUTION.]

Cases of domicile do not depend on residence alone, but on a consideration of all the circumstances of the case: *Moore v. Budd*, 4 Hag. Ec. 332.

The testator was born in Maryland, before the separation of the American colonies from Great

Britain, of parents domiciled in America, and was sent to Scotland when under age, for his education. At the age of twenty-four, and after the treaty of 1783, he went to India, being described in the ship's books as an American, and remained in that country for thirty years, where he acquired a fortune, the greater part of which he left there, on returning to Europe. He then went to America to see his family, and to look after some property left him by his father; and, having again visited different parts of England, Scotland, and the continent, finally returned to America, engaged in agricultural pursuits, commenced drawing his property to that country, and made a will, wherein he described himself as "late of Calcutta, and now of Richmond, in the country and state of New York," and appointed English executors. Shortly after, he died, at New York:—Held, that the testator had made his election to become a subject of the United States, and was at his death domiciled in America; and, consequently, that the legacies paid in this country to English legatees, were not subject to the legacy duty. *In re Bruce*, 1 Law J. (N.S.) Exch. 153, s. c. 2 Tyr. 475; 2 C. & J. 436.

An inquiry directed respecting the domicile of a testator, although for 140 years his will had been acted upon in the administration of a certain charitable fund, and, during 100 years of that period, under the direction of the Court, upon the ground that his domicile had been England, it appearing that no declaration had ever been made respecting the rights of persons entitled to take the benefit of the bequest. *Bernal v. Bernal*, 4 Law J. (N.S.) Chanc. 274.

#### DOMINICA.

Importation of lumber, &c. into (duty free), permitted. 5 & 6 Will. 4, c. 10; 13 Law J. Stat. 9.  
Provisions for the relief of. 5 & 6 Will. 4, c. 51; 13 Law J. Stat. 112.

#### DONATIO MORTIS CAUSA.

Though the obligee of a bond in her last illness gave the bond to another person, and afterwards the obligor paid to the obligee the money secured by the bond, a Court of equity refused to interfere in favour of the donee against the donor. *Edwards v. Jones*, 4 Law J. (N.S.) Chanc. 163.

The obligee of a bond, upwards of eighty years of age, and labouring under the disease of cancer, five days before her death, signed a memorandum, which was indorsed upon the bond, and purported to be an assignment of the bond to her niece, to whom she afterwards delivered it:—Held, that this was not a *donatio mortis causa*, it not appearing that the bond was given at the time of the indorsement, nor that there was an intention that it should be restored if the testatrix recovered. *Ib.* 164.

Declarations by an intestate, that he meant that a person, with whom he resided, should have his furniture and effects for what he owed her:—Held, sufficient to entitle such person to take and retain possession of the property. *Royston v. Hankey*, 3 Mo. & Sc. 381.

#### DOUBLE PROVISION.

The testator, upon the marriage of a daughter, entered into a bond for the payment of 5,000*l.* within six months after his decease to the trustees of his daughter's settlement, the interest to be paid to the husband for life; and after his decease, if the wife survived him, and there were children of the marriage, 1,000*l.*, part of the 5,000*l.*, to be paid to the wife, and the remainder to be applied for the use of the children of the marriage; but, if there were no children, 2,000*l.* to be paid to the wife, and the remainder of the 5,000*l.* to be paid to the executors and administrators of the husband; and in case the husband survived the wife, and there were no children, then the whole of the 5,000*l.* to the husband.

The testator afterwards made his will, and gave his daughter 5,000*l.*, stating it to be in addition to what he had secured upon his marriage. About five years afterwards, the testator executed a deed, whereby he covenanted that his executors should pay to the trustees, within six months after his death, the sum of 5,000*l.* upon the trusts of the settlement. Parol evidence of the declarations of the testator was admitted to prove, that he did not intend a double portion.

*Quere*.—Whether the different interests of the husband, wife, and children in the legacy of 5,000*l.*, and in the sum of 5,000*l.* given by the deed, would repel the common presumption against double portions. *Lloyd v. Harvey*, 2 Russ. & M. 310.

A testator, by his will, gave to his daughter Sophia and her children, under certain circumstances, a sum of 10,000*l.*, 4*l.* per cent. annuities, and directed, that, with the exception of certain sums, of which this was not one, and which were expressly ordered to be brought into hotchpot, the legacies bequeathed to any of his children were to be, not in satisfaction of, but in addition to any portion or provision to which they were or should be entitled under any articles, or settlement then already executed by him; afterwards, upon her marriage, a sum of 10,000*l.*, 4*l.* per cent. bank annuities, was settled upon Sophia, her husband, and her children:—she is not entitled to both provisions, notwithstanding the differences in the limitations.

The testator, on the marriage of another daughter without his consent, revoked a bequest of 10,000*l.*, 4*l.* per cent. bank annuities, which he had made by the same will in favour of that daughter and her children, and gave her a life interest in a sum of 5,000*l.*, 4*l.* per cent. bank annuities. He afterwards settled 10,000*l.* on her and her children; and by a codicil declared the settlement to be in satisfaction of the legacy:—This circumstance, even coupled with the difference of the provisions, and the language of the will, is not sufficient to repel the presumption against double portions in the case of the daughter Sophia. *Sheffield v. the Earl of Coventry*, 2 Russ. & M. 317.

#### DOVER CASTLE.

[Constable of. See SHERIFF.]

## DOWER.

[Amendment of the Law relating to. See 4 Will. 4, c. 105; 11 Law J. Stat. 217.]

In dower *unde nihil habet*, a plea, that before the commencement of the suit, the tenant was ready and willing, and tendered, and still is ready and willing to render dower, though confessed by the demandant, does not deprive her of her right to damages and costs under the statute of Merton, as such plea should contain an averment that the tenant has always been ready and willing to render dower from the death of the husband.

An attorney, who is surety in a bond of indemnity to a purchaser for loss by legal ouster from the whole or any part of the lands purchased, may set up as a defence in an action by the purchaser to recover the amount of costs and damages paid to the demandant in an action of dower, that such costs and damages were improperly awarded, although he acted as attorney for the purchaser (the tenant in dower) in the action of dower. *Jones v. Jones*, 1 Law J. (N.S.) Exch. 196, s. c. 2 C. & J. 611.

The 9th section of the 1st Car. 1, "An act for the settling, &c. of the copyhold estates and customs of the tenants in base tenure of the manor of Cheltenham," enacts, that "the wives of the copyholders which shall join in any grant or surrender with their husbands, of any of the customary messuages or lands, being first solely and secretly examined in court, according to the custom there, shall be concluded and barred afterwards to claim any right, title, or estate whatsoever, of or in those lands so surrendered as aforesaid:"—Held, that the plaintiff, widow of a copyholder, was entitled to dower out of customary lands, of which her husband was tenant during the coverture, but of which he did not die tenant; such lands having been aliened during the coverture by the husband alone, without the wife having been solely and separately examined in court, or having joined in the surrender thereof. *Riddeil v. Jenner*, 2 Law J. (N.S.) C.P. 248, s. c. 10 Bing. 29; 3 Mo. & Sc. 673.

The demandant, in January 1833, sued out her writ of dower *unde nihil habet*. In the ensuing May, the tenant, amongst other things, pleaded that demandant had by a certain deed of separation between herself, her husband in his lifetime, and certain trustees, craved her dower, and accepted an annuity in satisfaction. In August 1833, an order was made by the Court of Exchequer, in which the demandant had filed a bill against the father of her husband, as his administrator, by consent of the litigating parties, that the trustees named in the deed of separation should pay her the arrears of the annuity settled upon her by such deed, without prejudice to her other claims; which they accordingly did, and she received the same on the 9th of September:—Held, that such receipt by her, at such an interval of time after action brought, and plea pleaded, was not sufficient evidence to support the issue raised, of her election to receive such annuity in satisfaction of dower.—Held also, that the order of the Court of Exchequer of August 1833, was admissible in evidence, not as an adjudication, but as a circumstance to shew the *animus* with which the demandant received the sums in question. *Slatter v.*

*Slatter*, 4 Law J. (N.S.) C.P. 25, s. c. 1 Bing. N.C. 259; 1 Sc. 82.

## DRAMATIC LITERARY PROPERTY.

Amendment of Laws relating to. 3 Will. 4, c. 15; 11 Law J. Stat. 89.

## DUEL.

[See INFORMATION.]

## DISTRESS.

[See COGNOVIT.]

## DWELLING-HOUSE.

[See BURGLARY AND HOUSEBREAKING.]

## DYER.

[See LIEN.]

## EASEMENT.

[See LIGHT.]

A verbal licence is not sufficient to confer an easement of having a drain in the land of another to convey water; and such licence may be revoked, though it has been acted upon.

In 1816, A cut a drain in the land of B, to a spring, the water from which he appropriated as it ran through his own land. In 1833, B stopped the drain:—Held, that B was entitled so to do, no right having been acquired by user or length of possession. *Cocker v. Cooper*, 1 C. M. & R. 418, s. c. 5 Tyr. 108.

In an order to extinguish an easement by consolidation, there must be a unity of seisin of both estates; a unity of possession alone, where the interest in the estates is different, will only suspend the right, which will revive on severance.

Where a party has a right to have the droppings of rain fall from eaves projecting to a certain extent from a wall of a given height, he does not lose that right by raising his wall and extending the eaves. *Thomas v. Thomas*, 4 Law J. (N.S.) Exch. 179, s. c. 2 C. M. & R. 34.

## EAST INDIA COMPANY.

Arrangement with, and provisions for government of India till 30th of April 1854. See 3 & 4 Will. 4, c. 85; 11 Law J. Stat. 157.

Power of suspending provisions of 3 & 4 Will. 4, c. 85, relating to Agra. 5 & 6 Will. 4, c. 52; 13 Law J. Stat. 114.

## ECCLESIASTICAL PROPERTY.

Provisions for identification of. 2 & 3 Will. 4, c. 80; 10 Law J. Stat. 211.

## ECCLESIASTICAL REVENUES.

Provisions for protection, and preventing the lapse of, during the inquiry into the state of the Established Church. See 5 & 6 Will. 4, c. 80; 13 Law J. Stat. 61.

## ECCLESIASTICAL COURTS.

[See CONTEMPT—PRACTICE, in the Ecclesiastical Courts.]

A party cannot except to a witness by contradicting answers to interrogatories which go to incidental collateral matter, and are not relevant to the issue. *Whisk v. Hesse*, 3 Hag. Ec. 680.

The improbability of his evidence is not sufficient to discredit a witness of good general character, speaking firmly and solemnly, unless such improbability amount almost to absolute incredibility, and be incapable of explanation. *Ib.* 706.

In matrimonial suits, the libel must contain all facts that can by diligence be ascertained at the time, and subsequently, new facts only,—which are nearly conclusive of guilt—can be pleaded. The Court, on appeal, affirmed the rejection of additional articles, on the ground that the facts might have been pleaded originally, and were inconclusive. *Story v. Story*, 3 Hag. Ec. 738.

On the refusal of a monition against district churchwardens to join the parish churchwardens in making a rate, the district churchwardens, though no parties to the suit below, nor to the decree complained of, may, notwithstanding the formal words of the inhibition, be made the only respondents in an appeal; and the refusal of such monition, being a case within the third exception of the Statute of Citations, authorizes the citing the parties out of their diocese. Respondents appearing under protest assigned to appear absolutely. Costs reserved. *Cotterell v. Mace*, 3 Hag. Ec. 743. The process of the Prerogative Court does not run into a royal peculiar, but must be served by letters of request. *Crowley v. Crowley*, 3 Hag. Ec. 758.

The punishment for defamation is discretionary in the Ecclesiastical Court. Therefore, where a defendant was sentenced to acknowledge, that he believed the life and conversation of a woman, whom he had defamed, to be "sober, chaste, and honest," at the time of doing the penance, the King's Bench held, that the Ecclesiastical Court had not exceeded its jurisdiction. *Birch v. Brown*, 1 Dowl. P.C. 396.

## EJECTMENT.

[See AMENDMENT—LANDLORD AND TENANT—LEASE—MESNE PROFITS.]

- (A) WHERE MAINTAINABLE.
- (B) BETWEEN LANDLORD AND TENANT.
- (C) DECLARATION AND SERVICE.
- (D) NOTICE TO APPEAR.
- (E) CONSENT RULE.
- (F) PLEADINGS AND EVIDENCE.
- (G) VERDICT.
- (H) JUDGMENT.
- (I) EXECUTION.
- (K) SETTING ASIDE PROCEEDINGS.
- (L) COSTS.
- (M) VACANT POSSESSION.

## (A) WHERE MAINTAINABLE.

[See ADVERSE POSSESSION.]

A, donee in tail, enters and takes the profits in the lifetime of A. B enters and takes the profits

during thirty years to his own use. A dies. C, his issue in tail, may enter upon B, and is not bound to shew, that the possession of B was not adverse. *Doe d. Smith v. Pike*, 1 N. & M. 385.

Lease for twenty-one years to A B, his executors, administrators, and assigns. Proviso, that if A B, his executors, administrators, or assigns, should become bankrupt or insolvent, or suffer any judgment to be entered against him, &c. by confession or otherwise, or suffer any extent, process or proceedings to be had or taken against him, whereby any reasonable probability might arise of the estate being extended, &c., the estate should determine, and the lessor have power to re-enter. A B died during the term, and, by his will, devised the premises to his executors on certain trusts. The surviving executor having become bankrupt:—Held, that the lessor's right of re-entering thereupon accrued. *Doe d. Bridgman v. David*, 1 C. M. & R. 405, s. c. 5 Tyr. 125.

Under a bequest of leasehold property, in trust to permit and suffer the testator's widow to take and receive the rents and profits during life or widowhood, and, after her death or future marriage, to sell the same, and divide the produce between the testator's sons, the legal estate vests in the trustees; and therefore, on a lease (reciting the will) by the surviving trustee, the widow, and the testator's surviving son, reserving rent to the latter two parties, and a power of re-entry for non-payment to the lessors or the survivor, after the death of the trustee and the son, an action of ejectment for a forfeiture, by reason of non-payment of rent, cannot be sustained on a demise of the widow alone. *Doe d. Barker v. Goldsmith*, 1 Law J. (N.S.) Exch. 256, s. c. 2 C. & J. 674; 2 Tyr. 710.

The Commissioners of Woods and Forests conveyed to the lessor of the plaintiff, under the 57 Geo. 3, c. 97, a certain manor, upon the wastes of which, more than twenty years before, without the consent or knowledge of the Crown, encroachments had been made, and the portions encroached upon had been inclosed and separated from the rest:—Held, upon case reserved, that the purchaser, the lessor of the plaintiff, was not entitled to maintain an ejectment for the recovery of the lands inclosed. *Doe d. Watt v. Morris*, 4 Law J. (N.S.) C.P. 285, s. c. 2 Bing. N.C. 189; 2 Sc. 276.

A barn and outhouses standing and being in and upon a close, are attached to the freehold, and are the subject-matter of an ejectment. *Anthony v. Hanev*, 1 Law J. (N.S.) C.P. 81, s. c. 8 Bing. 186; 1 Mo. & Sc. 300.

A, having agreed to buy certain lands of B, had paid part of the purchase-money, and was let into possession. B had not executed any conveyance:—Held, that this was a mere tenancy at will in A; and that, if B had made a demand of possession, to determine the tenancy at will, he might recover the lands by ejectment. *Doe d. Hiat v. Miller*, 5 C. & P. 595. [Parke]

Ejectment may be maintained upon a term duly created, but assigned to the lessor of the plaintiff by a deed defective under the statute of 13 Eliz. c. 20. *Doe d. Moore v. Ramsden*, 1 N. & M. 489.

Where, by lease, mortgagee demised, and the executrix of mortgagor demised and confirmed, and power of re-entry was reserved to them, or

either of them:—Held, that it operated as the demise of the mortgagee, and the confirmation of the mortgagor's representative; that the re-entry enured to re-vest the estate in the mortgagee; and that a count in ejectment, laying the demise jointly in the two, was not sustainable. *Doe d. Barney v. Adams*, 1 Law J. (N.S.) Exch. 105\*, s. c. 2 C. & J. 232; 2 Tyr. 289.

A devised the residue of a term determinable on lives to B. After the decease of the testator, the administrator, with the will annexed, paid the rent reserved on the term for six years, and charged it to B:—Held, that this was sufficient evidence of his assent to the bequest to enable B to maintain an ejectment. *Doe d. Mabberley v. Mabberley*, 6 C. & P. 126. [Tindal]

A, thirty years ago, died seised of a cottage, having a son B and a daughter C. At his death, C, his daughter, then unmarried, took possession of it, and afterwards married D, and after his death W. After her death, W remained in possession sixteen years:—Held, that the son of B, who was the heir of C as well as being the heir of A and B, might recover in ejectment, although W, including the term he had occupied the cottage with his wife, had had more than twenty years possession of it. *Doe d. Tranter v. Wing*, 6 C. & P. 538. [Williams]

#### (B) BETWEEN LANDLORD AND TENANT.

In ejectment by landlord against tenant, if the title to the premises be disputed between them, the latter is not compellable to give the undertaking, and enter into the recognizance required by 1 Geo. 4, c. 87, s. 1. *Doe d. Sanders v. Roe*, 1 Dowl. P.C. 4.

Where a person claiming title to lands obtains possession from a tenant, he is bound by the tenant's estoppel, and cannot, in an ejectment, set up a valid title against the landlord. *Doe d. Buller v. Mills*, 1 M. & R. 385.

In ejectment for a forfeiture, under a covenant to keep in tenantable repair, it is not necessary to shew that the premises were not in repair on the day of the demise; but if proved to be out of repair a short time previously, it is incumbent on the defendant to give evidence that they have been put into repair before the right to re-enter accrued.

What is sufficient evidence of privity, to render a party in possession liable, as assignee of a lease, for a forfeiture in an action of ejectment. *Doe d. Hemmings v. Durnford*, 1 Law J. (N.S.) Exch. 251, s. c. 2 C. & J. 667.

Tenant at will underlets: a demand of possession by the superior landlord on the wife of the under-tenant, on the property, is sufficient to determine the will.

*Semble*, a demand on the wife off the premises is not sufficient. *Doe d. Blair v. Fairfax*, 3 Law J. (N.S.) K.B. 123.

Where the defendant obtained possession of premises by the permission of the lessor of the plaintiff to enter for a particular purpose, and fraudulently kept possession:—Held, that in an action of ejectment to recover back possession, the defendant could not dispute the title of the lessor of the plaintiff. *Doe d. Johnson v. Baytop*, 4 Law J. (N.S.) K.B. 263, s. c. 4 N. & M. 337; 3 Ad. & E. 188.

The six days' notice required by the 1 Will. 4, c. 70, is not a condition annexed to the plaintiff's

right to recover; but if there be any irregularity in the notice, if not waived by appearance, the proper mode to take advantage of it is to move to set aside the judgment. *Doe d. Antrobus v. Japson*, 1 Law J. (N.S.) K.B. 154, s. c. 3 B. & Ad. 402.

Where the defendant's father, and, after his death, the defendant, had occupied premises, by the permission of the father of the lessor of the plaintiff, and the defendant continued in possession after the death of the father of the lessor of the plaintiff:—Held, that the following letters did not amount to a disclaimer so as to determine the tenancy.

First, a letter written by the defendant to the plaintiff, in which, after acknowledging the receipt of a letter from the plaintiff on the subject of the premises in question, he said, "as the circumstances in it are not within my knowledge, I have placed it in the hands of Messrs. F, and have requested them to communicate with you."

A letter from Messrs. F to the plaintiff: "Earl C (the defendant) has given us a letter from you on the subject of some ground you state to have been let by the late Mr. L (the father of the lessor of the plaintiff) in 1811, and which has ever since been in the possession of his lordship's family. We will thank you to let us have the proofs that it was not the late Earl's own."

A second letter from Messrs. F requested further information "as to the late Mr. L having a right to let the piece of ground in question to Earl C, as it appears to us that the mere fact mentioned in your letter at the utmost only shews that Mr. L might claim it, and does not at all aver that Lord C admitted it even on the representation of his own agent."

Held also, that letters written after the day of the demise, and not containing any admission of a disclaimer before the day of the demise, will not have the effect of determining a tenancy, so as to support ejectment.—Held also, that if the letters of the solicitors had amounted to a disclaimer, the defendant would not have been bound, as they had no authority from him to disclaim. *Doe d. Lewis v. Lord Cawdor*, 3 Law J. (N.S.) Exch. 239, s. c. 1 C. M. & R. 398; 4 Tyr. 852.

Where a landlord's right of possession accrues on the day after essoign day of Trinity term, he is not entitled to serve a declaration in ejectment as of that term, under 11 Geo. 4, & 1 Will. 4, c. 70, s. 36. *Doe v. Roe*, 1 Dowl. P.C. 79.

Where a landlord's right accrues during Hilary term, and the premises are situate in the county of Middlesex, proceedings cannot be had for their recovery under the 11 Geo. 4, & 1 Will. 4, c. 70, s. 36. *Doe d. Norris v. Roe*, 1 Dowl. P.C. 547.

In an ejectment by landlord against tenant for a forfeiture, it is a good defence that the landlord, after the execution of the lease, conveyed away his title to the premises by mortgage; although it be not shewn that any interest on the mortgage is in arrear, or that the mortgagee has any claim, or otherwise enforced his rights as against either landlord or tenant. *Doe d. Marriott v. Edwards*, 5 B. & Ad. 1065, s. c. 3 N. & M. 193.

If a landlord allows his tenant to hold over above a year, without taking any steps to recover the premises, he is not entitled to the benefit of 1 Geo. 4, c. 87, s. 1. *Doe d. Thomas v. Field*, 2 Dowl. P.C. 542.

In an ejectment by a landlord against his tenant, the landlord relied on a disclaimer. It was proved that the tenant disclaimed in March 1833. In November 1833, the landlord put in a distress for rent:—Held, a waiver of the disclaimer.—Held also, that the statute 8 Anne, c. 14, s. 6, which enables a landlord to distrain after the determination of a tenancy, does not apply to cases where the tenancy is put an end to by the tenant's wrongful disclaimer. *Doe d. David v. Williams*, 7 C. & P. 322. [Patteson]

Where a landlord applies to the Court to compel his tenant to give the securities required by the 1 Geo. 4, c. 87, it may also be made part of the rule, that the landlord shall be at liberty to sign judgment against the casual ejector in case of a default on the part of the tenant to give the required securities. *Doe v. Roe*, 2 Dowl. P.C. 180.

### (C) DECLARATION AND SERVICE.

[See instances of what is deemed sufficient service in ejectment—*Doe d. Visger v. Roe*, 2 Dowl. P.C. 449; *Doe v. Roe*, ib. 184; *Doe v. Roe*, ib. 198; *Doe d. Wetherell v. Roe*, ib. 441; *Doe d. Courthorpe v. Roe*, ib. 441; *Doe d. Mortlake v. Roe*, ib. 444; *Doe d. Harris v. Roe*, ib. 607; *Doe d. Frost v. Roe*, 3 Dowl. P.C. 314; *Doe d. Wills v. Roe*, ib. 582; *Doe d. Grimes v. Roe*, 4 Dowl. P.C. 86; *Doe d. Osbaldeston v. Roe*, 1 Dowl. P.C. 456; *Doe v. Roe*, ib. 67.]

Where, after a declaration and notice in ejectment had been affixed to the door of the premises, the wife of the tenant in possession called upon the party who had attempted to make the service, and requested to know what she was to do with the paper; and he read and explained it to her, and advised her to go to the attorneys of the lessors of the plaintiff; and she said she would see her husband immediately, and inform him of such advice:—Held, that the service was insufficient.

If the wife of the tenant in possession be living with her husband at the time of the service of a declaration and notice in ejectment upon her, such service, it seems, need not be upon the premises. *Doe d. Griggs v. Roe*, 1 Law J. (N.S.) Exch. 77, s.c. 2 C. & J. 202; 2 Tyr. 211; 1 Dowl. P.C. 312.

Service of copy of declaration in ejectment on wife of tenant, at his residence, but not on the premises for the recovery of which the ejectment was brought:—Held, to be good service, and to entitle lessor of plaintiff to judgment against the casual ejector. *Doe d. — v. Roe*, 4 Law J. (N.S.) C.P. 137.

Service of the declaration in ejectment on the wife, at the house of a friend, where she and her husband are staying together, is good. *Doe v. Roe*, 2 Law J. (N.S.) Exch. 268, s.c. 3 Tyr. 602.

The premises were unoccupied, and situated at Streatham, and the service was made on the tenant's wife, at his dwelling-house, at Wandsworth:—Held good. *Doe d. Wingfield v. Roe*, 2 Law J. (N.S.) Exch. 149; s.c. 1 Dowl. P.C. 693.

Service of the declaration in ejectment on the wife on the premises, and reading over the notice without explaining it, is sufficient. *Doe v. Roe*, 2 Dowl. P.C. 199.

Service in ejectment on the wife of the tenant in possession on the premises is sufficient; although, from the conduct of tenant and wife, his christian name is not stated in the notice at the foot of the declaration. *Doe d. Warne v. Roe*, 2 Dowl. P.C. 517.

A declaration and notice of ejectment were served upon a servant of the tenant, whose wife subsequently admitted, that she had received it, and given it to her husband:—Held insufficient. *Doe d. Tucker v. Roe*, 4 Mo. & Sc. 165.

Service of declaration in ejectment is not sufficient on the wife, unless it is stated to have been on the premises, or that she was living with her husband. *Doe d. Williams v. Roe*, 2 Dowl. P.C. 89.

If the wife, on the premises, has received the declaration, and prevents the person serving it from giving an explanation, or reading it over, the service is sufficient. *Doe d. George v. Roe*, 3 Dowl. P.C. 541.

Service of a declaration in ejectment on the daughter of the tenant in possession is not good service, unless it be shown to have come to the hands of the tenant. *Doe d. Brittlebank v. Roe*, 4 Mo. & Sc. 562.

Service on the daughter on the premises is insufficient, even for a rule nisi; although there may be reason to believe the wife is aware of the proceeding, and keeps out of the way to avoid being served. *Doe d. George v. Roe*, 3 Dowl. P.C. 9.

Service on the daughter on the premises will not suffice, unless it is shown that the declaration came to the hands of the father, with proper explanation. *Doe v. Roe*, 2 Dowl. P.C. 414.

Service of the declaration in ejectment upon the tenant's daughter before the term, and an acknowledgment by the tenant within the term:—Held, sufficient to ground a motion for judgment against the casual ejector. *Doe d. Smith v. Roe*, 4 Dowl. P.C. 265.

A copy of the declaration was delivered to the daughter of the tenant in possession, and explained to her. She said, her father was ill up stairs, and she would go up and inform him. She went up stairs, and, on coming down, she said, she had told him, and explained it to him:—Held, good. *Doe d. Cockburn v. Roe*, 2 Law J. (N.S.) Exch. 149, s.c. 1 Dowl. P.C. 692.

Service of declaration on the son of the tenant, on the premises, the affidavit of service deposing to a belief, that the tenant kept out of the way to avoid service, and that the tenant's wife had said, "that any attempt to arrest him would be useless:—Held, insufficient. *Doe d. — v. Roe*, 4 Law J. (N.S.) C.P. 136.

If a tenant in possession is clearly keeping out of the way to avoid being served, the Court will grant a rule nisi for judgment, if the son is regularly served on the premises. *Doe d. Leaf v. Roe*, 3 Dowl. P.C. 575.

Service of a declaration in ejectment upon the mother of the tenant in possession is not sufficient. *Doe d. Smith v. Roe*, 1 Dowl. P.C. 614.

Service of a copy of the declaration on the sister of the tenant, to whom it was explained, on the premises, and who said she would accept it for her sister, the tenant:—Held, insufficient. *Doe v. Roe*, 4 Law J. (N.S.) C.P. 137.

Where in a declaration in ejectment, the lessors of the plaintiff are described to be executors, the affidavit of service need not, in stating the name of the cause, notice the character of the lessors stated in the declaration. *Doe d. Jenks v. Roe*, 2 Dowl. P.C. 55.



An affidavit of the service of a declaration in ejectment on "tenants in possession as administrators," is insufficient, as the words "as administrators" are words of qualification. *Doe v. Roe*, 1 Law J. (N.S.) Exch. 39, a.c. 2 C. & J. 45; 2 Tyr. 158; 1 Dowl. P.C. 295.

Service on the administratrix of the last tenant in possession is not sufficient, unless it is shewn that she is the tenant in possession. *Doe d. Rigby v. Roe*, 4 Dowl. P.C. 14.

Service of a declaration in ejectment, on the book-keeper of a company, in possession of part of the premises, sufficient. *Doe v. Roe*, 1 Dowl. P.C. 23.

Where the tenant in possession has absconded to another country, the service of the declaration in ejectment may be effected on his agents on the premises. *Doe d. Robinson v. Roe*, 3 Dowl. P.C. 11.

On motion for judgment against the casual ejector, the affidavit alleged a service of the declaration and notice upon a servant of the tenant upon the premises, the tenant being absent, and that the servant had subsequently stated, that he had given them to his master:—Held, not sufficient. *Doe d. Thomas v. Roe*, 1 Mo. & Sc. 435.

Service of a declaration in ejectment on the bailiff of the tenant is sufficient foundation for judgment against the casual ejector, where it appears to have duly come to the hands of the tenant's attorney, who promises to appear. *Tenny d. Mills v. Catts*, 1 Sc. 52.

In ejectment by a landlord for non-payment of rent, an affidavit stating, that the party called four times at the premises in question, without being able to find the tenant; that he delivered a true copy to the servant, with an intimation that it would be fixed on the door; and that he also believed, that the tenant kept out of the way to avoid being served:—Held, not sufficient to satisfy the Court that the tenant cannot be legally served, so as to make the affixing of a copy on the door of the demised premises good service, under 4 Geo. 2, c. 28, s. 2. *Doe d. — v. Roe*, 4 Law J. (N.S.) C.P. 137, s.c. 1 Sc. 464.

Where the service on one of two tenants was complete, and the copy of the declaration was left with, and explained to, a servant of the other tenant on the premises, and the person serving the copy, &c. subsequently met that tenant, to whom he proceeded to read the notice, but whilst he was so doing, the tenant ran away:—Held, that such service on the latter tenant, was good, and entitled the lessor to judgment against the casual ejector. *Doe d. — v. Roe*, 4 Law J. (N.S.) C.P. 137.

If the tenant in possession reads over, and says he understands the nature and object of a declaration in ejectment, it is not necessary for the person serving it to read it over or explain it. *Doe d. Jones v. Roe*, 1 Dowl. P.C. 518.

In serving a declaration in ejectment, it will suffice to read it over without explaining it, or to explain it without reading it over. *Doe v. Roe*, 1 Dowl. P.C. 428. [Patteson]

Where it became necessary to employ an interpreter, in order to explain to the tenant the object of the declaration in ejectment, but who was not upon oath:—Held, that the explanation was sufficient to entitle the lessor of the plaintiff to sign

judgment. *Doe d. Probert v. Roe*, 3 Dowl. P.C. 335.

Service on an under joint-tenant is good service on him and a joint-tenant. *Doe d. Hutchinson v. Roe*, 2 Dowl. P.C. 418.

Where a tenant in possession keeps out of the way to avoid being served, a rule nisi for judgment may be obtained by a service on the tenant on the premises. *Doe d. Morpeth v. Roe*, 3 Dowl. P.C. 577.

Service of declaration in ejectment on one of two joint tenants in possession is sufficient, if such joint tenancy appear on the affidavit of service. *Doe d. Gaskell v. Roe*, 3 Tyr. 84.

If the tenant in possession by fraud prevents a complete and regular service of the declaration in ejectment, judgment may still be obtained against the casual ejector. *Doe d. Frith v. Roe*, 3 Dowl. P.C. 569.

What is a sufficient acknowledgment by a tenant in possession, of receiving a declaration in ejectment. See *Doe v. Roe*, 1 Dowl. P.C. 365.

Service of declaration and notice in ejectment where the tenant is not to be found. See *Doe d. James v. Roe*, 1 Mo. & Sc. 597.

Service of declaration in ejectment on person not named therein as tenant in possession. See *Doe v. Roe*, 2 Tyr. 280.

Where a declaration in ejectment is served upon the son of the tenant in possession before the first day of term, and the latter afterwards acknowledges that he has received the declaration, such acknowledgment is not sufficient to entitle the plaintiff to a rule for judgment against the casual ejector, unless it appear thereby that the declaration came to the hands of the tenant before the first day of term. *Doe d. Marshall v. Roe*, 4 N. & M. 553, a.c. 2 Ad. & E. 588.

The Court will not allow a wife's declaration, with respect to her husband being out of the way, to avoid being arrested or annoyed, to be used for the purpose of obtaining judgment against the casual ejector. *Doe d. Wilson v. Smith*, 3 Dowl. P.C. 379.

The rule of court, Mich. 3 Will. 4, that every declaration shall be entitled of the day of the month and year on which it is filed and delivered, does not apply to declarations in ejectment.

The Court refused to set aside a declaration in ejectment, in which the notice was dated of a day after the service of declaration. *Doe d. Evans v. Roe*, 2 Ad. & E. 11.

*Semble*, that, in ejectment, the omission of all local description of the tenement demised is error, though the county and vill in which the demise was made are stated in the declaration, and the county is stated in the margin.

Pending a rule nisi to arrest judgment, on the ground of such error, the Court allowed the plaintiff to amend the declaration and issue, on payment of the costs of both rules. *Doe v. Bath*, 2 N. & M. 440.

A declaration in ejectment need not be entitled of a term or of a particular day as of a term. It is sufficient if it be entitled of a particular day. *Doe d. Ashman v. Roe*, 1 Bing. N.C. 253, a.c. 1 Sc. 166.

The Court will not grant a rule nisi for judgment against the casual ejector on an acceptance of the declaration and notice by an attorney who is not

on the roll of this court. *Doe d. Walker v. Roe*, 1 Law J. (n.s.) Exch. 186, s. c. 2 C. & J. 381; 2 Tyr. 459; 1 Dowl. P.C. 669.

If the service is regular, the substitution of "Jacob" for "Sarah" in the notice is immaterial. *Doe d. Folks v. Roe*, 2 Dowl. P.C. 567.

If a declaration in ejectment is entitled of a term which has not yet arrived, the error is immaterial. *Doe v. Roe*, 2 Dowl. P.C. 186.

The 15th rule of Michaelmas term, 3 Will. 4, does not apply to declarations in ejectment. *Doe d. Fry v. Roe*, 3 Mo. & Sc. 370.

#### (D) NOTICE TO APPEAR.

The statement of a term not yet arrived in entitling a declaration in ejectment, is immaterial, if sufficient information, as to the time of appearance, is given in the notice. *Doe d. Gore v. Roe*, 3 Dowl. P.C. 5.

A notice at the foot of a declaration in ejectment, advising the tenant to appear and defend in due time, is insufficient. *Doe d. Isherwood v. Roe*, 2 N. & M. 476.

A notice at the foot of a declaration in ejectment, omitting to state, that the consequence of the action not being defended, will be turning the tenant out of possession, is defective, but may be amended on terms. *Doe d. Darwent v. Roe*, 3 Dowl. P.C. 336.

It is no objection to a declaration in ejectment, not brought by a landlord against his tenant, that the notice directed by the 11 Geo. 4. & Will. 4, c. 70, s. 36, is subscribed, provided it is served before the essoign day. *Anonymous*, 1 Dowl. P.C. 18.

#### (E) CONSENT RULE.

The lessor of the plaintiff is not, necessarily, bound to produce in evidence the consent rule, as part of his case. And, where the defendant appears by counsel, and insists upon the lessor's producing it, and at the same time refuses to admit lease, entry and ouster, if the lessor of the plaintiff has proved his title, he is entitled to judgment against the casual ejector. *Doe d. Graves v. Raby*, 1 Law J. (n.s.) K.B. 66, s. c. 2 B. & Ad. 948.

Ejectment for various premises against twelve defendants, who entered into a joint consent rule to defend for a part, and admitted a joint possession. Before the trial, by an order of the Judge at Nisi Prius, two of the defendants were allowed to withdraw their pleas, and to suffer judgment by default, and their names were struck out of the record. The trial proceeded against the other defendants, who proved a title to their own premises, but not to those of the other two:—Held, that the lessor of the plaintiff was entitled to a general verdict and the general costs of the cause; but the Court restrained him from taking out a writ of possession against the ten, and directed that they should have the costs of defending their possession. *Doe d. Bighton v. Hughes*, 4 Law J. (n.s.) Exch. 321, s. c. 2 C. M. & R. 281.

Where an ejectment is served upon a person, who swears that he is in possession of no part of the premises sought to be recovered, the Court will order his name to be struck out from the appearance and consent rule, upon his undertaking to permit execution to issue for any part of the premises, of which he may be in possession. *Doe d.*

*Snape v. Snape*, 1 Law J. (n.s.) Exch. 97\*, s. c. 2 C. & J. 214, s. c. 2 Tyr. 340; 1 Dowl. P.C. 314.

#### (F) PLEADINGS AND EVIDENCE.

[See PRACTICE, Striking out Counts.]

In ejectment the tenant shall not be allowed to set up an outstanding term in trustees to secure an annuity, provided the lessor of the plaintiff do not seek to disturb the possession of the trustees. *Roe v. Pegge*, 4 Doug. 809.

In ejectment it is no answer to a *prima facie* title from twenty years possession, that such possession was in continuation of that of a sister, who entered, by abatement, into the land to which her elder brother (whose issue is alive) was entitled as heir, and who died more than twenty years before the ejectment was brought. *Doe d. Draper v. Lawley*, 3 N. & M. 331.

In defence to an action of ejectment, it may be shewn that the parties under whom the plaintiff claims, had no title when they conveyed to him, although the defendant himself claims, by a conveyance from the same parties, if the latter conveyance was subsequent to that which the defendant seeks to impeach. *Doe d. Oliver v. Powell*, 1 Ad. & E. 531, s. c. 3 N. & M. 616.

*Quære*—whether rule 15th of Michaelmas term, 3 Will. 4, as to entitling declarations, applies to declarations in ejectment. *Doe d. Haines v. Roe*, 2 Mo. & Sc. 619.

A demise in ejectment by two tenants in common must be by each severally, and they cannot recover on a joint demise. The Judge refused to amend under 3 & 4 Will. 4, c. 42. *Doe d. Poole v. Errington*, 3 Law J. (n.s.) K.B. 215, s. c. 1 Ad. & E. 750; 3 N. & M. 646.

On a question as to the right to a slip of land lying between the highway and old inclosures, the lord of the manor, who claims it, may give evidence of acts of ownership over similar slips of land adjoining the same road and the inclosures of other proprietors, though at a distance from the spot in question, but not over similar slips adjoining to other roads, and inclosures of different proprietors. *Doe d. Barrett v. Kemp*, 4 Law J. (n.s.) Exch. 331.

In an action of ejectment under an *elegit* against several parties in possession of the premises with the *elegit* debtor at the commencement of the action, if the *elegit* creditor prove the *elegit* debtor entitled to the whole property at the time of the judgment, it is incumbent on the other defendants to establish their title; otherwise the *elegit* creditor may have judgment against all. *Doe d. Evans v. Owen*, 1 Law J. (n.s.) Exch. 43, s. c. 2 C. & J. 71; 2 Tyr. 149.

In an action of ejectment by a mortgagee, an award made, in an action of ejectment, brought, subsequent to the mortgage, by a party against the mortgagee in possession, is not admissible in evidence; although the mortgagee had notice of the action, and attended before the arbitrator, but took no part in the proceedings. *Doe d. Smith v. Webber*, 3 Law J. (n.s.) K.B. 148, s. c. 1 Ad. & E. 119; 3 N. & M. 746.

In ejectment, evidence that the lessor of the plaintiff received rent for the premises from A, who formerly occupied them, and also from the parish officers, is admissible; although the defendant does

not claim under either A or the parish officers. *Doe d. Lichfeld v. Stacey*, 6 C. & P. 139. [Tindal]

Where a vicar brings ejectment claiming in right of his vicarage, a letter written by a former vicar is admissible in evidence for the defendant, and a witness for the lessor of the plaintiff may be asked as to what is inscribed on a tablet fixed up in the church. *Doe d. Coyle v. Cole*, 6 C. & P. 359.

Proceedings in Chancery, and upon an issue of *desineat vel non*, between the devisee and other persons against the heir-at-law, on which issue a verdict has been given establishing the will, held not *prima facie* evidence in favour of the will, so as to dispense with the necessity of the devisee giving further evidence, or to let in the reading of the will, in a subsequent action of ejectment, brought against him by the heir-at-law. *Wright v. Doe d. Tatham*, 3 Law J. (N.S.) Exch. 366, s. c. 1 Ad. & El. 3.

Regulæ Generales of M. T. 3 Will. 4, apply only to personal actions, and therefore do not extend to actions of ejectment:—The commencement and conclusion of a declaration in ejectment in the Court of Exchequer must consequently be in the old form. *Doe d. Gillett v. Roe*, 3 Law J. (N.S.) Exch. 267, s. c. 1 C. M. & R. 19; 4 Tyr. 649.

Where in a deed of 1817, a mortgage term was recited as having been created by the tenant in fee, and the mortgagees were parties to that deed, in conveying to the lessor of the plaintiff:—Held, that there was sufficient evidence of the title of the lessors of the plaintiff, without producing the deed creating the mortgage term. *Doe d. Rogers v. Brooks*, 4 Law J. (N.S.) K.B. 222, s. c. 3 Ad. & E. 513.

#### (G) VERDICT.

In ejectment against S & F, where it is shewn that B, not a party to the cause, came into possession of the premises under an unperformed contract of sale; and that S & F held of him, notice to quit, served upon S and F, is sufficient. Notice to quit, served upon F's wife on the premises held by F, is sufficient as to F's premises. S and F pleaded severally, and entered into separate consent rules, F as tenant for specified premises occupied by himself, S as landlord of the same premises, specifying them to be occupied by F, and as tenant of other specified premises occupied by himself. Service of notice to quit on F was proved, but not on S. After verdict for the plaintiff against both defendants, the Court refused to direct a nonsuit to be entered as to the premises occupied by S. The Judge, who tried the cause, being asked to amend the *postea* by confining the verdict to the premises occupied by F, refused, saying that he thought the verdict properly entered. This Court refused to amend the verdict to the same effect, by the Judge's notes. *Roe d. Blair v. Street*, 2 Ad. & E. 329, s. c. 4 N. & M. 42; s. c. *nomine Doe d. Blair v. Fairbanks*, 4 Law J. (N.S.) K.B. 67.

#### (H) JUDGMENT.

Where several tenants in possession have been served with distinct notices of declaration, one rule for judgment against the casual ejector is sufficient. *Doe v. Roe*, 1 Law J. (N.S.) Exch. 258, s. c. 1 Cr. & J. 330.

Rule nisi, for judgment against the casual ejector, in Hilary term, where the declaration was served in October, with notice to appear in Michaelmas term. *Right d. Jeffery v. Wrong*, 3 Law J. (N.S.) Exch. 86, s. c. 2 Dowl. P.C. 348.

A rule in the Court of Common Pleas of 32 Car. 2, requires that the rule for judgment against the casual ejector in town cases shall be moved for in Michaelmas or Easter term, within one week next after the first day of such term; and that, in Hilary term or Trinity term, it shall be moved for within four days after the first day of such term:—Such rule, moved for upon the sixth day of Trinity term, was discharged, as applied for at an improper time, the rule of Car. 2. being still in force, and not being affected by the late statutes or rules of court. *Doe d. Lawford v. Roe*, 3 Law J. (N.S.) C.P. 231, s. c. 1 Bing. N.C. 161; 4 Mo. & Sc. 681; s.r. *Doe d. Glynn v. Roe*, 2 Dowl. P.C. 822.

If the term in which a declaration in ejectment requires an appearance to be made is suffered to elapse, judgment against the casual ejector may be obtained in the following term on the same service. *Doe v. Roe*, 2 Dowl. P.C. 196.

The Court will not grant judgment against the casual ejector, when, from the affidavit in support of the motion, it appears that the premises are vacant. *Doe d. Norman v. Roe*, 2 Dowl. P.C. 428.

Judgment against the casual ejector may, under special circumstances, be obtained on an affidavit, swearing the service to have been on the tenant in possession, "as the deponent believes." *Doe d. George v. Roe*, 3 Dowl. P.C. 22.

If one term is allowed to elapse in a town cause between the service of the declaration in ejectment; and the motion for judgment against the casual ejector, the notice to appear being in the former term, a rule nisi only for judgment will be allowed in the Court of Common Pleas. *Doe d. Wilson v. Roe*, 4 Dowl. P.C. 124.

The practice of allowing judgment to be signed against the casual ejector, where the term in which the appearance is required, and before which the service has been effected has elapsed, in the following term, only applies to country causes. *Doe d. Greaves v. Roe*, 4 Dowl. P.C. 88.

If a regular service is effected before the term in which the appearance is to be made elapses, a motion for judgment may be made in the following term on the same service. *Doe d. Thompson v. Roe*, 3 Dowl. P.C. 575.

Where an action of ejectment is brought on certain breaches, and money is paid into court on one of them, and the plaintiff takes it out, and does not proceed to trial, the defendant is entitled to judgment as in case of a nonsuit. *Doe d. Stanley v. Towgood*, 2 Dowl. P.C. 404.

In ejectment, it is no answer to a rule for judgment as in case of a nonsuit that the plaintiff's agent has been let into possession by the tenants, it not appearing that it was with the consent of the defendant, who was the landlord. *Doe d. Draper v. Dyer*, 3 Dowl. P.C. 696.

The statute 11 Geo. 4. & 1 Will. 4, c. 70, s. 36, for expediting the remedy of the landlord where his right of entry accrues during or immediately after the issuable term, does not apply to the case of a tenancy under an agreement expiring the day

before the first day of the term. *Doe d. Summerville v. Roe*, 4 Mo. & Sc. 747.

Where, after notice of trial in an ejectment, the tenants in possession gave up possession to the lessor of the plaintiff, the Court compelled the latter to give a peremptory undertaking to try; the defendant on the record, being the landlord, and not having assented to the giving up of the possession. *Doe d. Draycott v. Dyas*, 4 Law J. (n.s.) Exch. 166, s. c. 2 C. M. & R. 60.

The declaration in ejectment stated the demise in a particular parish, but contained no averment as to where the premises were situate:—Held, bad, in arrest of judgment. Leave to amend, on payment of costs of the amendment, and of the motion in arrest of judgment. *Doe d. Rogers v. Bath*, 3 Law J. (n.s.) K.B. 48, s. c. 2 N. & M. 440.

The affidavit of there being no sufficient distress on the premises must be positive; the deponent's belief will not do. *Doe v. Roe*, 2 Dowl. P.C. 413.

### (I) EXECUTION.

Where a sheriff's officer taking possession under a *hab. fac. poss.* is dispossessed before he delivers possession to the lessor of the plaintiff, it is necessary that it should appear, that the persons dispossessing are acting in concert with the defendant. *Doe d. Thompson v. Mirehouse*, 2 Dowl. P.C. 200.

After execution executed in an action of ejectment, the Court will not set the proceedings aside on payment of the rent due and costs of the action, if there are other grounds of forfeiture besides the non-payment of rent; and if such an application be made, the Court will dismiss it, with costs. *Doe d. Lambert v. Roe*, 3 Dowl. P.C. 557.

### (K) SETTING ASIDE PROCEEDINGS.

In the absence of any suggestion of collusion between the lessor of the plaintiff and the tenant, the Court will not set aside a regular judgment in ejectment in order that the landlord may be let in to defend. *Doe d. Thompson v. Roe*, 2 Sc. 181.

The Court will set aside a judgment and execution in ejectment, and let in the landlord to defend, where he has not received notice of the service of declaration from the tenant in possession, although no clear case of collusion between the lessor of the plaintiff and the tenant be established. *Doe v. Roe*, 1 Law J. (n.s.) Exch. 196, s. c. 2 C. & J. 682.

### (L) COSTS.

[See Costs, Payment of, how enforced. And see, above, *Doe d. Lambert v. Roe*, 3 Dowl. P.C. 557.]

The Court will stay proceedings in a second ejectment until the costs of a former ejectment are paid, though the premises are different, if it does not appear that the title is different. *Fairclatm v. Thrustout*, 3 Doug. 405.

The Court will stay proceedings in a second ejectment brought on the same title till the costs of the former ejectment be paid, though the lessors of the plaintiff are different. *Doe v. Law*, 4 Doug. 250.

A motion to stay proceedings in a second ejectment till the costs of the former one had been paid—Held, to be in time, though a term had elapsed

since the action had commenced, and notice of trial had been given. *Doe d. Green v. Packer*, 2 Dowl. P.C. 373.

In a second action of ejectment brought for the same premises, the Court will stay proceedings till the costs of the former are paid, although the former action was discontinued before consent rule or plea. *Doe d. Langdon v. Langdon*, 5 B. & Ad. 864, s. c. 2 N. & M. 849.

A, having brought an ejectment, had judgment of nonsuit against him; afterwards he was discharged under the Insolvent Debtors Act, the costs of the ejectment being inserted as a debt in his schedule. The assignee of his estate having brought a second ejectment upon the insolvent's original title, the Court stayed the proceedings in it until the costs of the first were paid. *Doe d. Standish v. Roe*, 5 B. & Ad. 878, s. c. 2 N. & M. 468.

A notice of trial in a second action of ejectment, served at a much earlier period than was necessary, is no objection to an application for a rule to stay proceedings until the costs of a former ejectment and of an action for mesne profits have been paid. Neither is an irregularity in the service of the declaration in the former action.

Such a rule will not be enlarged until the trial of the second ejectment, in order to set off the costs of the lessor of the plaintiff, if successful, against the former costs. *Doe d. Maslin v. Packer*, 3 Law J. (n.s.) Exch. 148, s. c. 2 C. & M. 467; 4 Tyr. 144.

On an application for security for costs under 1 Geo. 4, c. 78, it is not necessary to produce an affidavit by the attesting witness to the agreement; its execution may be proved by any other person.

The application may be made where the lessor of the plaintiff claims an undivided portion of the premises. *Doe d. Mayoh v. Rotherham*, 4 Law J. (n.s.) Exch. 221, s. c. 3 Dowl. P.C. 690. (*Doe d. Morgan v. Rotherham*.)

Upon motion, calling on the defendant to shew cause why he should not undertake to give the plaintiff, in case he succeeded in the action, a judgment of the term next preceding the time of trial; and why he should not enter into a recognizance by himself, and two sufficient sureties, to pay costs and damages, under 1 Geo. 4, c. 87, s. 1:—Held, that an agreement by parol for a retaking of the premises for which the ejectment was brought, was a sufficient answer to the application, and took the case out of the statute. *Doe d. Lady Stourton v. Roe*, 3 Law J. (n.s.) C.P. 202.

A defendant in ejectment may obtain an attachment against the lessor of the plaintiff for non-payment of costs, without a *subpoena solvaci*. *Doe d. Fry v. Fry*, 3 Law J. (n.s.) Exch. 21, s. c. 2 C. & M. 234.

### (M) VACANT POSSESSION.

Where premises are totally deserted, and there is no one upon whom service can be effected, judgment cannot be had against the casual ejector; but the proceeding must be as upon a vacant possession. *Doe d. Norman v. Roe*, 2 Dowl. P.C. 399.

The usual entry in cases of vacant possession will, in certain cases, be dispensed with. *Doe d. Frith v. Roe*, 2 Dowl. P.C. 431.

In ejectment on a vacant possession, the affidavit

that six months' rent is in arrear may be made by a receiver. *Anonymous*, 3 Mo. & Sc. 761.

Where the premises consist of houses the tenants of which have been regularly served, and of unfurnished and uninhabited houses, the Court will not grant a rule nisi, that affixing the declaration and notice to the doors of the latter, shall be deemed good service. The plaintiff must proceed as upon a vacant possession. *Doe d. Shewell v. Roe*, 4 Law J. (N.S.) Exch. 177, s. c. 2 C. M. & R. 42.

## ELECTION.

[See MANDAMUS—PARLIAMENT.]

[Provisions for election of officers of corporations and public companies, on Saturdays or Mondays instead of Sundays. 3 & 4 Will. 4, c. 31; 11 Law J. Stat. 84.

See, also, ADVANCEMENT—STOCK—WILL—Construction.

*Dillon v. Parker*, 1 Jac. 505, 1 Law J. Dig. 215, affirmed in the House of Lords, 1 Cl. & F. 308, s. c. 7 Bl. N.S. 325.]

A testator gave to his wife for her life, the use of the furniture, &c. of every description in his house at the time of his death. There was both furniture, &c. belonging to the testator, and also furniture settled to the separate use of the wife, in his house:—Held, that the widow was bound to elect between the benefits given by the will, and her own property in the house. *Parrott v. Wallace*, 4 Law J. (N.S.) Chanc. 36.

Where persons, entitled to have money invested in stock under a will, have long been receiving interest on the principal money instead, they cannot afterwards elect to take the amount of stock, which would have been purchased, had it been so laid out at the proper time. *Child v. Gibles*, 3 Law J. (N.S.) Chanc. 124, s. c. 3 M. & K. 71.

Power to appoint to children or grandchildren, (the grandchildren to be born before the appointment); the power is executed by will, appointing equally among four children of the testatrix, both the property which was the subject of the power, and all the rest and residue of her property. By a codicil, the testatrix says, "In case I have the power," &c.—and directed the share which she had given by her will to a daughter, to be paid to trustees for her daughter for life, and, after her death, to divide the principal equally among her children:—this was held not to be a case of election: the daughter entitled absolutely to her share under the will. *Church v. Kemble*, 3 Law J. (N.S.) Chanc. 65, s. c. 5 Sim. 525.

Bequest to S of a term, in trust to sell and apply the proceeds to the maintenance of the testator's son during his life. Bequest of the remainder after the son's decease, to such uses as the son should by will appoint; and S was appointed executor. When the testator died, his son-in-law (who was also his journeyman,) was managing his business on the premises, and the testator's son resided there. At the funeral, S said in presence of the son-in-law and other relations of the testator, "The house is young B's," meaning the son: "T, the son-in-law, must stay in the house, and go on with the business, but young B must have a biding-place." The son-in-

law continued on the premises, carrying on the business for more than twenty years, paying no rent, but maintaining the testator's son, who was weak in intellect, and unable to provide for himself. During that time, S lived and did not interfere further with the property:—Held, that this was evidence of S having assented to take under the will as legatee in trust, and not as executor; and, consequently, that the term passed to his representatives. *Doe d. Sturges v. Tatchell*, 1 Law J. (N.S.) K.B. 239, s. c. 3 B. & Ad. 676.

A devise by a husband to trustees, of a freehold with appurtenances, upon trust to sell and apply the proceeds in a particular way, is inconsistent with the widow's right to dower. She must, therefore, elect between other benefits given her by her husband's will and her dower out of this property. *Parker v. Downing*, 4 Law J. (N.S.) Chanc. 198.

Testator bequeathed 2,200*l.* stock, his property, standing in the joint names of himself and wife, to trustees, upon trust to pay the interest and dividends to his wife for her life, and, after her decease, to distribute the capital amongst his grandchildren by name; and he directed that, in case he has not that sum standing in his name at the time of his death, the same should be made up out of his other estate and effects:—Held, that the stock was the absolute property of the wife surviving, and that she must elect between this and the other benefits bequeathed to her by the testator's will. *Coates v. Stevens*, 1 Y. & C. 66.

In cases of election, it is not the custom of the Court to order the deed elected against, to be delivered up to be cancelled. *Weale v. Rice*, 4 Law J. (N.S.) Chanc. 39.

A testator, before making his will, transferred two sums of 4*l.* per cent., and 5*l.* per cent., which were then the whole of his funded property, into the joint names of himself and his wife. By his will he bequeathed all his funded property or estate, of what kind soever, to trustees, in trust for his wife for life, and after her decease, in trust (amongst other things), to pay certain legacies of 4*l.* per cent. stock, amounting within 50*l.* to the stock of that description, which he had so bequeathed; and he gave the residue of his estate to A and B. He afterwards purchased further sums of 5*l.* per cent., in the names of himself and his wife, and died in her lifetime, having no stock except that before mentioned, exclusive of which his property was not sufficient to pay his legacies:—Held, that the wife, on her husband's death, became absolutely entitled to the stock; and that the bequest of the testator's funded property was not sufficiently specific to make her elect between the stock, and the benefits which she took under the will in certain parts of the testator's property. *Dummer v. Pitcher*, 5 Sim. 35.

The creditors of A, having issued a fiat in bankruptcy against him, and having at the close of the proceedings under the fiat received notice, by means of the examination of the bankrupt and others, that A was only the agent of B & Co., proceeded nevertheless to sign A's certificate:—Held, that this was not an election by the creditors to treat A as their sole debtor. *Taylor v. Sheppard*, 1 Y. & C. 271.

## ELECTION OF COUNTS.

[See INDICTMENT.]

Where a declaration contains several counts, founded on the same transaction, the plaintiff cannot at the close of his case be called upon to state on which count he relies. *Swinburn v. Jones*, 1 M. & Ro. 322. [Denman]

## ELEGIT.

Where a plaintiff has issued an elegit, and has not entered on the roll the award of elegit, and the sheriff's return, and the judgment is afterwards reversed, the Court will compel the plaintiff to supply his omission, at the instance of the defendant. *Caseldine v. Munday*, 2 Dowl. P.C. 169.

The Court cannot enlarge the time to return a writ of elegit after the return day at the instance of the sheriff, except with the plaintiff's consent; and, *quære*, if then? *Hildyard v. Baker*, 2 Law J. (N.S.) Exch. 218, s.c. 1 C. & M. 611; 2 Dowl. P.C. 16.

By an inquisition taken under an elegit, it was stated, that G, the defendant, was possessed of a term in land as mortgagee. The term had been bequeathed by words, upon which a question arose, whether such term were vested in G, or in the executrix. The Court refused to decide, on motion, at the instance of the mortgagor or of the executrix, whether G had an interest of the nature described in the inquisition, and liable to be extended. *Cooper v. Gardner*, 3 Ad. & E. 211.

## ELISORS.

Prothonotary enjoined to appoint elisors by a rule absolute in the first instance, where the sheriff and coroner were parties to the action. *The Mayor and Corporation of Norwich v. Gill and Others*, 1 Law J. (N.S.) C.P. 46, s.c. 8 Bing. 27; 1 Mo. & Sc. 91.

## EMBEZZLEMENT.

[See SLANDER, *Williams v. Stott*.]

Prevention of, by persons in the public service. 2 Will. 4, c. 4; 10 Law J. Stat. 10.

A servant, sent by his master to get change for a note &c., who embezzles the change, is not liable at common law for stealing the change, but must be indicted under the 59 Geo. 3, c. 85. *Rez v. Sullens*, 1 R. & M. C.C. 129.

In an indictment under 7 & 8 Geo. 4, c. 29, s. 47, the person employed to collect the sacrament money from the communicants, is not the servant of the minister, churchwardens, or poor. *Rez v. Burton*, 1 R. & M. C.C. 237.

Embezzlement by a man who is neither clerk nor servant, or in any respect under the controul of the person by whom he is, in a single instance only, requested to receive money, is not punishable under 7 & 8 Geo. 4, c. 29, s. 49; he does not come within the description of clerk or servant, or a person employed for the purpose of, or in the capacity of a clerk or servant. *Rez v. Nettleton*, 1 R. & M. C.C. 259.

If the property embezzled by a clerk, &c. has been in the possession of the master, or of any of

his other servants, the case is not within the statute 7 & 8 Geo. 4, c. 29, s. 47. *Rez v. Murray*, 1 M. C.C. 276.

Embezzlement of money by a servant not authorized to receive it, is not within 7 & 8 Geo. 4, c. 29, s. 47. *Rez v. Thorley*, 1 M. C.C. 343.

A servant may be found guilty of embezzlement, though he is not a general servant, and is employed to receive in a single instance only. *Rez v. Higgs*, 1 M. C.C. 370.

The prisoner had worked for the prosecutor sometimes as a regular labourer, and sometimes as a roundsman; but, at the time in question, not being at all in the prosecutor's service, he was sent by the prosecutor to get a cheque cashed at a banker's; for doing which, he was to be paid sixpence. He got the cash and made off:—Held, no embezzlement, as the prisoner was not a servant of the prosecutor, within the meaning of the statute 7 & 8 Geo. 4, c. 29, s. 47. *Rez v. Freeman*, 5 C. & P. 534. [Parke]

If a servant be indicted under the statute 7 & 8 Geo. 4, c. 29, for embezzlement, and the indictment contain only one count, charging the receipt of a gross sum on a particular day, if it turns out that the money was received in different sums on different days, the prosecutor must make his election, and confine himself to one sum and one day; and if the money was paid to the prisoner as the servant of the prosecutor, it will be sufficient, although the payment was made by one of the class of customers, of whom the prosecutor did not authorize the prisoner to receive money. *Rez v. Williams*, 6 C. & P. 626.

Where a party is charged with embezzlement, the Judge, before the indictment is found, will order the prosecutor to furnish the prisoner with a particular of the charges, if the prisoner make an affidavit that he does not know what the charges are, and that he has applied to the prosecutor for a particular, and it has been refused. *Rez v. Beestman*, 5 C. & P. 300. [Littledale]

## EMBLEMMENTS.

The right of tenant for life, or tenant *per autre vie*, to emblements not in a state to be gathered in at the dropping of the life, is, in general, confined to such emblements as are of annual produce. *Graves v. Weld*, 2 Law J. (N.S.) K.B. 176, s.c. 2 N. & M. 725; 5 B. & Ad. 105.

## ENCROACHMENTS.

[See EJECTMENT.]

## ENTRY.

[See EJECTMENT, Where maintainable—FINE.]

Where, in default of payment of arrears of annuity or rent-charge on lands, a right of re-entry, "to receive the rents and profits until the arrears shall be satisfied," is reserved, there is no necessity for a demand before bringing ejectment. Otherwise, where the right of re-entry is in derogation or destruction of the estate. *Doe d. Blass v. Horsley*,

3 Law J. (n.s.) K.B. 183, s.c. 1 Ad. & E. 766; 3 N. & M. 567.

ENTRIES—IN COURSE OF BUSINESS.

[See BILL OF EXCHANGE, Dishonour—EVIDENCE, Private Writings.]

EQUITY OF REDEMPTION.

[See MORTGAGE—POOR, Settlement by Estate.]

ERASURE.

[See OBLITERATION.]

ERROR.

[See SHERIFF—SLANDER, Pleading and Evidence.]

- (A) WHERE A WRIT OF ERROR LIES.
- (B) EFFECT OF.
- (C) JURISDICTION.
- (D) GROUNDS OF ERROR.
- (E) PROCEEDINGS.
- (F) VARIANCE.
- (G) BAIL.
- (H) COSTS.

(A) WHERE A WRIT OF ERROR LIES.

[See INFANT.]

The statute 11 Geo. 4. & 1 Will. 4, c. 70, s. 8, for the return before ten Judges in the Exchequer Chamber of writs of error, upon judgments given in the King's Bench, Common Pleas, and Exchequer, extends to a judgment given against a defendant on an indictment in the King's Bench. *Res v. Wright*, 1 Ad. & E. 434, s.c. 3 N. & M. 892.

The plaintiff and defendant by their respective attorneys agreed, that a question at issue between them, should be raised by demurrer, in order to a more speedy adjustment of it, and it was further agreed, that whatever the decision of the Court on the argument of the demurrer might be, "each party should pay his own costs and charges in and about the cause, and that such decision should bind the parties." Judgment having been given for the plaintiff on the demurrer:—Held, that it was not competent to the defendant to sue out a writ of error therein. *Brown v. Lord Granville*, 4 Mo. & Sc. 333.

(B) EFFECT OF.

A note of the allowance of a writ of error is no stay of the plaintiff's proceeding, if it mis-describe the form of action. *Green v. Okill*, 1 Dowl. P.C. 242.

A writ of error, allowed after a cognovit by defendant, containing an agreement "not to bring a writ of error, or delay execution," is no supersedeas. *Contrà*, as to a writ of error after a release of errors. *Best v. Gompertz*, 3 Law J. (n.s.) Exch. 89, s.c. 2 C. & M. 427; 4 Tyr. 280.

(C) JURISDICTION.

A court of error will not inquire into the propriety of amendments made in the Court below, but, though such amendments be made after error brought, will

consider them part of the original record, subject to their revision. *Mallish v. Richardson*, 1 Cl. & F. 224, s.c. 6 Bl. n.s. 70; 2 Mo. & Sc. 191; 9 Bing. 125.

A court of error cannot give judgment on exceptions placed upon the record, after the finding of the jury. *Armstrong v. Lewis*, 3 Law J. (n.s.) Exch. 359, s.c. 2 C. & M. 274; 4 M. & Sc. 1.

The court of error constituted by 11 Geo. 4. & 1 Will. 4, c. 70, s. 8, has jurisdiction over criminal as well as civil cases.

Therefore a writ of error may be brought in the Exchequer Chamber, on an indictment found at the Sessions, and removed by *certiorari* into the King's Bench. *Res v. Wright*, 3 Law J. (n.s.) Exch. 370, s.c. 1 Ad. & E. 434.

(D) GROUNDS OF ERROR.

The want of a return to the writ of *distingas juratores* is error, and is not cured after verdict by the statute 21 Jac. 1, c. 13, unless there be a panel annexed. *Rogers v. Smith*, 3 Law J. (n.s.) K.B. 211, s.c. 1 Ad. & E. 772; 3 N. & M. 760.

The defendant brought a writ of error, and assigned an objection as a ground of error:—Held, by the Court, that they could not say it was frivolous, they having granted a rule to shew cause, and heard it argued. *Gardiner v. Williams*, 4 Law J. (n.s.) Exch. 164, s.c. 1 C. M. & R. 78.

(E) PROCEEDINGS.

[See AMENDMENT, Records.]

[*Fausset v. Carpenter*, 2 D. & Cl. A.C. 232, 2 Law J. Dig. 123, s.c. 5 Bl. n.s. 75.]

An inferior Court, after verdict and after the allowance of a writ of error, amended the record, and sent up a transcript of the amended record, with the writ of error:—Held, that the Court of King's Bench could only look to the transcript as sent up to them; and, whether the Court below were justified or not in making the amendment, this Court would not alter the transcript so sent up, by making it agree with the amended record. *Salter v. Slade*, 3 Law J. (n.s.) K.B. 202, s.c. 1 Ad. & E. 608; 3 N. & M. 717.

An assignment of error in fact, will be badly pleaded, if it conclude not with a verification.

Yet, though the assignment of error be badly pleaded, if the Court see that the judgment of the Court below is bad in point of law, they will reverse it.

Accordingly, the error assigned was a fact, that one of the defendants, being under age, had appeared in person, and not by attorney. This, for want of a verification, was held to be bad. But, as the judgment was for treble damages generally, upon all the counts, only one of which would warrant treble damages, the Court reversed the judgment. *Castledine v. Mundy*, 2 Law J. (n.s.) K.B. 154, s.c. 1 N. & M. 635; 4 B. & Ad. 90.

Where a writ of error is brought on an indictment for felony, and there is no joinder in error, the Court, after notice that the prisoners would be brought up in order to be discharged, given to the prosecutor, and to the Attorney General, will discharge the prisoners out of custody. *Thomson v. the King*, 3 Law J. (n.s.) K.B. 152.

The Court, on motion, will not allow a defendant to non pro. his own writ of error, without payment of costs. *Wilkinson v. Malkin*, 2 Law J. (N.S.) Exch. 41, s. c. 1 C. & M. 240; 3 Tyr. 255, 1 Dowl. P.C. 628, 2 ibid. 65.

The late statute 1 Will. 4, c. 70, s. 8, applies only to cases which are originally commenced in the Court to which the writ of error is directed. *Ricketts v. Lewis*, 2 C. & J. 11, s. c. 2 Tyr. 15.

Error was brought in the King's Bench upon judgment at the Old Bailey, and one ground assigned was, that a material fact stated on the record was not true. This Court held such an averment inadmissible, and affirmed the judgment. The fact being, as alleged by the defendant below, the Court of oyer and terminer afterwards ordered the record to be amended, and their clerk, by the rule of the Court of King's Bench, with the consent of the Crown, came into the latter court, and made the amendment there. Upon motion, afterwards, that the case might be again set down for argument,—Held, that this Court could not rehear it after the expiration of the term in which judgment was given, though the Attorney General consented; and that the only remedy was by writ of error to the House of Lords. *Ras v. Carille*, 2 B. & Ad. 971.

Where there is a variance in the description of the form of action, between the note of allowance of a writ of error and the record, the plaintiff may sue out execution notwithstanding the writ. *Hills v. Spilsbury*, 1 Dowl. P.C. 421.

#### (G) BAIL.

Where the Court will grant time to put in fresh bail in error. *Anonymous*, 1 Dowl. P.C. 82.

If a defendant brings a writ of error, and puts in sham bail, the plaintiff may treat them as a nullity, and issue execution. *Sutcliffe v. Eldred*, 2 Dowl. P.C. 184.

In order to obtain time to justify bail in error, on account of the bail suddenly leaving town, it must be sworn, that the fact of such departure was a surprise on the defendant. *Rogers's Bail*, 2 Dowl. P.C. 197.

#### (H) COSTS.

[See SPECIAL VERDICT.]

The plaintiff having obtained a verdict with separate damages on one count, and a verdict with entire damages on the remaining counts, of a declaration for slander, entire costs were taxed and allowed on the whole declaration;—on error, one of the counts on which entire damages were given, was pronounced bad; but the plaintiff, in order to save a *venire de novo*, was permitted to remit his damages on all those counts:—Held, that he was not entitled to the costs of those counts, and, therefore, that the taxation should be reviewed, and a deduction made in respect thereof. *Dods v. Creece*, 3 Law J. (N.S.) Exch. 12, s. c. 4 Tyr. 74.

#### ESCAPE.

[See MARSHAL.]

Where the defendant escapes from the custody of the marshal, the latter, if served with the common side-bar rule, "to bring the defendant into court," &c. must give notice of the escape to the

plaintiff's attorney, within the time limited by the rule. *White v. Stratton*, 1 Dowl. P.C. 550.

A return of *cepi corpus, paratum habeo*, together with a statement at the sheriff's office that there was no bail-bond, is evidence of an escape. *Pock v. Humphrey*, 4 N. & M. 707, 8 Ad. & E. 130.

The serjeant-at-mace of the Borough Court of Liverpool, appoints and dismisses certain officers at pleasure, and takes the fees for the execution of process. They give an indemnity to the serjeant, and if it is wished that process should be executed by any body, not being one of the persons so appointed, it is done by the consent of the serjeant on application to him, and in such case a special indemnity against the acts of such person is given to the serjeant. The serjeant is always ruled to return these writs, and he is served personally with the rule; he does not return them himself, but the officers return them in their own names; but the attachment for not returning, &c. issues against the serjeant, and bail-bonds are always taken to him in his name:—Held, in an action of debt, for an escape under a writ of *ca. sa.*, directed to the serjeant-at-mace, and also by name to two of these officers, and delivered to and executed by one of these officers, that the serjeant-at-mace was liable, as they were his officers, and he was responsible for their acts. *Morris v. Parkinson*, 3 Law J. (N.S.) Exch. 333, s. c. 1 C. M. & R. 163; 4 Tyr. 700.

#### ESCHEAT.

[See TRUST AND TRUSTEE.]

Amendment of the law relative to the escheat and forfeiture of trust property. 4 Will. 4, c. 23, 12 Law J. Stat. 34.

#### ESCROW.

[See DEED.]

Where there is evidence to shew that a deed was delivered as an escrow, the fact of the deed being found out of the possession of the party to whom it was delivered, and in the possession of the party for whose benefit it is made, is *prima facie* evidence that the condition on which it was to be delivered to him has been complied with. *Hare v. Horton*, 3 Law J. (N.S.) K.B. 41, s. c. 5 B. & Ad. 715; 2 N. & M. 428.

#### ESTOPPEL.

[See BARON AND FEME, Privileges and Incapacities of Wife—EJECTMENT—INSURANCE, Actions.]

A party who is sued upon a deed is estopped from denying any fact stated in it, unless he shew fraud.

Accordingly, a company, established by local act of parliament, had the power to borrow money upon bond for certain purposes in advancement of the object of the act.—Being sued upon a bond they had given, appearing on the face of it to be given for those purposes, they pleaded that the bond was not given for those purposes:—Held insufficient, as they shewed no case of fraud; and therefore the general rule of estoppel applied. *Hill v. the Pro-*



printers of the Manchester and Salford Waterworks, 1 Law J. (n.s.) K.B. 230, s.c. 2 B. & Ad. 644.

The declaration in covenant alleged a deed, by which the plaintiff granted to the defendant a licence to use certain looms, by which deed it was recited that the plaintiff had invented certain improvements, &c., in power looms, and had obtained letters patent, and caused a specification to be enrolled:—Held, that the defendant was estopped from pleading that the plaintiff was not the inventor, that it was not a new invention, and that no specification had been enrolled. *Bowman v. Taylor*, 4 Law J. (n.s.) K.B. 58, s.c. 2 Ad. & E. 278; 4 N. & M. 264.

Where issue is taken upon facts stated in a plea; which facts the defendant is estopped in point of law from pleading in bar, a Judge cannot refuse to hear evidence upon that issue, but the defendant is entitled to have his evidence submitted to the jury. *Bowman v. Rostrass*, 4 Law J. (n.s.) K.B. 62, s.c. 2 Ad. & E. 295; 4 N. & M. 552.

If the condition of a good bond contain a generality to be done, the party is not estopped; but if it have reference to a particular thing, he is estopped from saying that there is no such thing. Thus, an obligor is estopped from denying that there is such a lease as is recited in the bond. And where a bond reciting a lease, with a reservation of 170l. rent, was conditioned for payment of 170l. rent, it was held, that the defendant was estopped from setting out a lease which contained a reservation of 140l. a year rent, with an averment of the payment of that rent, because that virtually was a denial that any such lease as that recited in the bond existed. *Lainson v. Tremere*, 4 Law J. (n.s.) K.B. 207, s.c. 1 Ad. & E. 792; 3 N. & M. 603.

## ESTREAT.

[See RECOGNIZANCE.]

Where the amount is under 5l., clerks of the peace, &c. may verify their returns of estreats, &c. to the Court of Exchequer by affidavit, without a commission or personal appearance. *Ex parte Tomlina*, 1 Law J. (n.s.) Exch. 39, 2 C. & J. 122; 2 Tyr. 176, s.c. 1 Dowl. P.C. 303.

Indictments for assault had been traversed on recognizance by defendant, and two sureties, to appear, enter, and try the traverses at the next sessions. The traversers gave the prosecutor no notice of trial before the next sessions, but moved there to respite the recognizance to the next sessions, which application was refused, and they were ordered to be estreated. Warrants of execution issued under 3 Geo. 4, c. 46, s. 6, against the defendant and his sureties. On motion to bring the recognizance, estreats, and warrants, into the Court of Exchequer:—Held, that the Court had no jurisdiction over estreats not returned into it, and that the Quarter Sessions only had jurisdiction to relieve. *Rex v. Thompson*, 3 Tyr. 53.

## EVICTIION.

[See LANDLORD AND TENANT.]

## EVIDENCE.

- (A) IN GENERAL.
- (B) ACTS OF PARLIAMENT.
- (C) RECORDS.
- (D) VERDICTS AND JUDGMENTS.
- (E) JUDICIAL PROCEEDINGS.
- (F) PUBLIC INSTRUMENTS.
- (G) PRIVATE WRITINGS.
  - (a) *In general.*
  - (b) *Attestation.*
- (H) DEPOSITIONS AND FORMER EVIDENCE.
- (I) REPUTATION.
- (K) OPINION.
- (L) DECLARATIONS.
- (M) ADMISSIONS.
  - (a) *In general.*
  - (b) *Of Documents under a Judge's Order.*
  - (c) *In pleading.*
- (N) CONFESSIONS.
- (O) RES INTER ALIOS.
- (P) CONFIDENTIAL COMMUNICATIONS.
- (Q) PRESUMPTION.
- (R) NOTICE TO PRODUCE.
- (S) SECONDARY AND PAROL EVIDENCE.

### (A) IN GENERAL.

In an action on a bill of exchange, where the defence is, that the bill had been altered, the defendant cannot go into evidence to shew that other bills have been likewise altered. *Thompson v. Mossely*, 5 C. & P. 501. [Lyndhurst]

Where there is a plea of prescription, and a plea claiming under a lost grant, and evidence is given which will support the prescriptive right, and no evidence to apply that usage to the time when the grant is alleged to have been made, a Judge is justified in directing the jury that there is no evidence upon the plea of a lost grant. *Blowitt v. Treganving*, 4 Law J. (n.s.) K.B. 233, s.c. 5 N. & M. 308.

The Judge will decide whether particular evidence which is tendered is admissible to prove identity, for the purpose of letting in evidence of a conversation: the jury will determine on the weight of the evidence when admitted. *Corfield v. Parsons*, 2 Law J. (n.s.) Exch. 262, s.c. 1 C. & M. 730; 3 Tyr. 806.

A bill was filed in Chancery against several defendants, whereupon an issue of *deviseavit vel non* was ordered, in which the defendants, in Chancery, were plaintiffs, and the plaintiff, in Chancery, defendant, respecting a will of M. mentioned in the proceedings devising real property. The issue was found in the affirmative, and the bill dismissed. At the trial of the issue, one of the three attesting witnesses to the will swore to its execution. The plaintiff, in Chancery, afterwards brought ejectment on his own demise, as heir-at-law of M. against one of the defendants, who claimed as devisee of M. for the premises which had been the subject of the issue. After the action of ejectment was commenced, judgment was entered up on the issue from Chancery, in the court of law in which it had been tried. An order of court was made in the action of ejectment, that the short-hand writer's and Judge's notes of the evidence of such witnesses on the trial of the issue, as should be dead before the trial of the ejectment, should be read at the latter trial.

On the trial of the ejectment, the defendant gave evidence of these several proceedings, and proved the former testimony of the above-mentioned witness, who was dead, from the short-hand writer's notes; and he produced a will, which was identified with that proved on the trial of the issue out of Chancery:—Held, that this was sufficient proof of the execution of the will, though another attesting witness was present at the trial of the ejectment; but that without proof of the evidence of the deceased witness, such proceedings would not have been proof of the execution. A question having arisen as to the sanity of the deviser, letters were tendered in evidence, which had been found among his papers shortly after his death, written to him by persons of his acquaintance, of whom all but one were dead; one of the letters purporting to be an answer to a letter written by the deviser. *Quære*, whether such letters were admissible, as shewing that the deviser was treated by his acquaintance as a person of sound mind. *Wright v. Doe d. Tatham*, 3 Law J. (N.s.) Exch. 366, a. c. 1 Ad. & E. 3; 3 N. & M. 268.

#### (B) ACTS OF PARLIAMENT.

A local act, containing the usual clause that it shall be deemed and taken to be a public act, &c., may be read in evidence without any proof of its having been printed by the King's printer, or compared with the original on the rolls of parliament. *Woodward v. Cotton*, 6 C. & P. 494. [Lyndhurst]

#### (C) RECORDS.

Where the cause of action arises in the term, and the memorandum of the bill is of the term generally, the plaintiff may shew in evidence the suing out of the writ, and elect to consider it the commencement of the action. *Pugh v. Martin*, 3 Doug. 347.

A plea in an action that was discontinued, and wherein no judgment was entered, is not admissible evidence against the party pleading it, of a fact therein averred. *Allen v. Hartley*, 4 Doug. 20.

The minute-book of a Court of Quarter Sessions is not evidence of its proceedings. The record should be made up on parchment, and examined copy produced by a witness who examined it. *Rez v. Thring*, 5 C. & P. 507. [Gurney]

Where an indictment is tried at Nisi Prius, the Nisi Prius record does not shew what names were on the back of the indictment. *Rez v. Smyth*, 5 C. & P. 201. [Tenterden]

An allegation that, "on &c., at &c., a certain indictment was preferred at the Quarter Sessions of the Peace, then and there holden in and for the said county of W, against the defendant and one J E, which said indictment was then and there found a true bill," is not supported by the production of the original indictment with the words "true bill" indorsed on it, it being necessary that a regular record should be drawn up, and proved either by its production or by an examined copy. *Porter v. Cooper*, 6 C. & P. 354. [Patteson]

On an indictment for perjury, committed on hearing a parish appeal at the Quarter Sessions, the production of the Sessions book is not sufficient proof that the appeal came on to be heard; and a regular record must be made upon parchment, the same as on a return to a *certiorari*, and a record, or

an examined copy must be produced. *Rez v. Ward*, 6 C. & P. 366. [Park]

A return of *nulla bona* made by the sheriff to a *fiert facias* against A is admissible in evidence upon the trial of a question as to property in goods at the time of such return between A and a succeeding sheriff. So, although the bailiff intrusted with the execution of such writ did not himself search for goods of A, but sent his assistant. *Avril v. the Sheriff of Warwick*, 3 N. & M. 871.

#### (D) VERDICTS AND JUDGMENTS.

On a plea of usury to an action on a bond, a verdict of acquittal in an action for the usury penalties on the same bond, between the same parties, is admissible for the plaintiff. *Cleve v. Powell*, 1 M. & Ro. 228. [Denman]

Where the examined copy of a judgment was proved by a witness to have been examined at the house of a person having the custody of the records of the court, the witness knowing that that person had the custody of the records:—Held, sufficient. *Bannister v. Lambert*, 1 Law J. (N.s.) K.B. 179.

The proprietor of certain iron-works recovered a judgment against a canal company, for injuries which his works had sustained, in consequence of the diversion of water from them. Some years after, having taken a partner in his trade, an action was brought in their joint names against the same defendants, for a similar injury to the works:—Held, that there was sufficient evidence of their being privies in estate to the former plaintiff; and, therefore, the judgment was admissible in evidence in the second action.—Held, also, that the fact of the additional plaintiff having been examined as a witness on the former trial, on behalf of the then plaintiff, did not affect the admissibility of the record. *Blakemore v. the Glamorganshire Canal Company*, 4 Law J. (N.s.) Exch. 146, a. c. 2 C. M. & R. 133.

#### (E) JUDICIAL PROCEEDINGS.

The sentence of a foreign Court of Admiralty, that a ship warranted neutral is lawful prize, is no conclusive evidence that the ship is not neutral, if the grounds of the sentence appear and do not shew a breach of neutrality. *Salucci v. Johnson*, 4 Doug. 224.

In an action for maliciously holding the plaintiff to bail, the declaration stated, that the defendant had sued out the writ, which he caused to be indorsed for bail, by virtue of an affidavit for that purpose filed.—Held, that a copy of the affidavit was admissible in support of this allegation. *Cook v. Dowling*, 3 Doug. 76.

On a trial at Nisi Prius, evidence that the cause was originally commenced in the Palace Court, and that the defendant let judgment go by default in that court, and afterwards removed the cause by *hab. corp.*, is admissible. *Tedmas v. Lees*, 5 C. & P. 233. [Tenterden]

Where a new petitioning creditor's debt has been substituted under the stat. 6 Geo. 4, c. 16, s. 18, it is sufficient to prove the petition to the Chancellor for the substitution of the new debt—the Chancellor's order referring the sufficiency of the debt, &c. to the commissioner—and the finding of the commissioner thereon. It is not necessary to produce the Chancellor's order confirming such finding. *Batchelor v. Vyes*, 1 M. & Ro. 331. [Tindal]

An allegation, that a suit has been pending in a court of equity, is sustained by evidence of an attachment for non-payment of costs.

*Seemle*—that a decree in equity is admissible in evidence for the purpose of proving merely the existence of such a decree, without a recital therein, or proof of the bill and answer. *Blosser v. Hollis*, 2 Law J. (N.S.) Exch. 176, s. c. 1 C. & M. 393; 3 Tyr. 357.

Office copy of an answer in Chancery offered in evidence. It appeared from the examination of the witness who had compared the office copy with the original, that the original contained words at length, such as "complainant," "orator," &c., which in the office copy were written "complt," "oror," &c.:—Held, to be no objection. *Anderdon v. Lord Foley*, 2 Law J. (N.S.) K.B. 214.

#### (F) PUBLIC INSTRUMENTS.

[See *BASTARD—SHERIFF*.]

A copy of a faculty granted in 1613, admitted as evidence in a tithe suit, it being produced from the custody of a person whose rights were abridged by it, and there being evidence that the original could not be found in the proper depository, which was destroyed by the great fire of London. *Isham v. Wallace*, 4 Sim. 25.

An entry in the baptismal register, that the defendant was born on a day there mentioned, is no evidence of that fact. *Burghart v. Angerstein*, 6 C. & P. 690. [*Alderson*]

The copy of the court roll of a manor, duly examined and stamped, is sufficient evidence of surrender. *Doe d. Hawthorne v. Mes*, 2 Law J. (N.S.) K.B. 104, s. c. 1 N. & M. 424; 4 B. & Ad. 617.

#### (G) PRIVATE WRITINGS.

[See *ARBITRATION, Effect of Award—BILL OF EXCHANGE, Dishonour*.]

##### (a) *In general.*

Counterparts of old leases from the repository of a lord of a manor are evidence of the demise of the premises, without proof of enjoyment. *Clarkson v. Woodhouse*, 3 Doug. 189.

The effect of an instrument under seal cannot be altered by a memorandum not under seal. *Wenham v. Fowle*, 3 Dowl. P.C. 43.

A deceased tradesman's bill for repairs, with his receipt thereon, is not evidence of the work having been done for the person charged, though the paper is found amongst the other papers of the person charged. *Doe d. Gallop v. Fowles*, 1 M. & Ro. 261. [*Littledale*]

Entries signed by a deceased agent, but not in his handwriting, but by which such agent charges himself, are receivable in evidence. *Doe d. Lichfield v. Stacey*, 6 C. & P. 139. [*Tindal*]

A notary's clerk, in the course of his business, when he presented a bill for payment, always wrote in the notary's book, close to an entry of the particulars of the bill, the answer he obtained, e.g. "out of town, and no orders:"—Held, in an action against the drawer, after the death of the clerk, that the entry is admissible evidence of the dishonour of the bill. *Poolle v. Dicus*, 7 C. & P. 79. [*Gaselee*]

Where it was the usual course of business in an attorney's office, for the clerks to indorse the particulars of service of notices to quit; and one of the

principals, who went out for the purpose of serving such notices, on his return indorsed the service of them, and delivered them so indorsed to his partner:—Held, that evidence of these facts, with proof of the death of such principal, was receivable as evidence of the fact of service of the notices. *Doe d. Pattershall v. Turford*, 1 Law J. (N.S.) K.B. 262, s. c. 3 B. & Ad. 890.

A book, in which a deceased executor charges himself with the receipt of the rents of certain premises, is good evidence of his being in possession, and entitled, as executor, to receive the rents of the premises in question, although he, the executor, may have a remote interest under the will of the testator. *Spiers v. Morris*, 2 Law J. (N.S.) C.P. 153, s. c. 9 Bing. 687; 3 Mo. & Sc. 118, 124.

The whole entry made by a deceased clerk, wherein he charges himself with a receipt of property, for which he is accountable, may be read, though he states facts, in the entry, of which he has no actual knowledge. *Crease v. Barrett*, 4 Law J. (N.S.) Exch. 297, s. c. 1 C. M. & R. 919; 5 Tyr. 458.

Receipts given by the parish clerk for the use of the vicar, for small tithes, the handwriting of the parish clerk being proved, were rejected as evidence, on the ground that the parish clerk was living, and his agency for the vicar could not be inferred, but must be proved.

An account-book of a former vicar, produced by a witness who deposed that he had received it from his aunt, who resided with his father, who was the son of the vicar; and that he had frequently seen the book in his aunt's possession, and had heard her say it belonged to his grandfather:—Held, not to be admissible evidence. *Thompson v. Perryman*, 1 Yo. 598.

In an action by the assignee of an insolvent, a letter written by the defendant was given in evidence; on the back of it something had been written by the insolvent:—Held, that the defendant's counsel were entitled to have that read. *Daglish v. Dodd*, 5 C. & P. 238. [*Taunton*]

A witness formed his opinion of the handwriting of a party from having observed it signed to an affidavit used in the cause (on a motion to postpone) by the counsel for the party, against whom it was proposed to be proved:—Held, sufficient. *Smith v. Sainsbury*, 5 C. & P. 196. [*Parke*]

A clerk, who has seen numerous letters addressed by a party to his employer, and has acted on those letters, may prove the handwriting of such party. *Rez v. Slaney*, 5 C. & P. 213. [*Tenterden*]

A jury may judge of a disputed handwriting by comparing it with other documents in evidence for other purposes, and admitted to be the handwriting of the party. *Solita v. Yarow*, 1 M. & Ro. 133. [*Tenterden*]. And see *Rez v. Morgan*, note, *ibid*. [*Bolland*]

In an action against the vendor of an estate to recover the deposit on a contract for the purchase, if the defendant, on notice, produce the contract, the plaintiff need not prove its execution. *Bradshaw v. Bennett*, 1 M. & Ro. 143, s. c. 5 C. & P. 48. [*Tenterden*]

A bond was executed by a person who could not write:—Held, that if there was no other plea, besides *non est factum*, the defendant's counsel could not ask whether the bond was read over to the de-

defendant before he signed it, nor what was the transaction respecting which it was given. *Cranbrook v Dadd*, 5 C. & P. 402. [Bolland]

Indorsements on a promissory note, admitting the receipt of interest, are presumed to have been written at the time they bear date. *Smith v. Battens*, 1 M. & Ro. 341. [Taunton]

An indorsement by the obligee of a bond, either contemporaneously with the execution of the bond, or before the presumption of satisfaction arises, of a fact peculiarly within his own knowledge, against his own interest, and which he has no interest to misrepresent, is admissible in evidence for himself or his representatives, in an action on the bond.

Thus, in an action by the executors of the obligee, against the executors of the obligor, on a bond, more than twenty years old, an indorsement by the obligee, that the money secured was trust-money, which appeared to have been made contemporaneously with the execution of the bond, but was not proved to have been seen by the obligor:—Held, admissible, for the purpose of applying a payment of interest to the *cestui que trust* to the bond, to repel the presumption of satisfaction. *Gleadow v. Atkin*, 2 Law J. (N.S.) Exch. 153, s. c. 1 C. & M. 410; 3 Tyr. 289.

Where a witness stated that he let a house as agent to his father, who was present, and that the terms were reduced to writing, to prevent the possibility of mistake, and signed by the wife of the tenant, on purpose to bind her husband, the husband himself not being present, but that the entry was not signed by the witness nor his father, nor did his father's name appear at any part:—Held, that this was neither a lease nor an agreement, but a mere memorandum, to which the defendant might refer to refresh his memory. And upon the witness saying that he had no memory of those things, but from the book, without which, from his own knowledge, he should not have been able to speak to the fact, but, on reading the entry, he had no doubt that the fact really happened, this was held sufficient parol evidence of the demise. *Rex v. St. Martin, Leicester*, 4 Law J. (N.S.) K.B. 52, a. c. 2 Ad. & E. 210; 4 N. & M. 202.

A counterpart of a feoffment, to an individual, of land, &c., in the town of Northampton, produced from among the corporation muniments, was held inadmissible, it appearing, that no rent was received in respect of the property. *Lancum v. Lovell*, 6 C. & P. 441. [Tindal]

If in a case of libel, the defendant in his plea states certain specific facts on which he justifies the publication, a letter written by the plaintiff, which does not go to prove any of the specific facts alleged in the plea, is not admissible in evidence for the defendant. *Moscatti v. Lawson*, 7 C. & P. 82. [Al-derson]

It was proved that it had been the practice, as long as the witness, who was conversant with the subject, could remember, for the town treasurer to furnish the town-clerk with information, from which he made out his (the treasurer's) accounts, and also for the treasurer to attend before the auditors, unless prevented by illness or accident, and produce vouchers verifying the town clerk's statement. Entries in book of that description, commencing with the year 1766, were tendered in evidence.

Some of them were signed by the auditors, as allowed; and to some of them appeared only an unsigned entry of their having been examined:—Held, that those which were signed by the auditors were admissible, without proof of any attendance by the particular treasurer before the auditor, or of any entry in his writing, charging himself; partly on the ground that there was reasonable evidence of his having made the town-clerk agent for the making of the accounts. *Lancum v. Lovell*, 6 C. & P. 443. [Tindal]

In an action on a promissory note, the defendant wished to give in evidence a composition deed executed by his mother and the plaintiff, and also by the defendant's creditors, but not by the defendant himself. It was in the hands of a trustee, who was willing to produce it, but the plaintiff's counsel objected:—Held, that the trustee ought not to produce it, but that the defendant might give in evidence an extract which had been furnished by the trustee, and which he, the trustee, proved to be a correct extract. *Cocks v. Nash*, 6 C. & P. 154. [Gurney]

Indictment against B and C for conspiring to extort money from the prosecutor A, by means of a charge of forgery, in which indictment a letter written by B in execution of the conspiracy, and charging A with the forgery of a cheque on C's bankers, is set out. The letter was given in evidence, and also conversations proved referring to the cheque alleged to have been forged:—Held, that the prosecutor was not bound to produce the cheque, though it appeared such cheque was in existence. *Rex v. Ford*, 1 N. & M. 776.

In an action for criminal conversation, the letters of the wife to a third party, written before the commencement of the adulterous intercourse, are admissible in evidence to shew the state of the wife's feelings towards her husband, notwithstanding such letters may chiefly relate to facts, which would not strictly be evidence. *Willis v. Bernard*, 1 Law J. (N.S.) C.P. 118, s. c. 3 Bing. 376; 1 Mo. & Sc. 584.

#### (b) Attestation.

A deed attested by a witness become blind, may be read, on proof of the witness's writing, without calling him. *Pedler v. Paige*, 1 M. & Ro. 258. [Park]

Proof of the handwriting of an attesting witness, who is incapable of being examined, is not sufficient to maintain an action on a written instrument; but the plaintiff must give some evidence of the identity of the defendant with the person executing, beyond the mere similarity of the name. *Whitelocke v. Musgrove*, 2 Law J. (N.S.) Exch. 210, s. c. 1 C. & M. 511; 3 Tyr. 541; and *Lagan v. Alder*, in the notes to the same case.

An attesting witness to a bond could not be found after sufficient inquiry:—Held, that evidence of his handwriting was admissible, it being clear that he had absconded, although a letter, which did not state where he was concealed, had been received from him by his clerk, a few days before the trial. *Morgan v. Morgan*, 2 Law J. (N.S.) C.P. 27, s. c. 9 Bing. 359; 2 Mo. & Sc. 490.

Where the defendants, claiming title under a deed, produce it at the trial when called for by the plaintiff, after a notice to produce, the attesting

witness need not be called, although the plaintiffs dispute the validity of the deed on the ground of fraud, but admit its execution. *Carr v. Burdiss*, 4 Law J. (N.S.) Exch. 60, s.c. 1 C. M. & R. 443; 3 Tyr. 136.

Where the defendants claimed title to certain goods under an assignment; and in pursuance of notice produced it at the trial when called for by the plaintiffs:—Held, that the plaintiffs were entitled to read it in evidence without calling the attesting witness to prove the execution, although they impugned the validity of the assignment on the ground of fraud. *Ib.* 1 C. M. & R. 782, s.c. 5 Tyr. 307.

If the subscribing witness to the acceptance of a bill of exchange, being one of the acceptor's family, cannot be served with a subpoena in consequence of the conduct of that family, the bill may be paid without his evidence. *Hill v. Phillips*, 5 C. & P. 356. [Tindal]

In assumpsit by indorsee against acceptor of an English bill of exchange, to shew that the plaintiff had received the bill when it was overdue, a protest, which had been made of it by the plaintiff's immediate indorsee, being in the hands of the plaintiff, was called for by the defendant at the trial on notice to produce. On its production it appeared to be attested by a subscribing witness:—Held, that the mere circumstance that the protest came out of the hands of the plaintiff, as he did not claim title under it, was not sufficient to dispense with the necessity of calling the subscribing witness; but it being proved that on two occasions the paper had been produced by the plaintiff's attorney to the defendant's attorney as the protest applying to the bill in question, it was admitted in evidence without proof of the attestation. *Marin v. Palmer*, 6 C. & P. 466. [Tindal]

#### (H) DEPOSITIONS AND FORMER EVIDENCE.

[See PERJURY.]

A, defendant, became bankrupt during the examination of witnesses, and a supplemental bill was filed against his assignees:—Held, that the depositions taken after the commission issued, and before the supplemental cause was at issue, could not be read against the assignees. *Hickens v. Congreve*, 4 Sim. 426.

Where a prosecutrix, in a case of felony, is bedridden, and there is no probability that she will ever be able to leave her house, the Judge will admit her deposition before the Magistrate, the same as if she were dead. *Rex v. Hogg*, 6 C. & P. 176. [Gurney]

A, who was witness for the prosecution against B, on a charge of arson, had first been examined before the Magistrate before any specific charge was made against any person, and his deposition taken in writing. A was next accused of the offence, and his statement, as a prisoner, was also taken down by the Magistrate. After this B was charged with the offence, and A examined as a witness, when A's statement, made at the time, was taken down, B being then committed:—Held, that all these statements of A so taken down ought to be returned to the Judge, and not merely the statement made when B was committed. *Rex v. Simons*, 6 C. & P. 540. [Alderson]

The rule, that the evidence of a witness who has died since a former trial, may be read in a subsequent suit between the same parties, on the same subject-matter, is founded upon the principle, that the parties have had the right to object to the competency of the witness, to cross-examine, and to try to contradict him by other evidence; it therefore applies, where the parties are substantially and virtually, though not nominally, the same.

Therefore, where in an issue of *devisavit vel non*, between the devisee and other persons, and the heir-at-law, the execution of the will was proved by one of the attesting witnesses, who died after the verdict:—Held, that his testimony might be read for the same purpose in an action of ejectment by the heir-at-law, as lessor of the plaintiff, against the devisee alone; and that it was not necessary to call another attesting witness, who was in court at the time, to prove the due execution of the will.—Held, also, that the reading of his evidence under a rule of court, by consent of parties that the evidence of such witnesses as were dead should be read, was sufficient proof of the execution of the will. *Wright v. Doe d. Tatham*, 3 Law J. (N.S.) Exch. 366, s.c. 1 Ad. & E. 3.

#### (I) REPUTATION.

[See POWER, Execution of—SHERIFF, Executions and Extents—WRECK.]

Perambulations of boundaries of a manor are receivable in evidence, in an action of trespass by a freeholder against the lord, where the property comes in dispute; they are evidence of a claim of right, and act of ownership on the lord's part. *Woolway v. Rows*, 3 Law J. (N.S.) K.B. 151; s.c. 1 Ad. & E. 114; 3 N. & M. 849.

The answers of the conventional tenants in one of the assessional manors of the Duchy of Cornwall, to questions submitted to them at their courts, respecting the toll of tin payable by custom in the manor, were admissible as evidence of reputation against the free tenants, it being sufficiently apparent that they had means of knowing the customs of mining in the district. They were admissible to prove a specific fact alleged therein, namely, that the right of common over the waste was held upon payment of a certain rent.

Evidence of separation of a custom may be received, though there is no proof of its having been acted upon, although it may be of little value.

Declarations by a deceased lord of a manor, that the waste of his manor reached a certain spot, but no farther, are not admissible in a suit between other parties; because he did not thereby necessarily diminish his own interest, inasmuch as he affirmed his own title to a part, although he disclaimed the residue; and they were not to be treated as reputation of boundary, but only as a declaration of his own property.

Where the lord of a manor entitled to the mines, granted a lease of them, and subsequently demised the surface, his description in the latter lease could not affect the first lessee, but it was binding upon the lessor and his reversionary interest. Consequently, it was admissible in evidence against the assignee of the first lessee, who had surrendered and taken a new lease. *Crease v. Barrett*, 4 Law J. (N.S.) Exch. 297, s.c. 1 C. M. & R. 919; 5 Tyr. 468.

A, in the year 1798, died possessed of property, which, many years afterwards, B commenced a suit to recover. In the year 1792, a relation of B made a declaration, the effect of which was to shew, that B was the heir and next-of-kin of A:—Held, that this declaration was not receivable in evidence, as the *lis mota*, or commencement of controversy, must be taken to be the arising of that state of facts on which the claim is founded, without anything more. *Walker v. Beauchamp*, 6 C. & P. 552. [Alderson]

The manors of R and of S, the parishes of C and of Y, and the counties of Brecon and Glamorgan, were co-terminous:—Held, that, in an action for disturbance of common, in which the boundaries of the two manors came in question, a county history of the county of Brecon, which stated the boundaries of the counties at this spot, was not receivable in evidence. *Evans v. Gelling*, 6 C. & P. 586. [Alderson]

*Semble*, that, in a pedigree case, statements contained in monumental inscriptions, and hearsay declarations made by a deceased relative, are competent evidence to prove the respective ages of the persons to whom they refer, as well as the fact of their relationship to each other. *Kidney v. Cockburn*, 2 Russ. & M. 167.

Where, in a pedigree case, the object is to connect A with C, after proving that B, a deceased person, was related to A; it is competent to give in evidence declarations by B, in which he claimed relationship with C.

A paper, in the handwriting of B, found in his repositories after his death, and purporting to give a genealogical account of his family, of which it represents C to have been a member, is admissible for the same purpose, though never made public in B's lifetime, though erroneous in various particulars, and professing to be founded chiefly on hearsay. *Monkton v. Attorney General*, 2 Russ. & M. 147.

On an issue joined, whether a certain place situate on the banks of a river is a public landing place for all the King's subjects, evidence may be giving of reputation that it is not a public landing place. *Drinkwater v. Porter*, 7 C. & P. 181. [Coleridge]

#### (K) OPINION.

A witness cannot be called to contradict another who denies having made a particular statement, if such statement was not of a fact, but only a matter of opinion; as such statement of opinion does not come within the rule which confines contradictions to matters directly connected with the issue in the cause. *Elton v. Larkins*, 5 C. & P. 385. [Tindal]

In an action of trespass for cutting a bank, where the question is, whether the bank, which had been erected for the purpose of preventing the overflowing of the sea, had caused the choking up of a harbour, the opinions of scientific men, as to the effect of such embankment upon the harbour, are admissible evidence; and evidence may also be given that other harbours, similarly situated, where there are no embankments, have begun to be choked and filled up. *Folkes v. Chudd*, 3 Doug. 157.

#### (L) DECLARATIONS.

[See BASTARD.]

Declarations made by a shopman are not evidence against his master, unless made in the course

of the business in which he was employed. *Garth v. Howard*, 1 Law J. (N.S.) C.P. 129, s.c. 8 Bing. 451; 1 Mo. & Sc. 628.

The declarations of a former owner of an estate, are evidence against the present owner, on the principle of identity of interest, although the party who made the declarations is alive. *Woolway v. Roe*, 3 Law J. (N.S.) K.B. 121; s.c. 1 Ad. & E. 114; 3 N. & M. 849.

The declarations of an indorser of a bill made whilst he was holder, are evidence to go to the jury against a holder under an indorsement made before the bill was due, if there be evidence, which satisfies the Judge, that the indorsee is merely an agent to sue for the indorser; the jury are afterwards to judge, first of the agency, and then of the effect of the declarations. *Welstead v. Levy*, 1 M. & Ro. 138. [Parke]

The declarations of a married woman during coverture of the non-payment of money lent to her before marriage, are admissible in evidence for the plaintiff in an action brought against her husband as her administrator. *Humphreys v. Boyce*, 1 M. & Ro. 140. [Tenterden]

If a carman take goods to the house of L, not knowing him, and ask for "Mr. L," of a person whom he finds in the house, and that person say—"I am Mr. L," that is *prima facie* evidence that this person was L. *Wilton v. Edwards*, 6 C. & P. 677. [Lyndhurst]

An offer made by the attorney of the defendant's father, is no evidence against the defendant; and the fact that the defendant afterwards employed the same attorney makes no difference. *Burghart v. Angerstein*, 6 C. & P. 690. [Alderson]

Any hope of recovery, however slight, existing in the mind of the deceased, at the time of his making a declaration, will render it inadmissible as a declaration *in articulo mortis*; but where a deceased knew that he must die, and the Magistrate, previous to his declaration, desired him, as a dying man, to tell the truth, and he replied that he would:—Held, that his declarations were admissible. *Rex v. Hayward*, 6 C. & P. 157. [Tindal]

A was charged with manslaughter in killing B, by driving a cabriolet over him; C saw the cabriolet drive by, but did not see the accident, and immediately afterwards, on hearing B groan, C went up to him, when B made a statement as to how the accident had happened:—Held, that this statement was receivable in evidence on the trial of A for the manslaughter of B. *Rex v. Foster*, 6 C. & P. 325.

In order to render a declaration *in articulo mortis* admissible as a case of manslaughter, it is not necessary to prove expressions of the deceased, that he was in apprehension of almost immediate death; but the Judge will consider, from all the circumstances, whether the deceased had or had not any hope of recovery. *Rex v. Bonner*, 6 C. & P. 386. [Patteson]

On the question, whether a declaration of a deceased person be admissible as a declaration *in articulo mortis*, the Judge will consider whether the conduct of the deceased was that of a dying person, such as whether he gave directions respecting his funeral, his will, &c., and not merely the expressions he used, as to whether he thought he should or should not recover. *Rex v. Spilsbury*, 7 C. & P. 187. [Coleridge]

If a declaration *in articulo mortis* be taken down in writing, and signed by the party making it, the Judge will not receive a copy of the paper in evidence, nor will he receive parol evidence of the declaration. *Res v. Gay*, 7 C. & P. 230. [Cole-ridge]

If a person whose death is the subject of a charge of manslaughter, express an opinion that he shall not recover, and make a declaration; and at a subsequent part of the same day asks a person whether he thinks he will "rise again":—Held, that this is such a hope of recovery as rendered the previous declaration inadmissible.

It is no objection against a declaration *in articulo mortis*, that it was made in answer to questions put to the deceased by the surgeon, and not a continuous statement made by the deceased. *Res v. Fagent*, 7 C. & P. 238. [Gaselee]

Where a constable entered a house with a warrant in his hand, and searched it; and for such entering and searching was indicted for a forcible entry:—Held, that his counsel might ask the witnesses for the prosecution what the constable said at the time as to whom he was searching for. *Res v. Smyth*, 5 C. & P. 201. [Tenterden]

On a prosecution for perjury, where, on the part of the prosecution, the depositions of a deceased person were offered in evidence; and upon the cross-examination of the prosecutor's witnesses, certain declarations of the deceased witness, not upon oath, were proved for the purpose of corroborating the facts stated in his depositions in a matter material to the defendant, it was held, that evidence of such declarations was not admissible. *King v. Parker*, 3 Doug. 242.

The declarations of the petitioning creditor (since dead) made after the commission, are not evidence against the assignees, in an issue to try whether the commission was concerted between the petitioning creditor, the bankrupt and the attorney. *Harwood v. Keys*, 1 M. & R. 204. [Patteson]

A having assigned his stock in trade and business to two trustees, one of them directed the plaintiff to go to Brussels to procure the liberation of A, who was detained there as a prisoner for debt, and it was arranged that Mr. L should remit the plaintiff's money whilst there. The plaintiff went there, and Mr. L sent a letter to him, announcing that he had done so:—Held, that, in an action by the plaintiff against the trustees for a compensation for going that journey, the statement in Mr. L's letter was not evidence; and also that the declarations of a person whom the trustees had placed in the house of business to manage the shop were also not evidence, that the plaintiff was entitled to be paid for taking an account of the stock. *Lawrence v. Thatcher*, 6 C. & P. 669. [Denman]

#### (M) ADMISSIONS.

##### (a) In general.

[See TRUSTEE, Power, Rights, and Duties—*Gibson v. Winter*.]

Admissions signed by attorney, commencing "We agree to admit, on the trial of this cause," &c. are binding on a second trial, although the attorney has, between the two trials, died, and the new attorney has sent notice that he will make no admis-

sions. *Doe d. Wetherell v. Bird*, 7 C. & P. 6. [Denman]

A letter written to the plaintiff's attorney before action brought, by the attorney, who afterwards appears in the cause for the defendant, is not evidence of a fact admitted therein, without further proof that the defendant authorized the communication. *Wagstaff v. Wilson*, 4 B. & Ad. 339, s. c. 1 N. & M. 4.

Where a vicar brings ejectionment, claiming in right of his vicarage, a letter written by a former vicar is admissible in evidence for the defendant; and a witness for the lessor of the plaintiff may be asked as to what is inscribed on a tablet fixed up in the church. *Doe d. Coyle v. Cole*, 6 C. & P. 359. [Patteson]

In assumpsit against several defendants, a statement made by one is receivable in evidence, as the plaintiff may proceed by steps to fix each of the defendants separately. *Whitford v. Tutin*, 6 C. & P. 228. [Tindal]

What a party says is evidence against himself as an admission, notwithstanding it may relate to the contents of a written paper. *Earle v. Picken*, 5 C. P. 542. [Parke]

A lease of tin mines and toll of tin was surrendered in 1810, and another lease taken, on payment of a fine, part of which was a compensation for the surrender of a former lease. A statement in a lease of the surface, made by the same lessor, during the existence of the former lease, is admissible in evidence against the lessee in that second lease of the mines and toll. *Crease v. Barrett*, 4 Law J. (N.S.) Exch. 297, s. c. 1 C. M. & R. 919; 5 Tyr. 458.

An entry by a deceased person charging himself, is admissible against strangers, even though it appears that the facts stated in that entry were not known to him of his own knowledge. 1b.

Where, to an action by assignees of a bankrupt, there was a plea denying their title,—Held, that an admission by the defendant of the debt on an application by them for payment, and a request by him for time, was sufficient *prima facie* evidence of their title to go to the jury. *Ingis v. Spence*, 4 Law J. (N.S.) Exch. 11, s. c. 1 C. M. & R. 432; 3 Tyr. 8.

A debtor, being in prison, wrote to the town agents of his creditors' attorneys, requesting them to send a confidential clerk to him, with whom he might communicate on the subject of his creditors' claim:—Held, in an action by the creditors to recover the claim, that what the debtor said to the person who went to him in consequence of his letter, was receivable in evidence, even though the subject-matter of the communication was an offer of 10s. in the pound. *Hill v. Elliott*, 5 C. & P. 436. [Park]

##### (b) Admission of Documents under a Judge's Order.

[Judges empowered to make regulations respecting. 3 & 4 Will. 4, c. 12, s. 14; 11 Law J. Stat. 98.]

The Court has no jurisdiction under Rule 20 of Hilary term, 4 Will. 4, to order the admission of documents; but if a Judge at chambers desires parties coming before him under that rule to go before the Court, they will be heard; but the Court will pronounce no judgment, leaving that to be done by the Judge at chambers.

On the plaintiff paying the defendant the expenses

of examining a judgment and other documents abroad, an order was made for the defendant to pay the expense of proving them at the trial, (such proof being satisfactory to the Judge, and so certified by him) whatever might be the result of the case, if after such examination the defendant did not admit them. *Smith v. Bird*, 3 Dowl. P.C. 641.

In an action for running down a ship, tried at Newcastle-upon-Tyne, the plaintiff having obtained a verdict, the Master refused to allow him the expense of proving certain documents, being the registers and transfers, &c. of the ship, upon the ground that reasonable notice had been given to the defendant to allow copies to be given in evidence. The commission day was on the 4th of March; notice of trial had been given on the 21st of February, and the notice to admit the documents was not served till Saturday the 28th of February on the London agent. He, however, refused to admit the copies; and another application was made on the following Monday, and the copies were produced to him; but he again refused, and a summons was then taken out, returnable the next day, but not attended. On the previous evening, the agent sent off the briefs. The Court ordered the Master to review his taxation. *Tynn v. Billingsley*, 8 Dowl. P.C. 810.

(c) *Admissions in Pleading.*

[See HIGHWAY.]

The statements in a special plea, which has been holden bad on demurrer, are not evidence for the plaintiff on the general issue, although the jury are to assess damages as well as to try the case on the general issue. *Montgomery v. Richardson*, 5 C. & P. 247. [Tenterden]

(N) CONFESSIONS.

A prisoner, before the Magistrate, made a statement which, by mistake, was written in the information book, and headed—"The information and complaint of A B":—Held, that it was not receivable, although the mistake could have been explained by the Magistrate's clerk. *Rez v. Bentley*, 6 C. & P. 148. [Gurney]

If a prisoner's examination before a Magistrate conclude, "taken and sworn before me," and under that be the Magistrate's signature, it is not receivable in evidence; and the Judge will neither allow the Magistrate's clerk to prove that, in fact, it was not sworn, nor will he receive parol evidence of what the prisoner did. *Rez v. Rivers*, 7 C. & P. 177. [Parke]

Where a Magistrate has signed the examination of a prisoner under 7 Geo. 4, c. 64, in order to allow it to be read on the trial, it is sufficient to prove the handwriting of the Magistrate, and to shew that the examination is that of the particular prisoner. *Rez v. Foster*, 7 C. & P. 148. [Bosanquet]

It is not necessary to call either the Magistrate or his clerk to prove the due taking in writing of the prisoner's confession. *Rez v. Hopes*, 7 C. & P. 186. [Vaughan]

An examination of a prisoner, taken before a Magistrate, signed with the prisoner's name, may be given in evidence, on the prisoner's handwriting being proved by any one present at the time of such examination.

When the prisoner has merely put his mark, it must be proved that the examination was correctly read over to him. *Rez v. Chappel*, 1 M. & Ro. 395. [Denman]

A girl, accused of poisoning, was told by her mistress, that if she did not tell all about it that night, a constable would be sent for in the morning to take her before a Magistrate. She then made a statement, which was held to be not admissible in evidence. Next day a constable was sent for; and as he was taking her to the Magistrate, she said something to him, he having held out no inducement to her to do so:—Held, that this was receivable, as the former inducement ceased on her being put into the hands of the constable. *Rez v. Richards*, 5 C. & P. 318. [Bosanquet]

A constable said to a prisoner charged with felony:—"It is of no use for you to deny it, for there is the man and boy who will swear they saw you do it":—Held, that this was such an inducement as would exclude evidence of what the prisoner said. *Rez v. Mills*, 6 C. & P. 146. [Gurney]

A was in custody on a charge of murder. B, a fellow prisoner, said to him, "I wish you would tell how you murdered the boy: pray, split." A replied, "Will you be upon your oath not to mention what I tell you?" B went upon his oath that he would not tell. A then made a statement:—Held, that this was not such an inducement to confess as would render the statement inadmissible. *Rez v. Shaw*, 6 C. & P. 372. [Patteson]

A statement relating to an offence made upon oath by a person not at the time under suspicion, is admissible in evidence against him, if he be afterwards charged with the commission of it. *Rez v. Tubby*, 5 C. & P. 580. [Vaughan]

A prisoner charged with felony made a statement before the committing Magistrate, which was taken down, and signed by the prisoner; but there was nothing on the face of the paper to shew, that, at the time the prisoner made the statement, he was under examination on the charge of felony:—Held, that this examination could not be used as an examination taken under the statute 7 Geo. 4, c. 64, but that the clerk to the Magistrate might state what the prisoner said, using the paper to refresh his memory. *Rez v. Tarrant*, 6 C. & P. 182. [Patteson]

A prisoner charged with felony made a statement before the committing Magistrate, which was taken down in writing, but not signed by the prisoner:—*Seem*, that the Magistrate's clerk should give evidence of what the prisoner said, using that which was taken down to refresh his memory. *Rez v. Presley*, 6 C. & P. 183. [Patteson]

If a prisoner in making a statement mention the name of another prisoner, the witness who gives evidence of the statement must state exactly what the prisoner said, without omitting the name of the other prisoner. *Rez v. Walkley*, 6 C. & P. 175. [Gurney]

Observations made by a wife to her husband, upon a subject which afterwards becomes matter of a criminal charge against him, and to which he gave no direct reply, may be opened to the jury by the counsel for the prosecution. *Rez v. Smithies*, 5 C. & P. 332.

A and his wife were separately in custody on a



charge of receiving stolen property. A person who was in the room with A said, "I hope you will tell, because Mr. G can ill afford to lose the money"; and the constable then said, "If you will tell where the property is, you shall see your wife":—Held, that a statement made by A afterwards was admissible in evidence. *Res v. Lloyd*, 6 C. & P. 393. [Patteson]

If a prisoner, when examined before the Magistrate, say that the deposition of F T is true, the deposition of F T may be read at the trial as part of the prisoner's statement, although F T has been examined at the trial as a witness for the prosecution. *Res v. John*, 7 C. & P. 324. [Patteson]

A gave a mortal blow to B, his master, who took out a summons against A for an assault. The charge of assault was heard under this summons before Mr. D and another Magistrate, who summarily convicted A of the assault. What was said by the parties before the Magistrate was not taken down in writing. B died:—Held, that, on the trial of A for the murder of B, Mr. D might give evidence of what B said in the presence of A at the hearing before the Magistrate, and of what A said in answer to it. *Res v. Edmunds*, 6 C. & P. 164. [Tindal]

What a prisoner is overheard to say to his wife, or even what he is overheard to say to himself, is receivable in evidence against him on a charge of felony. *Res v. Simons*, 6 C. & P. 540. [Alderson]

Several persons (one of whom was the prisoner) were summoned before the committing Magistrate, touching the poisoning of C. No person was then specifically charged with the offence. The prisoner was, sworn, and made a statement; and at the conclusion of the examination, the prisoner was committed for trial:—Held, that this statement was not receivable in evidence against the prisoner. *Res v. Lewis*, 6 C. & P. 161. [Gurney]

When, before the committing Magistrate, one of the prisoners was examined as a witness against the other, and, after being examined, was charged as a prisoner:—Held, that what this prisoner said before the Magistrate as a witness could not be given in evidence against her on her trial for the offence. *Res v. Davis*, 6 C. & P. 177.

Evidence is admissible to add to the examination of a party before a Magistrate, though taken in writing. *Venafra v. Johnson*, 1 M. & Ro. 316.

Parol evidence may be given to add to the written examination of a prisoner, taken by a Magistrate. *Res v. Harris*, 1 M. C.C. 338. See PERJURY, *Res v. Wilde*.

It is the duty of a Magistrate to return to the Judge, not only the depositions of witnesses, but also any confession taken down as made by a prisoner; and it is no excuse for not doing so, that the confession was wanted to be sent before the Grand Jury. *Res v. Fallows*, 5 C. & P. 508. [Vaughan]

A prisoner ought to be told by the Magistrate, that, if he makes any statement, it may be used as evidence against him; and that he must not expect any favour if he confesses; but the Magistrate ought not to dissuade him from confessing. *Res v. Green*, 5 C. & P. 312. [Gurney]

A confession made in consequence of persuasion by a clergyman, not with any view of temporal benefit, is admissible. *Res v. Gilham*, 1 R. & M. C.C. 186.

The committing Magistrate had told a prisoner, that he would do all he could for him, if he would make a disclosure: after this the prisoner made a statement to the turnkey of the prison, who held no inducement to the prisoner to confess:—Held, that what the prisoner said to the turnkey could not be received in evidence, more especially as the turnkey had not given the prisoner any caution. *Res v. Cooper*, 5 C. & P. 535. [Parke]

A man and woman being apprehended on a charge of murder, another woman, who had the female prisoner in custody, told her that she "had better tell the truth, or it would lie upon her, and the man would go free:—Held, that a declaration of the female prisoner, made to this woman afterwards, was not receivable in evidence. *Res v. Enoch*, 5 C. & P. 539. [Parke]

A was charged with setting fire to the racks of B, C, and D, upon the oath of E, an accessory before the fact, and a warrant to apprehend A was granted, mentioning all the three charges, and stating them to be made on the oath of E. The person who apprehended A told her, that "a very serious oath had been made against her by E" on these three charges. After this, A made a statement which was received in evidence. *Res v. Charlotte Long*, 6 C. & P. 179. [Gurney]

If the witness said to the prisoner, "It would have been better if you had told at first": this is an inducement to confess, and will render a statement made thereupon inadmissible evidence. *Res v. Walkley*, 6 C. & P. 175. [Gurney]

Where a prisoner made a confession to a constable, in consequence of a promise held out, was taken before a Magistrate, who, knowing what had taken place, cautioned the prisoner against making any confession before him; but the prisoner notwithstanding did make a confession before the Magistrate:—Held, that this second confession was receivable in evidence on the trial of the prisoner, though it did not appear that the Magistrate told the prisoner that the first confession would have no effect; and he, therefore, might have acted under an impression, that, having once acknowledged his guilt, it was too late to retract. *Res v. Howes*, 6 C. & P. 404. [Denman]

A prisoner charged with felony being in custody handcuffed in the house of the prosecutor, after a conversation with the prosecutor, and another person, in which he was told that they would do all they could for him, said, "If the handcuffs are taken off I will tell you where I put the property":—Held, that this statement was receivable in evidence, and could not be objected to, either as a confession made under a promise, or a statement obtained by duress. *Res v. Green*, 6 C. & P. 655.

If a prisoner be told, "You had better split, and not suffer for all of them": this is such an inducement to confess, as will exclude what the prisoner afterwards said. *Res v. Thomas*, 6 C. & P. 353. [Patteson]

A statement made by a prisoner when he is drunk, is receivable in evidence; and, *semble*, that if a constable gave him liquor to make him so, in the hope of his saying something, that will not render the statement inadmissible, but it will be a matter of observation for the Judge in summing up.

If a prisoner, during the examination of the wit-

nesses against him before the Magistrate, make an observation, parol evidence may be given of such observation, if the Magistrate's clerk prove that he only took down the evidence of the witnesses, and the statement of the prisoner after the evidence against him was concluded. *Rez v. Spilsbury*, 7 C. & P. 187. [Coleridge]

(O) RES INTER ALIOS.

[See ARREST, Proof of.]

Two causes, in which the same title was in question, were entered at one Assize,—*H. Foster v. T. Foster*, and *the Earl of Derby* (the present plaintiff, who claimed through H. Foster,) *v. T. Foster*. A witness was examined in the cause of *H. Foster v. T. Foster*, whose evidence it was proposed to read at the trial of this cause, but was rejected:—Held, that there was no such privity of estate between H. Foster and the Earl of Derby as to make the evidence given in the case of *Foster v. Foster* admissible in the present cause; and, in order to make such evidence admissible on the ground of privity of estate, the title of the Earl of Derby should have accrued since the former trial.

It appeared, that, on the occasion of the former trial, the same counsel held briefs in those causes for H. Foster and the Earl of Derby; that the counsel of Thomas Foster were the same in both cases; and that, after a verdict was given for H. Foster, a verdict was taken by consent for the Earl of Derby, as it depended upon the same evidence:—Held, that the Court would not inquire into what the general understanding or intention of the parties was; but that, if the examination of witnesses was waived, and it was intended by the parties that it should be considered that the same evidence was given in the second cause, that should have appeared upon the Judge's notes. *Doe d. Foster v. Earl of Derby*, 3 Law J. (N.S.) K.B. 191, a.c. 1 Ad. & E. 733; 3 N. & M. 782.

On a trial, touching the right to lands, decrees in Chancery between other parties concerning the same lands, were held admissible in evidence to shew the character in which the possessor enjoyed the lands. *Davies and Wife dem., W. L. Loundes ten.*, 4 Law J. (N.S.) C.P. 215, a.c. 1 Bing. N.C. 606; 2 Sc. 90.

(P) CONFIDENTIAL COMMUNICATIONS.

A prisoner was in custody on a charge of forgery, but was not allowed to see his wife. He wrote to a friend, "to ask Mr. G, or some other solicitor, whether the punishment was the same, whether the names forged were of real or fictitious persons." Mr. G was not his attorney:—Held, that this was not a privileged communication. *Rez v. Brewer*, 6 C. & P. 363. [Park]

In an action for a libel, charging an attorney with "disgraceful conduct," in having, on an election, disclosed confidential communications, which he had acquired professionally, the defendant pleaded, that the plaintiff had, on that occasion, disclosed details professionally and confidentially made known to him, relating to three transactions (which were specified), two of them being instances in which he had been employed by mortgagors to manage mortgages; and a third, where, in his employment as attorney, he had become acquainted with the na-

ture of his client's title, and his right to grant freehold leases. At the trial, it appeared, as to the mortgages, that the plaintiff had acted as attorney both for the mortgagors and mortgagees:—Held, that the question for the jury was, whether the matters disclosed by the plaintiff were confidential communications acquired by him professionally, and not whether they were such as he would not be compellable to disclose, if called as a witness in a court of justice. *Semble*, that the knowledge acquired by the plaintiff as to the right of his client to grant freehold leases, was of that privileged nature, that he would not have been bound to disclose it, if called on as a witness. *Moore v. Terrell*, 4 B. & Ad. 870, a.c. 1 N. & M. 559.

A conversation between a client, who afterwards becomes bankrupt, and his attorney's clerk on the subject of his affairs, is a privileged communication, and cannot be given in evidence in an action by his assignees, for the purpose of shewing his motives. *Bowman v. Norton*, 5 C. & P. 177. [Tindal]

What a mortgagor, in treaty to raise money, says to the attorney of the mortgagee, is not a privileged communication. *Murston v. Dawsons*, 6 C. & P. 381.

Where two parties in dispute have one attorney, a communication by one to him in his common capacity is not privileged, but may be used by the other. *Baugh v. Cradocke*, 1 M. & Ro. 182. [Paterson]. *Cleve v. Powell*, 1 M. & Ro. 228. [Denman]

A witness may be called upon by the plaintiff to state a conversation, in which the defendant proposed a compromise to the plaintiff; although the witness attended on that occasion as attorney for the defendant. *Griffith v. Davies*, 5 B. & Ad. 502.

(Q) PRESUMPTION.

The presumption of a deed is not a matter of law to be determined by the Court, but a matter of fact to be decided by the jury. *Tenny v. Jones*, 2 Law J. (N.S.) C.P. 219, a.c. 10 Bing. 15; 3 Mo. & Sc. 472.

(R) NOTICE TO PRODUCE.

[See ATTORNEY, Bill of Costs—BILL OF EXCHANGE, Notice of Dishonour. And see, *post*, Secondary and Parol Evidence.]

Whether depositions are sufficient notice to a party to produce an original document, so as to let in secondary evidence—*quære*. *Stals v. Stals*, 2 Law J. (N.S.) Chanc. 39, a.c. 5 Sim. 460.

Notice to produce must be served before the commission day on parties living away from the assize town. *Trist v. Johnson*, 1 M. & Ro. 259. [Park]

Where the attorney in a cause has been changed, a notice to produce served (before the change) on the first attorney, is sufficient to call for production of the paper at the trial. *Doe d. Martin v. Martin*, 1 M. & Ro. 242. [Tindal]

Communications made to an attorney by his client respecting the sale of estates, are privileged. The privilege is not limited to suits existing or expected. *Mynn v. Jolliffe*, 1 M. & Ro. 328.

Written admissions made for the purpose of a former trial, may be used on a new trial. If the party, who made them, wishes to withdraw them, he should take out a summons before a Judge, in order to obtain his permission. *Elton v. Larkins*, 5 C. & P. 305, a.c. 1 M. & Ro. 186. [Tindal]

The protection of communication made by a client to his attorney, applies to all cases in which the relation of attorney and client subsists, and to all cases where the client applies to the attorney in his professional capacity. An attorney cannot be asked, whether A applied to him to draw a certain deed, nor whether A asked his advice for a lawful or an unlawful purpose. *Doe d. Skellard v. Harris*, 5 C. & P. 592. [Parke]

A notice to produce, served on a defendant in London on a Saturday, the cause being tried on the following Monday, is too late: notice to produce ought to be served on the attorney, if there be one. *Housseman v. Roberts*, 5 C. & P. 394. [Gurney]

A cause came on to be tried at the Assizes on a Wednesday morning. On the previous Monday evening, the defendant's attorney, being at the assize town, was served with notice to produce a book, which would probably be at his office, which was nineteen miles from the assize town:—Held, that this service was too late. *Hargest v. Fothergill*, 5 C. & P. 303. [Taunton]

A prisoner, tried at the Assizes for arson on Wednesday the 20th of March, was, on Monday the 18th, served at the prison with a notice to produce a policy of insurance. The commission day was Friday the 15th, and the prisoner's home was ten miles from the assize town:—Held, that the notice was served too late. Held, also, that the intent to defraud an insurance-office, being charged in the indictment, was not such notice to the prisoner, as would make a notice to produce the policy unnecessary. *Rea v. Edlicombe*, 5 C. & P. 522, s. c. 1 M. & R. 260. [Littledale]

Where a document is proved to have come into the hands of one party to a cause, the opposite party cannot entitle himself to give secondary evidence of its contents by shewing that it has been since lost or destroyed, unless he has served notice to produce.

Defendant in ejectment relied on a will, devising all the testator's property, except a pecuniary legacy. In answer, plaintiff proved, that, after the execution of such will, a document, which he alleged to have been a will, was signed by the testator, and delivered to a woman, whom the defendant afterwards married; since which the witness who prepared it, had heard nothing of it. It was then asked, on behalf of the plaintiff, whether the deceased had declared that paper to be his will, and whether the witness and others had signed it in his presence:—Held, that the question could not be put, no notice having been given to produce the last-mentioned document. *Doe d. Phillips v. Morris*, 3 Ad. & E. 46, s. c. 4 N. & M. 598.

#### (S) SECONDARY AND PAROL EVIDENCE.

[See BANKRUPT, Evidence—BILL OF EXCHANGE, Actions and Suits—DEBTOR AND CREDITOR, Composition—DEVISE, Construction of—EXECUTOR AND ADMINISTRATOR, Pleading and Evidence—FRAUDS, Statute of. And see, *ante*, Private Writings.]

In replevin, the defendants avowed for a distress for poor rates:—Held, that one of the defendants, having acted as overseer of the poor, was *prima facie* evidence that he was so:—Held, also, that, to let in secondary evidence of his appointment, it was

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sufficient proof of loss, that a witness stated, that he, at the desire of the attorney, had applied to the defendant for his appointment; and that he said he had lost it, without proving any search made. *Guardians of the Poor of Bristol v. Wait*, 6 C. & P. 591. [Alderson]

There are no degrees in secondary evidence; therefore, where a defendant has given notice to the plaintiff to produce a letter, of which he kept a copy, he may, if the letter is not produced, give parol evidence of its contents, and is not bound to put in the copy; but, if there had been a duplicate original, it might be otherwise. *Brown v. Woodman*, 6 C. & P. 206. [Parke]

In an action against a mortgagor, the attorney of the mortgagee, who has the mortgage deed, cannot be compelled to produce it, if he objects to do so, nor can he be compelled to give evidence of its contents; but he may be asked for what purpose the money was raised, and secondary evidence may be given of the contents of the mortgage deed. *Murston v. Dawns*, 6 C. & P. 381. [Patteson]

Where a notice had been served on the defendant's attorney, on the Saturday previous to the commission day of the assizes at Chelmsford, to produce certain documents, which he went up to town for on Monday (the commission day), and, on his return, found a fresh notice to produce the documents mentioned in the former notice, together with others not contained in the first; upon which he told the person serving the notice, that he had just been to town, but that, if the plaintiff's attorney would pay the expenses of a messenger to town, he should have the additional documents required:—It was held, that the notice was not sufficient to entitle the plaintiff to give secondary evidence in default of the production of those additional documents. *Doe d. Curtis v. Spitty*, 1 Law J. (N.S.) K.B. 88, s. c. 3 B. & Ad. 182.

In ejectment in 1815, by a devisee under a will made in 1806, one of the attesting witnesses, a clerk in the office of the attorneys who made the will, was called to prove the execution. On the trial of a writ of right in 1835, it was proved that inquiries had been made at that office, and three advertisements inserted in three London newspapers, for the purpose of finding the witness, but the party of whom the inquiries were made stated, that upon being served with a subpoena, he had discovered, on reference to his books, that the witness, in 1815, was a clerk in the office of other solicitors, which fact, however, he had not communicated:—Held, that due diligence had been used in inquiry for the attesting witness to admit evidence of his handwriting. *Miller v. Miller*, 4 Law J. (N.S.) C.P. 259, s. c. 2 Bing. N.C. 76; 2 Sc. 122.

Where, on a second trial of a cause, a witness stated, that he had, on the argument for the new trial, handed a document to one of the learned Judges, and had not since seen it, or been able to find it, secondary evidence was received of its contents, without any search having been made at the chambers of the learned Judge, the presumption being, that his Lordship returned it to the party who produced it. *Deacon v. Fuller*, 6 C. & P. 74. [Lyndhurst]

Appellants against an order of removal relied on the settlement of a deceased party by apprentice-

ship; and, to let in parol evidence of the indenture, they called the widow of the deceased, who stated that her husband, in his last illness, told her, that he received his indentures from his master at the end of his apprenticeship, and wore them out in his pocket. The Sessions confirmed the order, subject to the opinion of this Court as to the admissibility of the evidence. The Court held, that, without further proof of inquiry after the indentures, evidence of this conversation was not admissible; and they refused to send the case back to be restated. *Rez v. the Inhabitants of Rawden*, 2 Ad. & E. 156, s. c. 4 N. & M. 97.

Where a witness stated, that he and the pauper went together with J P, who, in their presence and by their direction, entered the terms of hiring in writing, but which was not signed by himself or the pauper:—Held, that as it did not appear that either of the contracting parties ever saw the writing, or recognized it in any way as their own, that could not be considered as the agreement between the parties, and that parol evidence might be given of the terms of the hiring. *Rez v. the Inhabitants of Wrangle*, 4 Law J. (N.S.) M.C. 43, s. c. 4 N. & M. 375; 2 Ad. & E. 514.

Plaintiff acted as secretary to an association under a resolution of the committee, which regulated the terms, salary, &c. of the office, which was passed and inserted in the minute-book of the society before the plaintiff's appointment. Upon the dissolution of the body, and an action by the plaintiff against the defendants, members of the committee, for the amount of salary,—Held, that the plaintiff was bound to produce the book which contained the resolution regulating the office, &c., and that he could not recover upon a *quantum meruit*.—Held, also, that a notice to produce the book in question served on the defendants, and unattended to by them, was insufficient to admit secondary evidence, as such book was not proved to be in their possession, but was in the possession of another late committee-man; and the possession of the latter could not be said to be that of the defendants, the committee being dissolved, and the parties having no longer a common interest. *Whitford v. Tutin*, 3 Law J. (N.S.) C.P. 106, s. c. 10 Bing. 395; 4 Mo. & Sc. 166.

Where a witness made entries at the time the goods were delivered, in a ticket or waste book, of the weight, which on the same day were copied by his master out of the ticket or waste book into a ledger, and the prices affixed in the witness's presence, and which latter entries were checked by the witness, he having at that time a perfect recollection of the correctness of those entries as to the weight:—Held, that the witness might refer to the ledger to refresh his memory, as, under the circumstances, the entries must be considered as original entries made in his presence: but a witness cannot refer to a mere copy of original entries, in order to refresh his memory. *Burton v. Plummer*, 4 Law J. (N.S.) K.B. 53, s. c. 2 Ad. & E. 341; 4 N. & M. 315.

In an action of debt for rent in arrear, by the assignee of the reversion, against the assignee of the term, the plaintiff's attorney proved the execution of a conveyance of the premises to the plaintiff, but he admitted, on cross-examination,

that a subsequent deed had been executed between the same parties, relating to the same premises. This deed, he stated, was in court, but he refused to produce it, on the ground, that he was not compellable to produce his client's title deeds. The defendant's counsel then submitted, that he had a right to give parol evidence of the second deed, without stating that he was prepared with any, and what was the nature of the parol evidence:—Held, that as no notice to produce the deed had been given, the parol evidence was properly rejected. *Quere*, as to the authority of *Roe v. Harvey*. *Bate v. Kinsey*, 3 Law J. (N.S.) Exch. 304, s. c. 1 C. M. & R. 38; 4 Tyr. 662.

Secondary evidence of a document, to produce which notice has been given, is not admissible where the document is held by a stakeholder between the party in the cause and a third person. *Parry v. May*, 1 M. & R. 274. [Littledale]

The attorney for the opposite party cannot be asked whether he has with him a rule of court relating to the cause with a view to give secondary evidence of the rule, no notice to produce, or *subpoena duces tecum*, having been served. It is too late at the trial to serve such notice. *Cook v. Hearn*, 1 M. & R. 201. [Patteson]

In an action of trover against a sheriff, if it appear that the officer's warrant is lost, parol evidence may be given of its contents, with a view of connecting the sheriff with the officer; although it appear that a book is kept at the sheriff's office, in which an entry is made of all warrants granted by the sheriff, and this book is neither produced nor called for on the part of the plaintiff. *Moon v. Raphael*, 7 C. & P. 115. [Gaselee]

A was examined before commissioners of bankrupt; and on his examination he produced a machine copy of a letter he had sent to R. While A was before the commissioners, Mr. E, the solicitor to the assignees, made a copy of the machine copy of the letter produced by A:—Held, that, in an action by the assignees of the bankrupt against A, the copy of the letter made by Mr. E was not admissible in evidence against A, without reading his examination, although notice had been given to A, to produce the copy. *Holland v. Reeves*, 7 C. & P. 36. [Alderson]

The pauper was bound apprentice; there being but one indenture, which was taken by the master. He failed, and his books and papers came to the possession of an attorney, who examined such of them as related to accounts. At that time he saw no indenture. Thirty years afterwards, upon a question as to the pauper's settlement, the foregoing facts were given in evidence; and it also appeared, that the master was dead, but his widow was living. No application had been made to her for the indenture:—Held, that this was enough to warrant the reception of secondary evidence of the contents of the indenture. *Rez v. the Inhabitants of Piddlehinton*, 1 Law J. (N.S.) M.C. 43, s. c. 3 B. & Ad. 460.

Parol evidence of the admission of a debt is receivable, although such admission and a promise to pay the same be immediately reduced into writing and signed by the party making it.

The words in the particulars of demand, "as appears by a memorandum" do not confine the

plaintiff to proof of his demand by such memorandum only, but he is at liberty to give other evidence thereof. *Singleton v. Barrett*, 1 Law J. (N.S.) Exch. 134, s. c. 2 C. & J. 368; 2 Tyr. 409.

Where a party has made out and closed a *prima facie* case, in doing which it does not appear that there was any written agreement, the other side cannot, when they go into their case, and shew that there was a written agreement, throw upon the first party the onus of producing that agreement. *Rez v. the Inhabitants of Padstow*, 2 Law J. (N.S.) M.C. 15, s. c. 4 B. & Ad. 218; 1 N. & M. 9.

Proof of possession by a member of a committee of books, which he has in his custody, not as such member, but as tenant of the premises previously occupied by such committee, is not sufficient, in an action against other members of the committee, to let in parol evidence of the contents on notice and non-production. *Whitford v. Tutin*, 6 C. & P. 228. [Tyndal]

*Seem*, that the returns made annually of transcripts of parish registers to the registry of the diocese, under the 70th canon, are not receivable in evidence, instead of the original register, or an examined copy of it, without proof of the loss of the original register; but, *seem*, that, if the original be proved to have been lost, examined copies of these returns would be admissible. But if the returns were under the statute 52 Geo. 3, c. 146, s. 6 & 7, *seem*, examined copies would be evidence, without proof of the loss of the original register. *Walker v. Beauchamp*, 6 C. & P. 552. [Alderson]

If the vicar of a parish be applied to for an extract of a parish register of a particular date, and he state that there is no register book of that year, this is not sufficient proof of the loss of the book to let in secondary evidence of the contents of the register, without calling the vicar; but if the vicar had produced to the applicant a book as the original register, the Judge at the trial would have held it to have been so, unless the contrary was shewn. *Ibid.* [Alderson]

A had purchased at an auction an under-leasee's interest in a house, and refused to pay a cheque which he had given for the deposit, because the ground-rent payable to the superior landlord was greater than it was stated to be at the time of the sale:—Held, that the superior landlord's solicitor was not compellable to produce the counterpart of the original lease; and that a person who had advanced money on that lease, and held it as equitable mortgagee, could also not be compelled to produce the lease itself; but that if both those, on being called as witnesses, refused to produce the lease and counterpart, secondary evidence might be given of the contents of the lease, by calling any person who had seen it, and who neither claimed under it as one of his own title deeds, nor was privileged as an attorney or solicitor. *Mills v. Oddy*, 6 C. & P. 728. [Parke]

Where A employs a broker, B, to procure a charter-party, on a commission of five per cent., to be paid whether the contract be executed or abandoned, A cannot, under a plea of payment of a smaller sum and *non assumptis ultra*, give evidence of a subsequent agreement to accept two and a half per cent. only on account of the abandonment of the contract; but where the terms of the original contract are only

inferred from the usage of the trade, a conversation, in which B agrees to take two and a half per cent. only, on account of the abandonment of the contract, is admissible, to shew that such reduction was, as a contingent reduction, part of the original contract. *Broad v. M'Calmer*, 5 N. & M. 413.

Testator devised to J T his messuage or dwelling-house, and mill, with the garden and cottage adjoining, with the mill-pond, and privileges thereto belonging; and also his messuage, the Ark Cottage, garden, and lands at Shatterwell in Wincanton, rented by Mrs. Sly and others; and his messuage, dwelling-house, shop, garden, and orchard at Whitehall, in Wincanton aforesaid, rented by A B and others, with their respective appurtenances. He also devised to J T his orchard by the side of the river, in W, near the foregoing premises, for all his (testator's) estate and interest therein; charged nevertheless, as to the whole of the premises, with the payment of 500*l.* to his executors in aid of and towards his residuary personal estate.

In ejectment by the devisee to recover certain lands called Shatterwell Close, as part of the lands intended by the testator to pass by the above devise, it was proved by the defendant, that the testator was entitled to the following premises at Shatterwell, in Wincanton:—the principal messuage and two closes of land, rented by Mrs. S; the Ark Cottage, occupied by P, and the garden rented by W L; the messuage, garden, and orchard called Whitehall, rented by A B and C D, and Motion's orchard, described in the will as the little orchard, occupied by the testator himself. These premises, with the exception of Motion's orchard, were conveyed to the testator in 1828 by one conveyance, and were therein described to comprise a messuage, Ark Cottage, a garden, and close, by name, formerly in occupation of, &c., but then untenanted; and also a messuage called Whitehall, with a garden and orchard rented by A B.

Motion's orchard was purchased by the testator in 1827; before which time it had been united with the foregoing premises, in the possession of one person. The testator, in 1824, purchased other premises in Shatterwell; and at the date of his will and of his death, their situation was as follows:—Shatterwell Close was rented by W, with several other closes, at the rent of 170*l.* per annum; an orchard called Cold Bath Orchard, was also rented by W, but under a separate rent. A messuage adjoining was rented by the said W L, and Lewis's orchard was occupied by the testator himself. No part of the premises, purchased in 1828, had ever been let with any part of the premises purchased in 1824, except the garden rented by W L; and all these latter premises were separated from the former by a lane, from which there was no entrance to Shatterwell Close:—Held, that all these facts were admissible in evidence; but that they raised no ambiguity as to the meaning of the devise of the messuage, the Ark Cottage, garden, and lands at Shatterwell, in Wincanton, rented by Mrs. Sly and others, that being sufficiently explicit to pass all the lands of the testator, situate at Shatterwell, in Wincanton, rented by any tenant. *Doe d. Templeman v. Martin*, 4 B. & Ad. 771, s. c. 1 N. & M. 512.

A testator having two nephews named Morgan Morgan, one of whom only resided at Mothvey,

gave certain premises after the decease of his wife to his nephew Morgan Morgan, and afterwards certain other premises "to Morgan Morgan, of the village of Mothuey."—Held, that a latent ambiguity was raised, sufficient to admit parol evidence in explanation. *Doe d. Morgan v. Morgan*, 2 Law J. (n.s.) Exch. 88, s.c. 1 C. & M. 235; 3 Tyr. 179.

Where, in a mining lease, the defendant had covenanted before a certain day, to get the whole and every part of the demised mines, &c. not deeper than and below the level of the bottom of the mine, bed, or seam of coal, called the Arley Mine:—Held, that parol evidence was admissible, to shew what meaning miners, in the neighbourhood of the mine leased, attached to the word *level*. *Clayton v. Gregson*, 4 Law J. (n.s.) K.B. 161, s.c. 4 N. & M. 602.

Devise of the "close in the occupation of J W." It appeared, that J W was in the occupation of two closes:—Held, that this created a latent ambiguity, which let in parol evidence, to prove which of the two closes passed, or that the two closes were known by the description of "the close."

Evidence was given of the instructions to the attorney who prepared the will, by which it appeared, that the testator wished the land in Kirtton, occupied by Watson, to be the property of the devisee:—Held, that this evidence was not admissible for the consideration of the jury. *Richardson v. Watson*, 2 Law J. (n.s.) K.B. 134, s.c. 1 N. & M. 567; 4 B. & Ad. 787.

The Court will compel an attorney to perform an absolute written undertaking, notwithstanding a parol agreement that it should not be enforced except upon a contingency. *Wills v. Warner*, 2 Law J. (n.s.) Exch. 174, s.c. 1 Dowl. P.C. 680.

Where A B having freehold estates in the county of Clare, and a small estate in the city of Limerick, devised all his freehold and real estates situate in the county of Limerick and in the city of Limerick, to trustees:—Held, that parol evidence was not admissible to shew that it was his intention to devise his estate in the county of Clare. On opening the will of the testator, one of the sheets containing the operative words of a devise, was missing:—Parol evidence is admissible to account for the loss of this sheet. *Miller v. Travers*, 1 Law J. (n.s.) Chanc. 157.

In a lease it was provided that at the end of the term, the tenant should leave not less than 10,000 rabbits on the premises, to be taken and paid for by the landlord, at the rate of 60l. "per thousand":—Held, that evidence was admissible, to shew that the custom of that part of the country, in counting rabbits, was to allow six score to the hundred. *Smith v. Wilson*, 1 Law J. (n.s.) K.B. 194, s.c. 3 B. & Ad. 728.

If the terms of a contract are proposed and accepted by letters, but are afterwards varied by the contract as drawn up, the construction of the contract cannot be affected by the letters. *Farquharson v. Barstow*, 4 Bl. n.s. 560.

In assumpsit for refusing to allow the plaintiff to proceed with certain work according to agreement, the defendant pleaded, that the work was to be done to the satisfaction of A B; and that part of the work which was done, was not done to his satisfaction; and that, therefore, he discharged the plaintiff:—Held,

that, upon this issue, it was not necessary for the defendant to call A B. *Vickers v. Cock*, 3 Dowl. P.C. 492.

In the conveyance of an estate there was a covenant that the premises were free from incumbrances, except particular leases. *Quere*—whether these words affirm the leases, and whether parol evidence is admissible to shew it was so intended. *Doe v. Roberts*, 4 Doug. 306.

A bankrupt, previous to his bankruptcy, gave a bond to trustees for the payment of 5,000l. and interest, as a provision for his daughter on her marriage. The trustees having proved the amount under the commission, a petition was presented to expunge the proof, the bankrupt alleging, that when the bond was given it was understood between him and his obligees, that it was only to be available in the event of the success of a certain speculation:—Held, that such parol evidence was not admissible to controul the absolute effect of the bond. *Ex parte Morley*, 2 D. & Ch. 50.

### EXCHEQUER.

Court of (in Scotland)—Provisions for dispatch of business, now done by. 2 Will. 4, c. 54; 10 Law J. Stat. 113.

Regulation of the duties of officers on the Common Law side of. 2 & 3 Will. 4, c. 110; 10 Law J. Stat. 276.

Abolition of certain officers in the Court of. 3 & 4 Will. 4, c. 99; 11 Law J. Stat. 201.

Barons of (in Scotland), their powers and duties as to the public revenue transferred to the Commissioners of the Treasury. 3 Will. 4, c. 13; 11 Law J. Stat. 31.

(In Scotland) Recordship of the Great Roll or Clerkship of the Pike, abolished. 4 Will. 4, c. 16; 12 Law J. Stat. 31.

Regulations of office of Receipt of His Majesty's Exchequer. 4 Will. 4, c. 15; 12 Law J. Stat. 25.

Abolition of certain offices in Court of, (in Ireland). 5 & 6 Will. 4, c. 55; 13 Law J. Stat. 118.

### EXCHEQUER BILLS.

His Majesty enabled to direct issue of, for relief of Trinidad, British Guiana, and St. Lucie. 2 & 3 Will. 4, c. 125; 10 Law J. Stat. 319.

The office of Paymaster of Exchequer bills, under 44 Geo. 3, c. 1, is not an office during good behaviour, or for life, but during the pleasure of the Lords Commissioners of the Treasury.

A general appointment by the Lords Commissioners, though under seal, does not give an estate for life, as they have no authority, under the act, to grant more than an estate during pleasure.

In an action for money had and received founded on the appointment of the defendant to the same office, and to the receipt of the same salary as the plaintiff, a new appointment of the defendant, in the place of the plaintiff, is a sufficient determination of the pleasure of the commissioners, that the plaintiff should continue in the office, and a legal revocation of the former appointment, although in such former appointment no power to revoke was reserved, and the latter contains no clause of revocation.

In such action, the fact of the resignation of the plaintiff is immaterial, and therefore, although recited in the deed of appointment of the defendant, need not be proved by him. *Smyth v. Latham*, 2 Law J. (n.s.) Exch. 24, s.c. 1 C. & M. 547; 3 Tyr. 509.

EXCHEQUER CHAMBER.

[See INTEREST—REFLEADER.]

EXCISE.

[See WINE.]

Regulation of duties on glass, and laws relating to. 2 & 3 Will. 4, c. 102; 10 Law J. Stat. 255.

Consolidation and amendment of laws for issuing of permits for removal of goods. 2 Will. 4, c. 16; 10 Law J. Stat. 23.

Abolition of excise incorporation (in Scotland), and provisions relating to the funds thereof, and annuities to widows and orphans of members. 5 & 6 Will. 4, c. 72; 13 Law J. Stat. 161.

A count in an information, for a penalty of 100l., against a maltster, founded on section 1 of cap. 52, and section 18 of cap. 53, of 7 & 8 Geo. 4, charging, that the defendant did make use of a cistern for the making of malt, without having made a true and particular entry thereof in writing with the officer of Excise, in whose survey such cistern was intended to be used, is bad.

A count in an information upon section 40 of the former statute, charging the concealment of malt, &c. from "the officers of the Excise," need not name the officers, or allege the concealment to have been from the officers in whose district the premises were situate.

*Semble*—that on an information for carrying on the business of a maltster without taking out a licence, the onus of proving the negative is on the Crown.—*The Attorney General v. Dyer*, 3 Law J. (n.s.) Exch. 212, s.c. 2 C. & M. 664.

*Quere*, whether the keeper of an excise office is an officer of excise within the 7 & 8 Geo. 4, c. 53, s. 9, and therefore liable to a penalty for voting at an election of members of parliament. *Gooday v. Clarke*, 4 Law J. (n.s.) Exch. 290, s.c. 2 C. M. & R. 272.

EXECUTION.

[See EXTENT—LACHES—PEER—SHERIFF. And see AMENDMENT.]

The Court will not certify under stat. 1 Will. 4, c. 7, s. 2, for immediate execution in an action of debt on simple contract. *Percival v. Alcock*, 1 M. & R. 167. [Parke]

The statute 1 Will. 4, c. 7, s. 2, is not limited to cases of contract, but applies to all actions where the Judge thinks there ought to be early execution. *Barden v. Cox*, 1 M. & R. 203. [Patteson]. *Youngs v. Crooks*, ib. 220. [Parke]

Where a *fi. fa.* has issued, and a levy less than the plaintiff's debt has been made, a *ca. sa.* cannot issue till after the return day of the *fi. fa.*; although, in fact, the sheriff has made a return to it, and the *ca. sa.* recites the writ and the sheriff's return. *Laws v. Codrington*, 1 Dowl. P.C. 80.

If while a *ca. sa.*, at the suit of the plaintiff, is lying in the hands of the sheriff, the defendant is illegally taken into custody at the suit of another person, the *ca. sa.* attaches, and the sheriff cannot discharge the defendant. *Arundel v. Chitty*, 1 Dowl. P.C. 499.

Where an irregular execution is set aside, and the sums levied and paid by the defendant are ordered to be repaid, the plaintiff is only bound to repay the money which has been properly paid by the defendant. *Whalley v. Barnett*, 2 Dowl. P.C. 38.

A *fi. fa.* on a judgment, signed after a defendant's death, in vacation, may be tested on the last day of the preceding term, notwithstanding the 3 & 4 Will. 4, c. 67, s. 2. *Brocker v. Pond*, 2 Dowl. P.C. 472.

After a judgment in the county court has been set aside, though not at the instance of the parties, the Court will not compel the sheriff to issue execution on it. *Eldridge v. Fletcher*, 3 Dowl. P.C. 588.

Where plaintiff, by mistake, has taken out a *fi. fa.* for less than the sum for which he has obtained judgment, the Court will, on conditions, allow him to take out a *fi. fa.* for the residue. *Hunt v. Passmore*, 2 Dowl. P.C. 414.

Affidavits are not admissible in support of an application for immediate execution under 1 Will. 4, c. 7, s. 2. That statute only applies to cases where, on the facts at the trial, the Judge thinks there ought to be immediate execution. *Gervas v. Burtchley*, 1 M. & R. 150. [Lyndhurst]. *Contrà*, *Ruddick v. Simmons*, ib. 184. [Bayley]

Where a plaintiff after a trial, and before the return of the jury process, obtains an order for a speedy execution, under 1 Will. 4, c. 7, s. 2, the postea should state the special circumstances, in order to shew that the early judgment is warranted. *Engleheart v. Eyre*, 2 Law J. (n.s.) K.B. 207, s.c. 2 N. & M. 851; 5 B. & Ad. 68.

*Quere*—whether an outstanding term vested in a trustee to attend the inheritance, can be seized, by statute 29 Car. 2, c. 3, s. 10, under an execution against the *cestui que trust*, who is also owner of the inheritance.—*Semble*, that it may. *Dos d. Phillips v. Evans*, 2 Law J. (n.s.) Exch. 179, s.c. 1 C. & M. 450; 3 Tyr. 339.

If a plaintiff issue a writ of *fi. fa.* against the goods of his debtor, and, upon taking possession under the writ, it is found that in consequence of prior executions and a bill of sale by the party, no fruit can be derived from the execution, he, the plaintiff, may, upon abandoning the *fi. fa.* and levying nothing, sue out a writ of *ca. sa.* before the return of the *fi. fa.* *Dicas v. Warrs*, 3 Law J. (n.s.) C.P. 60, s.c. 10 Bing. 241; 3 Mo. & Sc. 814.

A second execution against the person of a defendant, upon a judgment entered up on a warrant of attorney, containing an agreement for successive executions upon default of payment, as therein stipulated, is not void.

The plaintiff in his declaration stated, that he contracted with M & M for the sale of certain leasehold property, for the sum of 8,000l., for the payment of which, securities were given; amongst others, a warrant of attorney, which contained a proviso, that no execution should be issued upon the said judgment, so to be entered up, by virtue of the above-mentioned warrant of attorney, until

default should be made in payment of the said sum of 8,000*l.* or the interest thereof, or the annual sum so covenanted to be paid to the said M C and A G, or the survivors of them, &c., and at the respective times therein mentioned, and in manner therein appointed, &c.; but in case default should be made in any such payment as aforesaid, that it should be lawful for the said plaintiff, &c. at any time, or from time to time thereafter, to issue execution, or cause execution to be issued upon the said judgment, for the whole or any part or parts of the said sum of 8,000*l.*, and the interest thereof, and all costs, charges, &c., without the necessity of reviving the said judgment, notwithstanding there should have been no prior proceedings thereon, or no proceedings within a year immediately preceding the issuing of such execution;—that default having been made, the plaintiff sued out an execution against M and M for 802*l.* 2*s.*, interest, &c., under which they were arrested; and to procure their discharge, the defendant entered into an agreement with the plaintiff, that if they were liberated, and if the plaintiff should think it necessary to sue out a second execution against them, within the space of twelve months, he (the defendant) would undertake, that they, M and M, should be forthcoming;—that the parties were accordingly liberated; and, the plaintiff having issued a second execution within the time limited by the agreement against them, for 7,000*l.* and upwards, the defendant did not cause and procure M and M to be forthcoming.

The defendant by his plea, denied that, at the time of the arrest and agreement, the sum of 802*l.*, or any part of it, was due and payable; and the plaintiff replied, that at the time, &c. the sum of 800*l.* was due and payable:—Held, on demurrer, that the plea was bad, as the defendant was estopped from disputing the validity of the process, upon which the arrest took place, and the plea did not state, that the second execution was issued for the same cause as the first:—Held, also, that the action was maintainable, as a second execution was not void, where there was an agreement that it should issue. *Atkinson v. Baynton*, 4 Law J. (N.S.) C.P. 127, s. c. 1 Bl. N.S. 444; 1 Sc. 404.

Goods of an intestate, taken possession of and used by an administrator in the house of the intestate, cannot be taken in execution for the administrator's own debt. *Gaskell v. Marshall*, 1 M. & R. 132, s. c. 5 C. & P. 31. [Tenterden]

The goods of a testator in the possession of his executors are taken and sold under a *f. fa.*, on a judgment against the executor, for a debt of his own and with his consent. The property passes by such execution, notwithstanding the plaintiff, in an action against the executor, knew they were assets. *Semble*, otherwise, if he had known of an unsatisfied debt, and so had colluded with the executor to make a *destravit*. *Whale v. Booth*, 4 Doug. 36.

If judgment is obtained against a defendant in custody on *mesne process*, the plaintiff in the action may issue execution against the goods without discharging him. *Jones v. Tye*, 1 Dowl. P.C. 181.

A defendant being in custody of the sheriff of C, the plaintiff issued a *testatum ca. sa.*, which was delivered to the sheriff, and on the following day sued out a *habeas corpus ad satisfaciendum*, to remove the defendant to the custody of the marshal:

—It was held, that the execution was completed by the delivery of the *testatum ca. sa.* to the sheriff, and the prisoner was remanded to the custody of the sheriff. *Owen v. Owen*, 2 B. & Ad. 805.

Where a defendant has surrendered in discharge of bail after trial, and the plaintiff has not charged him in execution within two terms after the trial, the defendant may be superseded, and cannot afterwards be taken on a *ca. sa.* issued on a judgment afterwards signed. *Brown v. Gardner*, 1 Dowl. P.C. 426.

An action having been commenced against a surety on a promissory note, he agreed, that, if the plaintiff would take proceedings against the principal, he (the surety) would pay the extra costs occasioned thereby; the plaintiff having done so, afterwards issued execution against the surety for the balance due on the note, and also the extra costs; the Court ordered the execution to be reduced to the extent of the costs included in it. *Evans v. Pugh*, 2 Dowl. P.C. 860.

If a sheriff take goods after an act of bankruptcy, and sell them, the jury, in an action of trover by the assignees, may allow to the sheriff the expenses of the sale, if they think that the assignees must have sold the goods, if they had not been sold by the sheriff; but this is a matter for the jury. *Clark v. Nicholson*, 6 C. & P. 712. [Parke]

Under statute 4 & 5 Will. 4, c. 62, s. 31, where a judgment has been obtained in the Court of Common Pleas, Lancaster, and it is sworn that the defendant has removed his person out of the jurisdiction, but nothing is said as to his goods, the Court of King's Bench will grant execution against the person only. *Lord v. Cross*, 2 Ad. & E. 81, s. c. 4 N. & M. 30.

In debt on bond (with *non est factum*, *inter alia* pleaded) to secure the payment by instalments of the consideration for the purchase of a business, the plaintiff ought to suggest breaches; and if he has not done so, and a verdict be found for him on the plea of *non est factum*, he is not entitled to a certificate for speedy execution under the statute. *D'Aranda v. Houston*, 6 C. & P. 511. [Alderson]

The plaintiff sued out *f. fa.* into Bedfordshire, and lodged it in the office of the deputy under-sheriff in London. On the receipt of it, the under-sheriff wrote to say the defendant had no effects; the plaintiff thereupon immediately sued out *ca. sa.*, and lodged it at the same office. Before the return of the *f. fa.*, finding that the defendant had effects, the plaintiff's attorney wrote to the under-sheriff not to execute the *ca. sa.*:—Held, that the sheriff was bound to return the *f. fa.*; and, *semble*, the issuing of the *ca. sa.* was not a countermand of the *f. fa.* *Smith v. Johnson*, 2 C. M. & R. 350.

## EXECUTOR AND ADMINISTRATOR.

[See DEMURRER—EXECUTION—LEASE—PLEADING.]

Executors and administrators empowered to bring actions for injuries to the real estates of the deceased, and liable to action for injury to real or personal property by the deceased. 3 & 4 Will. 4, c. 42, s. 2; 11 Law J. Stat. 98.



- (A) RIGHTS AND INTERESTS.
- (B) POWERS AND DUTIES.
- (C) LIABILITIES.
- (D) ASSETS.
- (E) EXECUTOR DE SON TORT.
- (F) ACTIONS AND SUITS BY AND AGAINST.
  - (a) *Where maintainable.*
  - (b) *Pleadings and Evidence.*
  - (c) *Practices.*
  - (d) *Costs.*
  - (e) *Judgment.*

#### (A) RIGHTS AND INTERESTS.

Executors will not be allowed to charge for the employment of an agent, except under very special circumstances.

An exception to the Master's report, by which he had reduced an executor's charge, for the employment of an agent at five per cent. to two and a half per cent., overruled. *Weiss v. Dill*, 3 M. & K. 26.

Personal property wherever situate follows the person, and therefore the rights of a person constituted in England the representative of a deceased domiciled in England, extend to personal property wherever locally situate. *Spratt v. Harris*, 4 Hag. Ec. 408.

An executor has, in equity, the same right of retainer of his debt as at law, and his right is not affected by the circumstance of his being appointed a trustee to pay the debts of the testator. *Druce v. Jarvis*, 4 Law J. (N.S.) Chanc. 163.

An executor, who is also devisee of real estate in trust to sell and pay debts, has no right, in case of a deficiency of assets, to retain in the first place his own debt in full, out of such part of the assets as arises from the sale of real estate. *Parker v. Parker*, 4 Law J. (N.S.) Chanc. 285.

Where a creditor is an administratrix, and has assets in her hands, and pays them into court, that does not divest her of her right of retainer; and therefore, she is entitled to receive back the amount of her debt, from the fund paid in by her. *Langton v. Higgs*, 1 Law J. (N.S.) Chanc. 150, s. c. 5 Sim. 228.

A married woman, executrix, and having separate property, over which she had and exercised an appointing and disposing power, can continue the chain of executorship. *Birkett v. Vandercom*, 3 Hag. Ec. 750.

Where there was a fund in court standing to the separate account of a married woman, whose husband survived her, and died before administering to her estate, the fund was ordered to be paid to the wife's legal personal representative, although such representative had not also obtained administration to the husband's estate. *Gutteridge v. Stowell*, 1 M. & K. 486.

A testatrix gave legacies of 100*l.* each to A, B, and C; and in a subsequent part of her will, she appointed them her executors. In the preceding clauses, she made devise and bequests to her executors thereafter named, and "to her executors and trustees." A neither proved nor acted:—Held, that he was not entitled to the legacy. *Piggott v. Green*, 6 Sim. 72.

#### (B) POWERS AND DUTIES.

[See ATTORNEY, Connexion between, and Client.]

Executors and administrators empowered to bring actions for injuries to the real estate of the deceased. 3 & 4 Will. 4, c. 42, s. 2; 11 Law J. Stat. 98.

An executor may, under the stat. 17 Car. 2, c. 8, s. 1, enter up judgment on a verdict obtained by his testator in an action for a libel. *Palmer v. Cohen*, 2 B. & Ad. 966.

An executor, though he has discharged himself by paying the money into court, in a suit, is nevertheless bound to give every proper information to the parties interested respecting their legacies; and, *semble*, that if he improperly refuses, he does so at the peril of the costs of a subsequent suit.

The Court will not, on an interlocutory application by the plaintiff, order the defendant to pay the costs of a second suit, which has been caused by the defendant's misconduct in not giving proper information, although it appears that it will be useless to proceed in such second suit. *Woollett v. Harris*, 4 Law J. (N.S.) Chanc. 151.

Thirty-eight legatees were made defendants to a bill for the administration of a small estate, and all the legacies, except four, amounted together to 1,170*l.*; on a motion being made, before decree, against the executor, for the payment into court of the sum of 2,567*l.*, he admitted sufficient assets, and expressed his willingness to pay all these small legacies. The Court postponed making any order as to the 1,170*l.*, to give the executor an opportunity, if he thought fit, to pay these legacies. *Robinson v. Hewison*, 4 Law J. (N.S.) Chanc. 217.

In a case of inventory and account brought by a legatee, a declaration (instead of an inventory) setting forth desperate debts due to, and larger debts due from, the estate, but annexing no vouchers nor accounts, held sufficient, after the lapse of seventeen years. In such a suit the Court cannot decide whether debts alleged to be due from the estate are a legal set-off. *Higgins v. Higgins*, 4 Hag. Ec. 242.

The conversion by an administrator, of a part of the intestate's effects, before he has exhibited an inventory and made his account, or before a decree to pay over the residue, is a breach of the condition of the administration bond, that he shall "well and truly administer," so as to render the sureties liable for the whole amount so appropriated, if the administrator become bankrupt, and the assets so misapplied are entirely lost to the intestate's estate.

Where to a declaration on an administration bond, the defendant has pleaded *non est factum*, and the plaintiff, on the roll, suggests as breaches the not delivering a perfect inventory, or making a true and just account on a particular day, the defendant cannot give in evidence that there was no court held on that day; but if that be any answer, it should be pleaded in excuse of performance.

The condition of the administration bond does not require the administrator to distribute the residue amongst the next-of-kin, before a decree of the ecclesiastical court.

Where the plaintiff, in an action on an administration bond, who has obtained a general order to put the bond in suit against the surety, solely on

the ground that the residue has not been paid over, on a plea of *non est factum*, also suggests breaches on other parts of the condition, the Court will not strike out those breaches, or allow the defendant to let judgment go by default, and pay nominal damages thereon. *The Archbishop of Canterbury v. Robertson*, 3 Law J. (N.S.) Exch. 102, s. c. 1 C. & M. 690; 3 Tyr. 390.

### (C) LIABILITIES.

[See ACCOUNT STATED—ATTACHMENT—LANDLORD AND TENANT, Executors.]

Executors and administrators liable to action for injury to real or personal property by the deceased. 3 & 4 Will. 4, c. 42, s. 2, 11 Law J. Stat. 98.

[See *Newton v. Reid*, 2 Dig. Law J. 132, s. c. 4 Sim. 141.]

The entry of one of two executors of a deceased tenant for years into the demised premises, does not render them both liable to an action for use and occupation. *Nation v. Tozer*, 3 Law J. (N.S.) Exch. 234, s. c. 1 C. M. & R. 172; 4 Tyr. 561.

Where two executors have committed a devastation, and joined in misapplying the testator's assets, and, upon reference to the Master, he finds that two of the executors have obtained part of the assets improperly, by signing joint receipts in favour of each other, while they had large balances in their hands respectively, and the report is not excepted to, the Court will give interest on these sums at 5l. per cent. against both executors. *Beck v. Molley*, 4 Law J. (N.S.) Chanc. 63, s. c. 2 M. & K. 312.

Executors employing the estate of their testator, mixed up their own monies, in carrying on their own business, held liable to account, not only for the trust property so employed, but also for the whole of the profit made upon it. *Docker v. Somes*, 3 Law J. (N.S.) Chanc. 200, s. c. 2 M. & K. 655.

An executrix ordered on motion to pay the whole of a sum admitted by her answer to be in her hands, although she was entitled to one-third of the personal estate as one of the next-of-kin, the reason being, that no account had been taken of the debts. *Robotham v. Amphlett*, 4 Law J. (N.S.) Chanc. 40.

An executor taking a transfer of stock during his testator's life, with the knowledge that it was a trust fund, in his capacity of executor, held liable to the *cestui que trusts*.

So, if an executor continues to pay an annuity which his testator paid during his life, for seven years after the death of the testator, he cannot then refuse to continue the payments for want of assets, but will be held personally liable to the annuitant's claim, on account of his laches in not ascertaining what the rights of the annuitant were. *Bentham v. Noble*, 2 Law J. (N.S.) Chanc. 93.

Testator, a wine merchant, directed by his will, that A B and C D should carry on his trade, and he bequeathed to them his stock of wines. Before the death of the testator, certain wines belonging to him arrived in a vessel at the port of London, and the vessel was reported. After his death, the wines were entered:—Held, that the executors, and not the legatees, were chargeable with the duties. *Stewart v. Denton*, 4 Doug. 219.

Any acts, which shew an intention to take upon them the executorship, prevent executors renouncing; therefore the insertion of an advertisement

calling upon persons to send in their accounts, and to pay money due to the testator's estate to A and B, "his executors, in trust,"—Held to make them compellable to take probate, and to subject them personally to the costs occasioned by their resistance; the estate being small, and left for two years and a half without representation. *Long v. Simes*, 3 Hag. Ec. 771.

A party having, after a lapse of thirty-five years, called for an inventory and account of an insolvent estate, the executor, who appeared under protest, dismissed, with costs. *Bowles v. Harvey*, 4 Hag. Ec. 241.

Under the common decree against an administrator directing his intestate's assets to be applied in a due course of administration, the Master is not entitled to go into the consideration of transactions between the administrator and the other creditors, which might affect the administrator's right of retainer of a debt due to himself. *Spicer v. James*, 2 M. & K. 387.

Executors charged with the profits made by them from the employment of the testator's assets in any trade or business since the testator's decease. *Parmer v. Mitchell*, 2 M. & K. 672.

After a decree in a creditor's suit, the Court will restrain a creditor of the testator from proceeding at law against the assets, but not from proceeding against the executors personally. *Kent v. Pickering*, 5 Sim. 569.

Where an executor agrees with a legatee to allow him interest on his legacy, if he will permit it to remain in his hands, it becomes a loan to the executor, for which he is personally liable at law, and cannot plead *plene administravit* in bar to an action by the legatee. *Warney v. Earnshaw*, 4 Tyr. 806.

A, being a partner in a mercantile house in India, was entitled to the interest of a sum of money, which was limited to his sons on his dying within a given period. The firm in India, at A's death within that period, was greatly indebted to their agents in England, of which firm B, the administrator, was a partner. After A's death, notice was given to the firm in England, of there being male issue of A, but not stating their names. B subsequently received the dividends, and credited the Indian firm with the amount in the books of the English firm:—Held, that the partners of the English firm were liable to repay such dividends, with interest at 5l. per cent. *Agabeg v. Hartwell*, 4 Law J. (N.S.) Chanc. 190.

There is no fixed sum for funeral expenses, where the estate of a testator is insolvent; but the executor will be allowed reasonable expenses according to the circumstances of the particular case. *Edwards v. Edwards*, 3 Law J. (N.S.) Exch. 204, s. c. 2 C. & M. 612; 4 Tyr. 438.

The Court refused to allow 2,210l. for the funeral expenses of a deceased nobleman, whose personal estate was believed to be solvent at his death, but ultimately, from unforeseen circumstances, proved to be insolvent. *Bissett v. Antrobus*, 4 Sim. 512.

Although an executor, as such, is only liable for the expenses of a funeral suitable to the rank and station of the deceased; yet, where a funeral had been ordered by the widow, (who was not executrix,) and the executor was himself present at the funeral, and by his acts had adopted the widow as his agent, and had made an express promise to the undertaker

to pay the amount of his account:—Held, that the executor was personally liable for all the charges which were fair and reasonable of the funeral, which was performed; notwithstanding that it might be in a more expensive style than was suitable to the circumstances of the deceased. *Brice v. Wilson*, 3 Law J. (N.S.) K.B. 98, s. c. 3 N. & M. 512.

#### (D) ASSETS.

Copyhold and freehold estates how made assets for the payment of simple contract and specialty debts. 8 & 4 Will. 4. c. 104; 11 Law J. Stat. 217.

Equitable assets, when they come into the hands of the executor in money, are legal assets. *Marston v. Downes*, 6 C. & P. 381. [Patteeson]

A disposition of assets by an executor, in payment of a debt due in his own right, in collusion with his creditor, is void. Therefore, where a mortgage of leasehold property, expressed to be for a pecuniary consideration, in hand well and truly paid to the administratrix of the testator, but which, in fact, was given for securing an old debt of the administratrix, was executed by the administratrix and the next-of-kin,—it was held to be a good defence to an action of ejectment by the mortgagee, that the execution by the next-of-kin was obtained by fraud and collusion between the lessor of the plaintiff and the administratrix. *Doe d. Woodhead v. Fallows*, 1 Law J. (N.S.) Exch. 177, s. c. 2 C. & J. 481; 2 Tyr. 460.

The inventory of the goods and chattels of the deceased, made out by the executor for the purpose of taking out probate of the testator, is not conclusive evidence of assets in the hands of the executor, to the amount specified in that inventory. Where, therefore, two executors had jointly handed in an inventory to the ordinary, but it was proved that one of them had never interfered with the testator's effects, and personally had received no assets; upon *plene administravit* he was held to be entitled to a verdict. *Steen v. Mills*, 2 Law J. (N.S.) K.B. 106, s. c. 1 N. & M. 436; 4 B. & Ad. 657.

A purchase of the reversion in fee, by the executor of the mortgagee for a term of years—held to be a purchase subject to the trusts of the will, under the circumstances, on the ground that the purchase was made out of the testator's assets. *Fosbrooke v. Balguy*, 2 Law J. (N.S.) Chanc. 135.

Although an executor by his plea admits assets, and afterwards denies that he has assets, the Court will set aside a judgment and execution *de bonis propriis*, and order the money paid under such execution to be returned, if the plaintiff was only entitled to a judgment *de bonis testatoris*, &c., *et si non, de bonis propriis*. *Ward v. Thomas*, 2 Law J. (N.S.) Exch. 217, s. c. 1 C. & M. 532; 2 Dowl. P.C. 87.

A creditor in an administration suit, where the estate of the deceased debtor was not sufficient to meet his debts, proved the full amount of the debt before the Master. The Master, by his report, deducted from the sum proved by the creditor, the amount of certain payments which had been made to the creditor *ante* the time of the debt proved and the making of the report:—Held, on exception to the report, that under these circumstances, a debtor can only receive dividends on the sum actually due, and not on the debt as proved,

since the report speaks from its date. *Jennings v. Elster*, 2 Law J. (N.S.) Chanc. 72, s. c. 1 M. & K. 440.

Where a testator directs his real estate to be sold, and the produce to sink into his personal estate, and then gives his personal estate to trustees, upon certain specific trusts, after payment of his debts, funeral and testamentary expenses, the whole fund is equitable assets, and this charge amounts to a charge of debts on real estate.

Whether, if there had been no charge of debts, the produce of the real estate would have been equitable assets—*quære*. *Soames v. Robinson*, 2 Law J. (N.S.) Chanc. 153, s. c. 1 M. & K. 500.

An admission of assets to pay a legacy must extend also to the interest of the legacy, and the costs of the suit; else the estate must pay the costs of taking accounts of the assets. *Philanthropic Society v. Hobson*, 3 Law J. (N.S.) Chanc. 97, s. c. 2 M. & K. 357.

A devise of "all the testator's freehold, copyhold, and leasehold estates, and all the residue of the personal estate and effects, after payment of debts," &c., amounts to a general charge of debts, unless from the other parts of the will there can be gathered an intention to limit the expressions to personal estate. *Withers v. Kennedy*, 3 Law J. (N.S.) Chanc. 29, s. c. 2 M. & K. 607.

Creditors by voluntary contract have a right to marshal the assets of a testator, as against legatees and devisees, but not as against creditors for value; and therefore, where the personal estate has been exhausted by mortgagees and specialty creditors for value, the voluntary creditors have a right to stand in their place against the real estates.

Where there is, in a will, a general direction to the executors to pay debts and legacies out of the personal estate, and afterwards a specific gift of real and personal estate to them, upon trust, to pay certain debts and legacies, which are specified; the general charge remains, but the particular debts and legacies will take precedence of those not specifically directed to be paid. *Lomas v. Wright*, 3 Law J. (N.S.) Chanc. 68, s. c. 2 M. & K. 769.

Payments of expenses of reconveyance of mortgaged premises to the real representatives, and of costs in ejectment by mortgagee, postponed to the claim of an annuity creditor by a voluntary deed. *Edwards v. Edwards*, 3 Law J. (N.S.) Exch. 204, s. c. 2 C. & M. 612; 4 Tyr. 438.

On an issue taken on *plene administravit*, the amount of duty paid on probate is not in itself *prima facie* evidence of assets to the amount covered by the stamp; it is, however, admissible in evidence as a declaration of the executor as to the amount of assets, which at that time he expected to realize, but must be confirmed by evidence of goods having subsequently come to hand. *Mann v. Lang*, 4 Law J. (N.S.) K.B. 210, s. c. 5 N. & M. 202; 3 Ad. & E. 699.

A devise of an estate "subject to a mortgage," is only a devise as the law subjects it, and does not alter the right of the devisee to have the mortgage paid out of the personal estate.

Where the personal estate is not sufficient to pay the mortgage and the legacies, a pecuniary legatee may marshal against the devisee of the estate devised, "subject to the mortgage," on the autho-

urity of the decided cases; but on the general principles of equity, a devise of an estate subject to a mortgage, is held to be a devise of the whole estate, and not of the equity of redemption only.

The principles of equity, as to marshalling of assets, do not apply between those claiming under the same will, so as to enable one to defeat another: legatees and devisees being considered equally objects of the testator's bounty, there is no right to marshal between them. *Secus*, as between legatees and those claiming by descent.

A testator contracted for the purchase of a real estate in his lifetime; and by his will devised that estate; but died without paying the purchase-money. Pecuniary legatees have no right to marshal assets against the devisee, where the purchase-money is paid out of the personal estate after the testator's death. *Wythe v. Henniker*, 3 Law J. (N.S.) Chanc. 221, s. c. 2 M. & K. 635.

Merchants, who, by the direction of an executor, their commercial correspondent, applied a fund, which they knew to be part of the testator's assets, in satisfaction of advances made by them in the course of trade to relieve the embarrassments of their correspondent, were held to be responsible for the fund so applied to general pecuniary legatees under the will of the testator. Affirmed upon appeal. *Wilson v. Moore*, 1 M. & K. 337.

If in an action by a bond creditor against the heir of an intestate, the latter plead a false plea, the Court will, after a decree obtained in a suit, by another creditor, for the administration of the intestate's assets, restrain the plaintiff at law from taking out execution against the assets, but not from proceeding against the heir personally. *Price v. Evans*, 4 Sim. 514.

#### (E) EXECUTOR DE SON TORT.

If a person named executor intermeddles, however slightly, he cannot afterwards refuse to take probate; and if not named executor, he becomes so *de son tort*; but acts of necessity do not bind, and even if an executor has shewn himself willing to accept, he may, by the Court, be dismissed in aid of justice. *Long v. Symes*, 3 Hag. Ec. 774.

A had pledged goods to B for a debt. B died, and the parish officers took the goods, and gave them to J, the carpenter who made the coffin of B, on condition of his paying B's rent and the funeral expenses:—Held, that, by taking these goods, the parish officers became executors *de son tort*; and that, if they sold the goods to J, they would be liable to A in trover, because such a sale was so inconsistent with the bailment, as to reveal the right of possession in A. But, if the parish officers merely relinquished their possession, and let J take possession, this would not make the parish officers liable in trover; as, in this case, a mere seizure of the goods by a stranger, who afterwards relinquished them, would not be a conversion. *Samuel v. Morris*, 6 C. & P. 620. [Alderson]

An executor *de son tort*, who afterwards takes out administration, is not bound by any act done whilst he was such executor *de son tort*. Where, therefore, by an arrangement between an executor *de son tort*, and the landlord, a lease for years (of the deceased) had been given up by the former, and the landlord let into possession before the expiration of the term:

—Held, that such executor *de son tort*, having subsequently taken out administration, might maintain ejectment against the landlord. *Doe d. Hornby v. Glenn*, 3 Law J. (N.S.) K.B. 162, s. c. 1 Ad. & E. 49; 3 N. & M. 837.

Defendant's executors *de son tort*, paying over what they had received in that character to one who had taken out administration with the will annexed pending the suit, not discharged thereby. *Layfield v. Layfield*, 4 Law J. (N.S.) Chanc. 2.

The being in possession, after the death of a deceased person, of goods under a sale from the deceased, which sale was not *bond fide*, will constitute the person so in possession an executor *de son tort*: so if a party buy goods of the widow of the deceased, knowing that they were the goods of the deceased, he will be an executor *de son tort*; and a mistake in point of law, arising from thinking that they were the widow's property, will make no difference.

Defendant not allowed to plead *ne unques executor* and *plene administravit*. *Seally v. Powis*, 4 Law J. (N.S.) K.B. 107.

#### (F) ACTIONS AND SUITS BY AND AGAINST.

##### (a) Where maintainable.

[See LANDLORD AND TENANT, Repairs—Under-lease.]

Debt on simple contract maintainable in any court of common law against an executor or administrator. 3 & 4 Will. 4, c. 42, s. 14; 11 Law J. Stat. 91.

Defendant agreed with plaintiff's intestate, to sell him a freehold estate for a certain sum, part to be paid immediately, and the residue upon a certain day, when the sale was to be completed, and a good abstract of title to be delivered. The purchaser was also to be entitled to the rents and profits, upon certain conditions, from the ensuing Christmas, to the day fixed on for the completion of the contract. The defendant did not fulfil his agreement, and the plaintiff having sued as administratrix of the purchaser:—Held, upon demurrer, that the non-performance of his contract, by the defendant, and its consequences, the loss upon the deposit, the expenses of investigating the title, the non-enjoyment of the rents for the interval agreed upon, amounted to such an injury to the personal estate of the intestate, as vested a right of action in the personal representative, not in the heir-at-law,—consequently that the action was well brought. *Orme v. Broughton*, 3 Law J. (N.S.) C.P. 208, s. c. 10 Bing. 533; 4 Mo. & Sc. 417.

A trustee and executor advances money to his son, to purchase property, which he sells under the trusts of the will, and the devisee for life acquiesces, and is satisfied with the amount. Six years after, the same property is sold at a considerably advanced price to the corporation of Windsor, for the purpose of making an approach to a bridge:—The Court will not set aside such a transaction, on the ground of fraud. *Baker v. Carter*, 4 Law J. (N.S.) Ex. Eq. 12, s. c. 1 Y. & C. 250.

An executor, to whom his testator, having been his partner in trade, had given liberty to purchase his share in the business at a valuation, had been left by his co-executors to take the whole execution of the trusts of the will; and the valuation appear-

ing to have been made under his direction, and without due regard to his character as a trustee,—the purchase set aside several years after his death. *Stocken v. Stocken*, 4 Law J. (N.S.) Chanc. 278, s. c. 2 M. & K. 489.

(b) *Pleadings and Evidence.*

Counts on promises to a testator may be joined with counts on promises to the executor; and, in answer to a set-off, the executor may give in evidence money paid by him as executor. *Gallant v. Boutefflower*, 3 Doug. 34.

An executor who pays legacies six months after probate, cannot plead such payment in discharge of his testator's liability on a covenant. *Davis v. Blackwell*, 1 Law J. (N.S.) C.P. 143, s. c. 9 Bing. 5; 2 Mo. & Sc. 7.

The lending of money directed to be laid out on real or other sufficient security, as the executors shall approve, by one executor to the other on bond, is a misapplication, for which the executors of the former are liable under stat. 4 & 5 W. & M. c. 24. And the executors of the obligee are not precluded, by reason of circuity of action, from recovering on the bond against the executors of the obligor.

Therefore, a plea to a declaration by the executors of one joint executor, against the executors of the other, on a bond by the latter original executor to the former, that the money for which the bond was given was the personal estate of the original testator, directed by his will to be laid out "on real or other sufficient securities, as they should approve":—Held, bad, on general demurrer. *Gleadow v. Atkin*, 1 Law J. (N.S.) Exch. 228, s. c. 2 C. & J. 548; 4 Tyr. 598.

Testator had dealings in the ordinary course of business with the defendants, and there were accounts current between them. Upon his death, the executors continued the dealings, and the defendants accepted bills drawn upon them by the plaintiffs, as executors. Upon action brought by the plaintiffs, to recover a balance, the declaration consisted of two sets of counts: the first alleged, that defendants were indebted to testator for goods sold and delivered, by him to them, at their request;—the second, that the defendants, after the death of the testator, were indebted to the plaintiffs as executors. Verdict for plaintiffs, upon the second set of counts. Upon motion and rule nisi to set verdict aside, and have it entered for defendants, upon the grounds of misjoinder and variance between the proof and the allegation:—Held, first, that as the jury found a verdict on the one set of counts alone, the declaration was to be considered as consisting of that set only; consequently, the objection arising from misjoinder was at an end;—second, that there was no variance, as the defendants, by accepting bills drawn by plaintiffs as executors, had recognized them in their representative capacity; at all events, under the circumstances of the case, the description as executors was immaterial, and may be rejected as surplusage. *Aspinall v. Wake*, 2 Law J. (N.S.) C.P. 227, s. c. 10 Bing. 51; 3 Mo. & Sc. 423.

An executor or administrator, who has obtained a verdict for a debt of his testator, or intestate, may make a fair and reasonable compromise to discharge the debtor out of custody, without rendering himself liable for the amount of the verdict as assets.

Accordingly, an administrator having recovered a verdict for 750*l.*, after the debtor had remained in prison a considerable time, and petitioned the Insolvent Court for his discharge, received, by way of compromise, the sum of 150*l.*, and consented to the debtor's liberation:—Held, in an action by a creditor of the intestate, and evidence that the costs of the former suit exceeded 150*l.*, that the proper question was, whether the compromise was fair and reasonable; and that a verdict for the defendant was right. *Pennington v. Healey*, 2 Law J. (N.S.) Exch. 98, s. c. 1 C. & M. 402; 3 Tyr. 319.

In debt upon a judgment, suffered by default against the defendant, suggesting a *devastavit*, the production of the judgment, and of a *testatum* writ of *fi. fa.*, with the sheriff's return of *nulla bona*, is sufficient evidence of the *devastavit*, although the writ of *fi. fa.* upon which the *testatum fi. fa.* is founded, is irregular; for example, directed to the sheriff, instead of the sheriffs, of London. *Leonard v. Simpson*, 4 Law J. (N.S.) C.P. 302, s. c. 2 Bing. N.C. 176; 2 Sc. 336.

Since the passing of the Uniformity of Process Act, the defendant, who was an executrix, pleaded *plene administravit*, and that she had not, "on the day of exhibiting the bill," assets; upon which issue was joined:—Held, that as, under the former practice, the exhibiting of the bill might have been the commencement of the suit, the meaning of the issue must be taken to be, whether she had assets at the time of the commencement of the suit by the service of the writ of summons; and that she could not be permitted to give evidence of payment made by her, after the service of the writ, but before the filing of the declaration.

*Quære*—whether a writ of summons, which was general, and not against the defendant as executrix, amounted to notice. *Rees v. Morgan*, 3 Law J. (N.S.) K.B. 102, s. c. 5 B. & Ad. 1035; 3 N. & M. 206.

Where an executor pleads the general issue and *plene administravit*, and the former plea is found against him, and the latter for him, he is entitled to the *postea*. *Colkoon v. Drinkwater*, 3 Doug. 239.

A made a promissory note, payable to B or order. B indorsed it, and gave it to C to get it discounted. C went away, and shortly afterwards came back to B with the money. The executors of C's father, of whom C was one, brought an action on the note as executors:—Held, that, as the executors produced the note on the trial as executors, they might recover on it, although there was no evidence that C's father ever had the note in his lifetime. *Godson v. Richards*, 6 C. & P. 188. [Littledale]

A, having appointed B his executor, gave him a promissory note, payable on demand for 100*l.*, in consideration of the trouble he would have in the office of executor after his death. B died in A's lifetime, not having put the note in suit:—Held, in an action upon it by B's executors, that the consideration had totally failed; and the action, therefore, was not maintainable. *Solly v. Hind*, 6 C. & P. 316. [Bolland]

In an action against a feme covert executrix and her husband, *plene administravit* was pleaded. It appeared that the husband, who was not executor, paid debts to more than the amount of the assets; but it appearing, that, before he so paid them, he had raised a sum of 1,400*l.*, by mortgage of lands,

under a power given to him by a deed executed by the testator in his lifetime, for the purpose of paying the testator's debts, it was left to the jury to say whether he paid the debts out of the assets in the hands of his wife, or out of the sum so raised. *Marston v. Downes*, 6 C. & P. 381. [Patteson]

In an action against A and B as executors, A suffered judgment by default. The probate of the will was produced, and notice had been given to both of the defendants to produce a receipt, which had been given to A, as one of the executors:—Held, that, if it was not produced, secondary evidence might be given of its contents; and that A's having suffered judgment by default, made no difference. Held, also, that the clerk of Mr. B, an attorney, might be asked, whether A and B did not, as executors, employ Mr. S. as their attorney. *Beckwith v. Benner*, 6 C. & P. 681. [Gurney]

A demurrer to a declaration by executors, commencing in the *debit* and *definet*, was overruled. *Collett v. Collett*, 3 Dowl. P.C. 211.

#### (c) Practice.

In a suit against the Bank and an administrator appointed under 38 Geo. 3, c. 87, the Court, *on motion, before decree*, ordered stock standing in the testator's name to be transferred to the Accountant General. *Warburton v. Hill*, 5 Sim. 532.

#### (d) Costs.

[See Costs, Security for.]

Executors and administrators, plaintiffs, are liable to pay costs, in the same manner as if suing in their own right, unless the Court or a Judge shall otherwise order. 3 & 4 Will. 4, c. 42, s. 31; 11 Law J. Stat. 98.

Whether stat. 3 & 4 Will. 4, c. 42, s. 31, renders executors liable to costs in actions commenced by them previously to the passing of that statute?—*Seemle*, that it does. *Lakin v. Massie*, 3 Law J. (n.s.) Exch. 203, s. c. 2 C. & M. 685; 4 Tyr. 389.

In order to induce the Court to exempt an executor, who has failed in an action brought by him in that character, from costs, under statute 3 & 4 Will. 4, c. 42, s. 31, it is not sufficient that the action has been brought *bond fide*, under counsel's advice, and that it has been defeated on a difficult point of law, unless there be improper conduct on the part of the defendant. Unnecessary prolixity in the pleadings is not such conduct, nor omitting to give the plaintiff information, which might have prevented his proceeding with the action, if the plaintiff did not apply for the information. *Farley v. Briant*, 4 Law J. (n.s.) K.B. 246, s. c. 3 Ad. & E. 339; 5 N. & M. 42.

Under 3 & 4 Will. 4, c. 42, s. 31, executors are liable to costs in actions commenced before the statute came into operation, and tried afterwards:—Held, *Littledale, J. dissentiente*. *Freeman v. Moyes*, 1 Ad. & E. 338, s. c. 3 N. & M. 883.

Defendant allowed costs under 3 & 4 Will. 4, c. 42, s. 31, against an executor plaintiff, where the action was commenced before, but the cause was tried after the passing of the statute.

Practice as to taxing defendant's costs, without motion to the Court. *Grant v. Kemp*, 3 Law J. (n.s.) Exch. 211.

Testator employed the defendant to effect an in-

surance upon his life, for a certain sum. This was accordingly done, but the policy was in the name of the defendant. Upon testator's death, the defendant received the money from the office, which he refused to pay over to the plaintiff, alleging that a third party was entitled. She sued as executrix to recover the money, and was nonsuited:—Held, that she was entitled to have the judgment of nonsuit entered without costs, under the 3 & 4 Will. 4, c. 42, s. 31. *Lysons v. Barrow*, 3 Law J. (n.s.) C.P. 192, s. c. 10 Bing. 563; 4 Mo. & Sc. 463.

The Courts have no discretionary power, under the 3 & 4 Will. 4, c. 42, s. 31, to deprive a defendant of his costs, where a plaintiff sues as executor, and would have been liable to pay costs previously to that statute. The case of *Lysons v. Barrow*, so far as it is an authority as to the Court's possessing such discretionary power, cannot be supported. *Ashton v. Pointon*, 4 Law J. (n.s.) Exch. 71, s. c. 1 C. M. & R. 738; 5 Tyr. 322.

The Courts have no discretionary power, under the statute 3 & 4 Will. 4, c. 42, s. 31, of awarding or depriving a defendant of costs against an executor, in cases where an executor would have been liable to costs before the passing of that act. *Spence v. Albert*, 4 Law J. (n.s.) K.B. 97, s. c. 4 N. & M. 385.

Upon an application to the discretion of the Court, under 3 & 4 Will. 4, c. 42, s. 31, for the purpose of having judgment as in case of a nonsuit entered against the plaintiff (executor) without costs, the Court will take into consideration the conduct of the plaintiff in the cause; and, according to their view of such conduct, they either will or will not, exercise the discretion which the statute allows. *Wilkinson v. Edwards*, 4 Law J. (n.s.) C.P. 6, s. c. 1 Bing. N.C. 301; 1 Sc. 173.

In deciding whether they will exempt an executor from costs, under 3 & 4 Will. 4, c. 42, s. 31, the Court will consider the conduct of the plaintiff, as to the investigation of the claim, and of the evidence by which it was to be supported, either before bringing the action, or previously to carrying the cause into court.

Therefore, where the plaintiffs, as executors, sought to recover certain sums for the hire of carts, waggons, and cartage, but did not investigate or inquire into the nature of a special contract, entered into between the testator and the defendants, and the latter paid a certain sum into court:—Held, (*dissentiente* Vaughan, J.) that such non-investigation upon the part of the plaintiffs entitled the defendants to their costs, and precluded the plaintiffs from that exemption, which the Court, in the exercise of their discretion, had it in their power to grant.

*Seemle*, that a refusal by the defendant to disclose the nature of his objection to the demand, will not (except in extreme cases, *e.g.* the possession of a receipt or forged document), entitle the plaintiff to the exemption which he claims. *Southgate v. Crowley*, 4 Law J. (n.s.) C.P. 102, s. c. 1 Bing. N.C. 518; 1 Sc. 374.

On an application by an executor to be at liberty to pay in the interest which had accrued on a legacy payable to an infant, the Court refused to order the costs of the application to be paid out of such interest. *Es parte Cobb*, 4 Law J. (n.s.) Chanc. 271.

An executor or trustee will be fixed with costs of a suit, where the suit has been occasioned by fraud in his conduct. *Postbrooke v. Balguy*, 2 Law J. (N.S.) Chanc. 135.

On a judgment as in case of a nonsuit against an executor or administrator, suing in his representative character, he was liable only to such costs as had been occasioned by his wilful negligence, in not proceeding to trial. *Pickup v. Wharton*, 3 Law J. (N.S.) Exch. 97, s. c. 2 C. & M. 401; 4 Tyr. 224.

Unless circumstances of considerable misconduct are proved against an executor or trustee, who retains a balance not considerable in his hands, he will not be compelled to pay the costs of a suit instituted against him; and if a suit be instituted with undue haste against an executor or trustee, and no gross misconduct be established, he will be entitled to his costs. *Bennett v. Attkins*, 4 Law J. (N.S.) Exch. Eq. 35, s. c. 1 Y. & C. 247.

Upon a judgment as in case of a nonsuit, an executor (plaintiff,) who has been guilty of wilful negligence, is not liable to the costs of the cause, but only to the costs occasioned to the defendant by such wilful negligence. *Woolley v. Stoper*, 9 Bing. 754, s. c. 3 Mo. & Sc. 248; 2 Dowl. P.C. 208.

An executor, who pleads *non assumpsit* and *plene administravit*, is entitled to the general costs of the cause, if he succeeds on the latter plea. *Iggulden v. Terson*, 4 Tyr. 309, s. c. 2 Dowl. P.C. 277.

Where a motion is made against an executor to compel him to account, and the rule is made absolute, it is not imperative upon the Court to make the rule absolute with costs. *Ex parte Siratt*, 3 Dowl. P.C. 309.

An executor plaintiff who loses his cause is not, under the 3 & 4 Will. 4, c. 42, s. 31, exempted from the payment of costs, unless *mala fides* appears on the part of the defendant—*Vaughan, J. dissentiens*. *Brown v. Croley*, 3 Dowl. P.C. 386.

#### (c) Judgment.

On a plea of *plene administravit prater*, the plaintiff is entitled to judgment of assets *in futuro* for debt and costs. *Cox v. Peacock*, 2 Sc. 125.

### EXPENSES OF WITNESSES.

[See WITNESS.]

### EXONERATION.

[See MORTGAGE.]

Testatrix gives real estates to trustees, to be sold, and directs the trustees, out of the produce, in the first place, to pay all her just debts, and funeral and testamentary expenses, and the legacies given by her will, or by any codicil; she then specifically devises a specific part of her personal property, and all other the rest, residue, and remainder of her personal estate and effects, to the trustees on trust for her three daughters and grand-daughter. The will also contains a discretionary power to the trustees, to postpone the sale of the real estates, till after the death of the devisees for life:—Held, that this devise of the real estates did not create an exoneration of the personal estate from the liability to

debts. *Walker v. Hardwick*, 2 Law J. (N.S.) Chanc. 104, s. c. 1 M. & K. 396.

A testator, by his will, directs his trustees and executors, by mortgage, sale, or demise of certain copyhold lands, to raise 2,000*l.*, for payment of certain specific debts, "and also all such other debts as might be due and owing from him, at the time of his decease;" and he gives "all the rest, residue, and remainder of his estate and effects, real and personal, whatsoever and wheresoever," to his wife, her heirs, executors, and administrators:—Held, that the personal estate was exonerated, to the extent of the 2,000*l.*, from its primary liability to the payment of debts. *Clutterbuck v. Clutterbuck*, 2 Law J. (N.S.) Chanc. 113, s. c. 1 M. & K. 15.

### EXTENT.

The Court refused to allow a writ of immediate extent to be ante-dated. *Rez v. Maberly*, 3 Law J. (N.S.) Exch. 164, s. c. 2 Dowl. P.C. 383; 2 C. & M. 537; 4 Tyr. 345.

Goods of the debtor already seized under a *f. fa.*, but not sold, may be taken under an extent, in chief or in aid. *Giles v. Grover*, 9 Bing. 128, s. c. 2 Mo. & Sc. 197; 1 C. & F. 72; 6 Bl. N.S. 277.

*Semble*, that the Court of Exchequer has power to refer it to the Master to take an account of the rents and profits of land extended to the plaintiff, and to order him to refund the surplus, if it shall appear that he has been overpaid. *Brookbank v. Miers*, 4 Dowl. P.C. 179.

Where lands had been bought at a sale under an extent, and the purchaser resold them at a loss; the Court ordered the second purchaser's name to be substituted in the contract, and the conveyances to be made to him, the original consideration being expressed in the deed. *Rez v. Rawlings*, 4 Law J. (N.S.) Exch. 295, s. c. 2 C. M. & R. 471.

A Crown debtor, after he has paid his debt to the Crown, cannot continue prerogative proceedings against his own debtor. *Rez v. Bingham*, 2 Law J. (N.S.) Exch. 266, s. c. 1 C. & M. 862; 3 Tyr. 938; 2 Dowl. P.C. 128.

### EXTORTION.

[See PRISONER.]

### EXTRA WORK.

[See CONTRACT, Evidence.]

### FACTOR.

The defendants purchased for N & Sons eighteen chests of indigo, paying the purchase-money and receiving the warrants for the delivery of the indigo to them or their order: N & Sons made out and sent an invoice to the plaintiff, stating that they were bought by N & Sons for the plaintiff, and the latter paid to N & Sons the amount of the invoice. N & Sons never had the actual possession, power, or control over the indigo or the warrants—and the defendants never had notice that the indigo was purchased for the plaintiff till after the 26th of

of May, when they sold one of the chests, and shipped the others for sale to Hamburg. From the course of dealing between N & Sons and the defendants, it appeared that the latter were in the frequent habit of making purchases for N & Sons; that, on making such purchases, they paid the purchase-money, and debited N & Sons with the amount; that they also sold on the account of N & Sons, receiving payment, the amount of which they entered on the credit side of the account with N & Sons generally, and not as having being received specifically in payment of the warrants delivered at the time. Money was occasionally lent by the defendants to N & Sons, who repaid the same almost immediately. These sums were also entered generally on the debit and credit sides of the account respectively. In January 1829, the defendants delivered an account to N & Sons of the eighteen chests as bought for them; a day or two after, N & Sons paid to the defendants several sums of money without any particular directions as to the application of them, nor did they on any occasion when money was paid specify any particular warrants which they should want. The defendants were always creditors of N & Sons to a larger amount than the value of the eighteen chests.—Held, that these facts did not amount to evidence of payment by N & Sons to the defendants for these eighteen chests of indigo; and that the defendants, having no notice that they were purchased by N & Sons for the plaintiff till after they sold them, were not liable to an action of trover by the plaintiff.

It appeared also, that N & Sons having on their own account, in the possession of the defendants, nineteen India warrants, on which the defendants had a lien for the purchase-money and charges, substituted in lieu thereof twenty-three other warrants, which had been purchased for the plaintiff in the same mode, and under the same circumstances, as the above eighteen were purchased:—Held, that this was not a contract for the sale of goods within the second section of the Factors Act, 6 Geo. 4, c. 94: nor was it a disposition of them, as the act must be taken to mean such a disposition as is in the nature of a sale: neither was it such a pledge as was contemplated by the second section. The term negotiable instrument, as there used, applies only to such negotiable instruments as by the usage of trade are substituted for money, such as bills of exchange, &c. and does not apply to East India warrants. *Taylor v. Kymer*, 1 Law J. (N.S.) K.B. 114, a.c. 3 B. & Ad. 320.

By the 6 Geo. 4, c. 94, s. 2, any person intrusted with, and in possession of any bill of lading, India warrant, &c. shall be deemed and taken to be the true owner of the goods, &c. in the documents described, so far as to give validity to any contract, or agreement, entered into by such person so intrusted and in possession, with any person, for the sale and disposition of the said goods, or for the deposit or pledge thereof, as a security for any money or negotiable instrument.—It is not sufficient for a party availing himself of a defence under a contract, that he appear to have come into possession of the goods under a contract for valuable consideration—but he must prove the terms of the contract. *Evans v. Trueman*, 1 Law J. (N.S.) K.B. 34, a.c. 2 B. & Ad. 886.

By custom in the corn market, a buyer may pay the factor upon discount, within two months, which constitute the ordinary time of payment, either for his own accommodation or that of the factor: and, therefore, where a factor stopped payment after he had received the money for corn sold, but before the expiration of the two months,—it was held, that the principal could not sue the buyer, but must look to the factor. *Heisch v. Carrington*, 5 C. & P. 471. [Denman]

#### FACTORIES AND MILLS.

Regulation of labour of children in. 3 & 4 Will. 4, c. 103; 11 Law J. Stat. 210.

Amendment of the regulations relating to, contained in 3 & 4 Will. 4, c. 103. See 4 Will. 4, c. 1; 12 Law J. Stat. 1.

#### FACULTY.

[See CHURCH.]

#### FALSE IMPRISONMENT.

Suspicion that a person has committed a misdemeanour, by obtaining goods under false pretences, does not justify the apprehending of him by a private individual, without a warrant. *For v. Gaunt*, 1 Law J. (N.S.) K.B. 198, a.c. 3 B. & Ad. 798.

Magistrates have no authority to detain a person known to them, till some other person makes a charge against him. Before they detain a known person, they should have a charge actually made. *Rex v. Birnie*, 5 C. & P. 206, a.c. 1 M. & R. 160. [Tenterden]

A woman died after a very short illness. Rumours were generally in circulation in the neighbourhood where she had lived, that her husband had poisoned her, and a great crowd was collected in front of his house; upon which the constable of the parish, without any warrant, took him into custody and conveyed him before a magistrate, who detained him till medical men had reported the cause of death, and then discharged him:—Held, that if the jury were of opinion, that the constable had reasonable ground of suspicion to justify the apprehension, an action could not be maintained. The jury thought that there was such ground, and found a verdict for the defendant. *Nicholson v. Hardwick*, 5 C. & P. 495. [Gurney]

In trespass for false imprisonment, proof must be given of circumstances from which the Judge and jury may decide, whether there was or was not a restraint or detention of the person; and it is not enough for witnesses to swear, that they considered the plaintiff was in custody, and thought that he was under restraint; nor is it enough to shew, that the defendant at a police-office stood before the plaintiff and said, "You cannot go away till the magistrate comes;" if it appears that he relinquished that attitude, and went to another part of the office before the plaintiff had made any attempt to depart. *Cant v. Parsons*, 6 C. & P. 504. [Lyndhurst]



If A and B rent a ready furnished bed-room jointly, and both are taken into custody in the bed-room, charged with jointly stealing feathers from the bed, and on search pawnbrokers' duplicates are found on one of them:—Held, that these duplicates are receivable in evidence against the other, on a plea of justification to an action for false imprisonment brought by that other.

In an action for false imprisonment, the defendant pleaded that the plaintiff had stolen feathers from a bed in a ready furnished bed-room, let to him by the defendant, and that he therefore gave the plaintiff into the custody of a policeman, who, because the plaintiff resisted, beat the plaintiff and took him to the station-house; there was no evidence either of any resistance of the plaintiff, or of any blow given to him by the policeman:—Held, that on proof of the other allegations, the plea was substantially made out. *Atkinson v. Warne*, 6 C. & P. 687. [Gurney]

A (a boy) was placed at the defendant's boarding school by his mother, whom the defendant afterwards refused to permit to take him away. A was not detained against his own will, nor did he know that his mother had applied to have him restored to her:—Held, that an action for false imprisonment did not lie against the defendant at the suit of A, but that his mother might have maintained an action in a different form. *Herring v. Boyle*, 3 Law J. (N.S.) Exch. 344, s. c. 6 C. & P. 496; 1 C. M. & R. 377; 4 Tyr. 801.

If a person conducts himself in a disorderly manner in a public-house, and the landlord requests him to depart, and he refuses to do so, the landlord is justified in laying hands on him to put him out; and if, while the landlord has hold of him to put him out, the person lays hands on the landlord, this is an assault; and if it is seen by a peace officer, he is justified in taking the person into custody.

If a person, without committing any assault, make such noise and disturbance in a public-house as would create alarm, and disquiet the neighbourhood, and the persons passing along the adjacent street, this would be such a breach of the peace as would not only justify the landlord in turning the person out of the house, but would justify the landlord in immediately giving the person into custody of a peace officer, provided that this occurred in the presence of the officer. *Hoswell v. Jackson*, 6 C. & P. 723. [Parke]

A caused B to be taken into custody, and taken before a magistrate, who remanded B for two days, and then discharged him:—*Semble*, that B (on a declaration for false imprisonment in the usual form,) cannot recover for the two days imprisonment after the remand. *Quare*, whether he could do so, if it were stated as special damage. *Holtum v. Lotun*, 6 C. & P. 726. [Parke]

On an action of trespass for false imprisonment, for causing a person to be taken to a police-station-house, if it appear that the plaintiff's going proceeded originally from the plaintiff's own will, the defendant will be entitled to a verdict, either on "not guilty," or on "leave and licence" pleaded; but the plaintiff will not be deprived of his right to recover damages, if it appear, that being acted upon by the defendant's having made a charge of felony against him in the presence of a policeman, he went volun-

tarily with the policeman to the station-house for the purpose of meeting it. *Peters v. Stanway*, 6 C. & P. 737. [Alderson]

To justify a constable in apprehending a party without a warrant for an affray, it is essential that the party should have been engaged in the affray, that the constable should have had a view of the affray while the party was so engaged in it, and that the affray was still continuing at the time of the apprehension. *Cook v. Nethercote*, 6 C. & P. 741. [Alderson]

Where an attorney's clerk accompanied a creditor to his debtor, and pretended that he was a sheriff's officer, and in consequence the debtor went away with him, not willingly, but supposing they had power to compel him:—it was held, that this was sufficient arrest to support an action for false imprisonment, although no writ was produced, and it did not distinctly appear, that either the creditor or the clerk had touched the debtor at all. *Wood v. Lane*, 6 C. & P. 774. [Tindal]

In trespass for false imprisonment against two magistrates, the defendants gave in evidence a conviction under 7 & 8 Geo. 4, c. 30, s. 24, of the plaintiff for "unlawfully and maliciously damaging," &c. a quantity of rushes, for which they adjudged the plaintiff to pay the sum of 10s. as a reasonable compensation, and 6s. 6d. for costs; and, in default of immediate payment, the plaintiff to be imprisoned for one calendar month, unless the said sums should be sooner paid. The warrant of commitment stated the offence to be, that the plaintiff unlawfully trespassed on land in the occupation of D. Thomas, and cut down and carried away a quantity of rushes, for which offence he was ordered to pay the sum of 10s. penalty, and the gaoler was ordered to detain him for the space of one month, or until he should be delivered by the due order of law:—Held, that the conviction sufficiently supported the commitment. *Daniell v. Philipps*, 4 Law J. (N.S.) Exch. 108, s. c. 1 C. M. & R. 662

Where in trespass for false imprisonment, the defendant justified under process of outlawry, and the plaintiff replied, that there was no affidavit of debt made and filed, &c., and the defendant rejoined that there was such affidavit, and set out an irregular affidavit, and the plaintiff demurred:—Held, that the defendant was entitled to judgment, trespass not being maintainable where the process is irregular merely, and not void; though, if the defendant had applied to the Court, he would have been discharged out of custody on filing common bail. *Reddell v. Pakeman*, 4 Law J. (N.S.) Exch. 130, s. c. 2 C. M. & R. 30; 3 Dowl. P.C. 714.

#### FALSE PRETENCES.

An unstamped order for payment of money, which ought to be stamped under 55 Geo. 3, c. 184, is not a valuable security within 7 & 8 Geo. 4, c. 29, because it would be a breach of the law in the drawer to pay it. *Rex v. Yates*, 1 R. & M. C.C. 170.

Obtaining credit in account from the party's own banker, by drawing a bill on a person on whom the party has no right to draw, and which has no chance of being paid, is not within 7 & 8 Geo. 4, c. 29, s. 53, though the banker pays money for him in consequence thereof, to an extent he would not

otherwise have done. *Rea v. Wocell*, 1 R. & M. C.C. 224.

A person who obtained goods on delivering a forged letter, "Please to let the bearer W J have for J R four yards of linen," signed J R, is not indictable for obtaining goods by false pretence, as this is an uttering of a forged request for the delivery of goods, which is felony under section 10 of the statute 1 Will. 4, c. 66. *Rea v. Evans*, 5 C. & P. 553. [Taunton]

Where a false pretence was contained in a false letter, which was lost before the trial, the prisoner was convicted on parol evidence of its contents. *Rea v. Chadwick*, 6 C. & P. 181. [Tindal]

An indictment on a charge of false pretences is bad, if it states that the prisoner "unlawfully, knowingly, and designedly, did feloniously pretend," &c. *Rea v. Walker*, 6 C. & P. 657. [Law, Recorder]

If a party obtain money by a false pretence, knowing it to be false at the time, it is no answer to shew, that the party from whom he obtained the money, laid a plan to entrap him into the commission of the offence. *Rea v. Aday*, 7 C. & P. 140. [Vaughan]

An attorney who had appeared for a person who was fined 2*l.* on a summary conviction, called on the person's wife and told her that he had been with another person, who was fined 2*l.* for a like offence, to Mr. B. and Mr. L., and that he had prevailed on Mr. B. and Mr. L. to take 1*l.* instead of 2*l.*, and that if she would give him 1*l.* he would go and do the same for her. She gave the attorney the sovereign, and afterwards paid him for his trouble. It was proved that the attorney never applied to either Mr. B. or Mr. L. respecting either of the fines, and that both were afterwards paid in full:—Held, that the attorney was guilty of obtaining money by false pretences. *Rea v. Asterley*, 7 C. & P. 181. [Parke]

#### FALSE REPRESENTATIONS.

[See FRAUD—VENDOR AND PURCHASER.]

The plaintiff acting as a solicitor of a banking firm, in order to prevent the taking out of circulation notes issued in the lifetime of the testator, who was at the head of the banking concern, induced the mother and guardian of the testator's heir, to forego proceedings to compel the application of the primary funds to the payments of the testator's debts, in exoneration of certain descended estate, by representing that such proceedings were wholly unnecessary, and that the property primarily liable was abundantly sufficient for the payment of the testator's debts. The plaintiff afterwards filed a creditor's bill against J W, the executor and devisee of the testator, and against the heir; and upon the bankruptcy of J W, his assignees were brought before the Court by a supplemental bill:—Held, that the plaintiff was entitled to the common decree against the personal and devised real estate of the testator; but the bill, as against his heir, was dismissed with costs. *Jones v. Waters*, 2 M. & K. 610.

A tradesman, before supplying a party with goods, inquires, by letter, of defendant, whether a statement by the party, that he has 300*l.* capital, his own property, is correct, and receives a written answer, that the statement as to the 300*l.* is perfectly correct. The goods are supplied, the party

fails, and it appears that the 300*l.* was not the party's own property, but was money lent to him by the defendant. The jury having found a verdict for the defendant, the Court set it aside, as being against evidence, and granted a new trial. *Corbett v. Brown*, 1 Law J. (N.S.) C.P. 13, s. c. 8 Bing. 33; 1 M. & Sc. 85.

A plaintiff's attorney, being about to charge a defendant in execution, agreed to forbear to do so until the following term, at the request of the defendant's attorney, who falsely represented that he had authority of the defendant to consent to the arrangement, and who drew up, signed, and delivered to the plaintiff's attorney an agreement to prevent a supersedeas. This agreement did not state that the proceedings were stayed at the request of the defendant, according to rule Trin. term, 26 & 27 Geo. 2, in consequence of which the defendant obtained his discharge, on the ground, that he had not been charged in execution in time:—Held, that an action for damages, by reason of the false representation, could not be maintained against the defendant's attorney. *Hewitt v. Mellon*, 3 Law J. (N.S.) Exch. 228, s. c. 1 C. M. & R. 232; 4 Tyr. 1003.

By advertisement for sale, the brig *Leslie Ogilby* was described, amongst other things, "as copper-fastened; hull, masts, stores, &c. to be taken with all faults as they now lie;" and at the bottom of the advertisement was "Inventory." Then followed a list of anchors, cables, sails, ship's stores, &c. By a memorandum of agreement, the same ship was afterwards sold, and it contained the following: "On payment of the whole of the purchase-money, a legal bill of sale shall be made out and executed to the purchaser, and the said brig, with what belongs to her, shall be delivered according to the inventory which has been exhibited; but the said inventory shall be made good as to quantity only, and the said brig, together with her stores, shall be taken with all faults," &c.:—Held, that the whole advertisement was not incorporated in the contract, but only that which was, properly so called, the inventory; and that no action was maintainable by the purchaser as upon a warranty that she was copper-fastened. And the jury having found, that the vessel was not copper-fastened, but that the vendors did not know that she was not, and that there was no concealment:—Held, that no action would lie for deceit. *Freeman v. Baker*, 3 Law J. (N.S.) K.B. 17, s. c. 5 B. & Ad. 797; 2 N. & M. 446.

A party bought a ship under a representation that she was copper-fastened. He ascertained in the course of a few days, that she was not, but did not make any complaint to the seller till several months afterwards, when she had been on a voyage and returned:—Held, that this delay could not prevent his recovery in an action for the misrepresentation, provided the action was in other respects maintainable:—Held, also, that "Lloyd's Register of Shipping," was not admissible in evidence to shew, that the vessel was considered as copper-fastened. The contract stated, that the vessel was to be delivered with all her stores, according to the inventory: the inventory was at the end of the advertisement for the sale:—It was held, that this did not import into the contract, the representation contained in the

advertisement, as the vessel itself was not mentioned in the inventory, but only the stores. The questions for the jury, in such a case, are, whether the vessel was in fact copper-fastened? and if it was not, did the seller know it was not? and if he did, did he use any means to conceal the fact from the buyer? *Freeman v. Baker*, 5 C. & P. 475. [Denman]

In debt on bond to secure the payment, by instalments, of the consideration for the purchase of a business, to support a plea that the bond was obtained by fraud, covin, and misrepresentation, it is not enough to shew that the business did not produce to the purchaser the sum represented by the seller; but, if it be shewn that it did not produce the sum to the seller, it will be enough, as in such a case it may be assumed that the representation was untrue to the knowledge of the party making it. *D'Aranda v. Houston*, 6 C. & P. 511. [Alderson]

### FELON.

[See ASSIGNMENT.]

### FELONY.

[See INDICTMENT, VENUE, &c.]

In order to entitle a defendant, on a charge of felony, to be bailed before a magistrate in the country, it is not necessary to produce an affidavit of poverty, if it appears from the other affidavits in the cause, that he is in a humble situation of life. *Rex v. Brooker*, 2 Dowl. P.C. 446.

### FEOFFMENT.

At the time of making livery upon feoffment, a child who was an inmate of the feoffor continued in the house of which the conveyance was made:—Held, that the livery was good notwithstanding. Had the child been placed there to represent a party having an interest in the property, it would have avoided the livery.

A feoffment by one co-parcener, or joint tenant of the estate, after a general entry, is a disseisin. *Doe d. Read v. Taylor*, 3 Law J. (N.S.) K.B. 57, a. c. 5 B. & Ad. 575; 2 N. & M. 508.

### FERRY.

The grantee of a ferry may maintain an action on the case against any person who ferries passengers near to the terminus of his ferry, such passengers actually intending at the time to go to those terminus, and not to any other place, whether there be any fraudulent intent on the part of the boatmen or not.

But where there is a ferry from a certain point on one side of a river, which passes by several towns to a point on the other side, it is no infringement of that right to carry passengers to those towns which are not in the line leading from one terminus to the other.

So, if there be places which lie on the line, and the ultimate though not the sole intention of the passenger be to go from one terminus to the other, it is not an infringement of the right, where, in-

tending previously to go to some other place, the passenger is landed at a point near to the line.

In such a case where it was proved that the ultimate object was to go to the terminus of the line of the ferry; but it was left in doubt, whether it was the sole object, and the jury found a verdict for the defendant,—the Court refused to grant a new trial, the object of the action being to try another right claimed by the plaintiff, in which he had failed. *Huxey v. Field*, 4 Law J. (N.S.) Exch. 239, a. c. 2 C. M. & R. 432.

### FEVER HOSPITALS,—IN IRELAND.

Amendment of acts relating to. 2 Will. 4, c. 9; 10 Law J. Stat. 14.

Amendment of 58 Geo. 3, c. 47, relating to. 4 & 5 Will. 4, c. 46; 12 Law J. Stat. 77.

### FIERI FACIAS.

[See EXECUTION.]

### FINES AND RECOVERIES.

(A) IN GENERAL.

(B) LEVYING, ACKNOWLEDGMENT, AND PASSING.

(C) EFFECTS.

(D) AMENDMENT.

[See TRUST AND TRUSTEE, Substituted Trustee.]

Abolition of fines and recoveries, and substitution of simpler modes of assurances. 3 & 4 Will. 4, c. 74; 11 Law J. Stat. 135.

Fines and recoveries abolished in Ireland. 4 & 5 Will. 4, c. 92; 12 Law J. Stat. 192.

#### (A) IN GENERAL.

It is a sufficient entry to avoid a fine, if the party enters expressly to claim the premises as his own; it is not necessary for him to say that he enters to avoid all fines, or to specify what particular act, adverse to his own interest, he means to defeat. *Doe d. Jones v. Williams*, 5 B. & Ad. 783, a. c. 2 N. & M. 602.

#### (B) LEVYING, ACKNOWLEDGMENT, AND PASSING.

A fine allowed to pass where the acknowledgment was taken in Jamaica on paper, upon a certificate that no parchment could be procured. *King dem., Gibson def.*, 1 Law J. (N.S.) C.P. 8, a. c. 2 Bing. 4; 1 Mo. & Sc. 83.

Upon an affidavit that no parchment could be procured in the Brazils, the Court allowed a fine to pass, the affidavit of the acknowledgment of which was taken there on paper. *Turner pl., Alçada def.*, 2 Mo. & Sc. 24.

Fine, (under circumstances) permitted to pass, though one commissioner had omitted to sign return on back of ded. po. *Markham dem., Bailey def.*, 1 Law J. (N.S.) C.P. 12, a. c. 8 Bing. 18; 1 Mo. & Sc. 62.

Recovery allowed to pass, one of four vouches appearing by a sole warrant of attorney. *North couch.*, 1 Law J. (N.S.) C.P. 12, a. c. 8 Bing. 18; 1 Mo. & Sc. 57.

A fine acknowledged at Leghorn, allowed to pass without affidavit of acknowledgment being returned on parchment; it appearing that the original affidavit duly made on parchment, had been deposited in the tribunal according to the laws of Tuscany, and authenticated copies being annexed to the præcipe and concord. *Wickham dem., Foreman def.*, 2 Law J. (N.S.) C.P. 16, 9 s.c. Bing. 332; 2 Mo. & Sc. 420.

A recovery by the son of a peer may pass, though the acknowledgment be signed with his name of courtesy, and not with his true name, if the documents properly describe him as "commonly called Lord," &c. *Newark vouch.*, 2 Law J. (N.S.) C.P. 28, s.c. 9 Bing. 397; 2 Mo. & Sc. 562.

A statement on the indentures of a fine, that the proclamation was made "according to the form of the statute, the day, year, and place within mentioned," is sufficient to warrant the inference that it was made in court; as otherwise it would not be truly said to have been made according to the statute.

The addition by the officer of the court of date and place, more fully than they were given in such an entry as the above, does not warrant any objection to the reception of the indentures; supposing such alterations to be warranted by the fact. *Doe d. Jones v. Harrison*, 1 Law J. (N.S.) K.B. 234, s.c. 3 B. & Ad. 764.

Passing of fine after death of conusee. *Griffith's Fine*, 1 Bing. N.C. 720, s.c. 1 Sc. 711.

A fine may be levied by a trustee, substituted for a missing trustee, under 6 Geo. 4, c. 74, s. 5. *Jackson dem., Ward conusee*, 9 Bing. 399.

The caption of a fine in Scotland must be taken before advocates or clerks to the signet. Where one of the commissioners was only an attorney of a Scotch Court, the fine was not allowed to pass. *Anon.* 1 Mo. & Sc. 54.

Where through the fraud of an attorney's clerk a fine had not duly been paid, the fee at the Chirographer's Office not having been paid, the Court, on payment of the fee, allowed the fine to pass as of the term of which it would, but for that circumstance, have passed. *Elton pl., Yateman def.*, 2 M. & Sc. 1.

In a recovery the premises were described by the general term, "messuages." They consisted of stables and coach-houses, with apartments for servants above, and were a distinct property not appurtenant to any dwelling-houses:—Held, that the term "messuages" was sufficient to comprehend them. *Suffolk (Earl) dem., Hill ten.; Lord Guernsey vouches*, 2 Mo. & Sc. 55.

In a recovery, the acknowledgment of a warrant was taken before one of the Justices of the Court of Common Pleas, in Ireland:—The Court permitted it to pass on proof of the signature being in the hand-writing of the Judge. *Forster dem., Frere ten.*, 2 Mo. & Sc. 351.

On an application for the tenant in a recovery residing a short distance from Westminster, to appear at bar by attorney, on account of illness, the affidavit must state the place of his residence when he was taken ill, and at what period he was seen previously to the application. *Sands dem., Solis ten.*, 2 Mo. & Sc. 489.

The Court permitted the tenant in a recovery to appear at bar by attorney, on an affidavit that he was

too ill to be moved, and that such illness arose subsequently to his appointment. *Egan ten.*, 2 Mo. & Sc. 777.

Where the acknowledgment of a party to a fine was taken before commissioners, who were aware of the fact of her being a married woman, and of the non-concurrence of her husband; but the parties were living separate under a deed, by which the husband covenanted not to interfere with his wife's property; the Court refused to reverse the fine at the instance of the husband, but left him to his common law remedy. *Cheek pl., Booth def.*, 4 Mo. & Sc. 460.

It having been certified by the proclinator of fines, that three-fourths of the fines levied for forty years (during which he had held the office,) had been proclaimed before ingrossment (in the term in which they were ingrossed),—The Court refused to set aside an award which had proceeded on the assumption that such a fine was good. *Doe d. Fleming v. Ford*, 3 Law J. (N.S.) K.B. 214, s.c. 1 Ad. & E. 758; 3 N. & M. 813.

#### (C) EFFECTS.

Lord Bolingbroke seized in fee, leased to Stephens for twenty-one years in 1765. In 1773, he granted an annuity to Mrs. Hare, and as a security demised the premises in the possession of Stephens to Mrs. Hare, for ninety-nine years, if he should so long live, with a proviso that Mrs. Hare should the next day, re-demise the premises to him, for ninety-eight years and eleven months, at and under the said annuity. Mrs. Hare accordingly re-demised. In 1773, Lord Bolingbroke conveyed the premises to Jones in fee, without notice of the annuity. Jones was in the receipt of the rents from 1773, and in 1775 levied a fine, with proclamations to himself in fee. The annuity became in arrear in 1774, five years having passed from the time of the levying of the fine:—Held, that Mrs. Hare was not barred, as her interest had never been divested. *Goodright d. Hare v. Board*, 3 Doug. 149.

A S, being in wrongful possession of certain estates, devised them to two nephews, whom he appointed executors. The nephews received the rent due in the testator's time, and afterwards levied a fine on the estates. After the levying of the fine, they received the rents accruing in their own time:—Held, (*Willes, J. dubitante*), that it was rightly left to the jury to say, whether the nephews had a sufficient wrongful possession to support the fine; and the jury having found it sufficient, the Court refused to interfere. *Roe d. Davis v. Kent*, 3 Doug. 209.

By a marriage settlement an estate was limited to the husband for life, remainder to trustees for 500 years, for raising younger children's portions, remainder to the sons of the marriage in tail. By an agreement, indorsed on the settlement before its execution, and signed by the husband and the father of the lady, it was agreed, that, if the lady should die without leaving issue of the marriage, the husband, after the death, should pay to her father 600*l.*; and that, in default of payment, it should be raised by demise, &c. of the term. There was issue of the marriage a son and a daughter; the latter died an infant in her mother's lifetime; the son attained twenty-one, and suffered a recovery; and he also

died in his mother's lifetime:—Held, that, notwithstanding an estate tail had vested in the son, before the 6004. was raiseable, the recovery did not defeat that charge. *Eales v. Conn.*, 4 Sim. 65.

Estates were conveyed to A and B, and the heirs of A. A died having devised the estates to C in tail. C alone, in B's lifetime, conveyed the estates to D, to make him tenant to the præcipe, and a recovery was suffered to the use of C in fee. D died, leaving an infant heir:—Held, that the heir was not a trustee; for, though the recovery did not bar the estate tail, it drew out from D the whole estate that was vested in him under the recovery deed. *In re Debary*, 5 Sim. 283.

If a tenant in tail suffers a recovery, and declares uses which were void, he does not take back an estate tail, but an estate in fee. *Tanner v. Radford*, 6 Sim. 21.

Tenant's father seized of the freehold of the lands, whether as trustee or in his own right, levied a fine, with proclamations:—*Semble*, that a court of law would not declare such fine to be invalid, so as to prevent it, when followed by five years' non-claim, from being a bar to other claims. *Davies v. Lowndes*, 4 Law J. (N.S.) C.P. 214, s.c. 1 Bing. N.C. 597; 2 Sc. 71.

#### (D) AMENDMENT.

Under the statute 1 Will. 4, c. 70, s. 14, the jurisdiction of the Courts of Great Sessions in Wales, as to recoveries, is transferred to the Court of Common Pleas; and by s. 27, it is enacted, that "the Court of Common Pleas shall have the like power and authority to amend the records of fines and recoveries passed heretofore in any of the courts abolished by this act, as if the same had been levied, suffered, or had in the Court of Common Pleas:"—Held, that where the officer of the Court of Great Sessions had omitted to enter of record a recovery duly suffered at bar in 1804, that the Court of Common Pleas had the same power to amend such recovery as if it had been suffered in the Court of Common Pleas; and an order nisi obtained for such recovery being entered *nunc pro tunc*, was made absolute accordingly. *Evans dem., Griffith ten., Jones vouch.*, 2 Law J. (N.S.) C.P. 9, s.c. 9 Bing. 312; 2 Mo. & Sc. 383.

A recovery amended, by transposing the names of the defendant and tenant. *Hamilton dem., Farrer ten.*, 1 Law J. (N.S.) C.P. 5, s.c. 8 Bing. 10; 1 Mo. & Sc. 43.

The deed to declare the uses in a fine, stated the lands to be situated in the parish of Isham, whilst the fine described them as in the parish of Burton Latimer. Upon application to the Court for leave to amend such misdescription in the fine,—Held, that it was provided for in the 7th section of 3 & 4 Will. 4, c. 74, and consequently that the application was unnecessary. *Lockington dem., Shipley con.*, 4 Law J. (N.S.) C.P. 48, s.c. 1 Bing. N.C. 355; 1 Sc. 263.

The Court allowed a fine to be amended by inserting land in a parish not named in the deed, it appearing, from the description of the property in the deed, that it was the intention of the parties to pass such land, and it being necessary to make up the quantities stated therein. *Anonymous*, 1 Mo. & Sc. 239.

The Court allowed a recovery, suffered in 1780, to be amended by the insertion of three-fifths of

five messuages instead of one, to make it conform with the deed. *Hind dem., Radden ten., Hawkins vouch.*, 1 Mo. & Sc. 515, s.c. 1 Dowl. P.C. 269.

The Court allowed a recovery to be amended by inserting "Holy Trinity" before "Kingston-upon-Hull," on an affidavit that the property intended to pass was situate in the parish of the Holy Trinity at Kingston-upon-Hull. *Danse dem., Lee ten., Crowther vouch.*, 3 Mo. & Sc. 371.

Where in levying two fines between the same parties, the one *sur concessit*, the other *sur connissance de droit*, the parcels had, by mistake, been transposed, the Court allowed the fines to be amended, so as to make them conformable with the deed to lead the uses. *Banbury pl., Harper def.*, 3 Mo. & Sc. 101.

#### FINES.

[See LONDON—COPYHOLD.]

Provisions for the more speedy return and recovery of fines, issues, recognizances, &c. 3 & 4 Will. 4, c. 99; 11 Law J. Stat. 201.

#### FIRE-ARMS.

[See MALICIOUS INJURIES.]

#### FIRE.

[See LANDLORD AND TENANT.]

#### FISH.

[See DEER-STEALING.]

Amendment of 33 Geo. 3, c. 27, as to the conveyance and sale of fish at first hand. 4 Will. 4, c. 20; 12 Law J. Stat. 32.

#### FISHERY.

*Quære*, whether a weir, which does not destroy the fry of fish, nor impede navigation, and has existed from time immemorial, is illegal within the stat. 2 Hen. 6, c. 15. *Robson v. Robinson*, 3 Doug. 307.

Fishing with stake nets on the sea coasts, near the mouth of a river, is not prohibited either by the statute or the common law of Scotland. Proprietors on the sea coast, having grants from the Crown with right of fishing limited to fishing with net and coble, cannot, on the suit of owners of fisheries in a river, be restrained from fishing with stake nets. *Kintore v. Forbes*, 4 Bl. N.S. 485.

#### FIXTURES.

[See BANKRUPT, Possession, Order and Disposition — LANDLORD AND TENANT — LEGACY, Construction of — TRESPASS, Pleading.]

Where the lessee of a house and premises, who has paid the lessor for tenant's fixtures, assigns the term by way of mortgage, expressly including the fixtures in the assignment, and afterwards becomes bankrupt, the fixtures do not pass to his assignees as goods and chattels, within his order and dispo-

sition at the time of his bankruptcy. *Boydell v. M'Michael*, 3 Law J. (N.S.) Exch. 264, a.c. 1 C. M. & R. 177; 3 Tyr. 974.

An outgoing tenant, who had paid a former tenant for fixtures which he was entitled to remove during his tenancy, agreed, a few days before his tenancy expired, at the request of his landlady, not to remove the fixtures, she engaging to take them at a valuation, to be made by two brokers. At the expiration of the tenancy, the tenant delivered up possession, leaving the fixtures in the house, which were valued on the following day at 40*l.* 10*s.* by two brokers, who signed the appraisement:—Held, that, although the fixtures were not removed, the tenant might maintain *indebitatus assumpsit*, for the price and value of fixtures, &c. bargained and sold and sold and delivered; and that the sale was not within the 4th section of the Statute of Frauds, as the sale of an interest in land. *Semble*, also, that no note or memorandum in writing was required according to the 17th section of the statute, as for a "sale of goods" above the value of 10*l.* *Hallen v. Rander*, 3 Law J. (N.S.) Exch. 260, a.c. 1 C. M. & R. 266.

Assignees of bankrupt calico-printers, held entitled to remove all the machinery, utensils and fixtures, erected and used by the bankrupts in the print-works, except the steam-engines with their boilers, the first-motion shafts and wheels upon them, and water wheels, against a mortgagee of the lands and buildings to which they were affixed, with "all that and those the steam-engine, mill gearing, heavy gear to millwright work, fixed machinery, and things erected, standing, and being in and upon the thereby granted and demised buildings, works, and premises, which in any manner constitute fixtures and appendages to the freehold of the same, or any part thereof." *Trappes v. Harter*, 3 Law J. (N.S.) Exch. 24, a.c. 2 C. & M. 153; 3 Tyr. 609; 4 Tyr. 121.

Where, by a deed, were granted "all that iron-foundry, together with the said dwelling-houses and appurtenances thereto belonging, and the dwelling-houses and buildings erected thereon; and all and singular other the hereditaments, &c., together with all grates, boilers, bells, and other fixtures *in and about the said dwelling-houses*, and the brewhouses thereto belonging;"—it was held, that the fixtures of the iron-foundry did not pass. *Hare v. Horton*, 3 Law J. (N.S.) K.B. 41, a.c. 5 B. & Ad. 715; 2 N. & M. 428.

A testator, by his will, devised his house, with the grates, stoves, coppers, &c., and the "fixtures and fixed furniture," to his executors, upon trust to permit E. S. V. to have the use thereof for her life; and he also bequeathed his furniture, plate, &c. to E. S. V. absolutely:—Held, that chimney-glasses fixed to the wall, and a book-case screwed or fastened to the wall, were fixed furniture; but that a book-case, merely placed in a wall, and not screwed or fastened to the wall, was not so. *Birch v. Dawson*, 6 C. & P. 658. [Littledale]

Whether a carpet tacked to the floor is fixed furniture—*quære*. *Ibid.*

Issue being joined on an allegation by plaintiff that a cornice was fixed to, and not of right removable from, the freehold, the Judge desired the jury to find for defendant, if they considered that the cornice was ornamental merely, fixed during the

tenancy, capable of removal without substantial injury to the freehold, and so removed, in fact, during the tenancy. The jury found for the plaintiff:—Held, no misdirection. *Avery v. Cheslyn*, 3 Ad. & E. 76.

## FORCIBLE ENTRY AND DETAINER.

[See CONVICTION.]

An indictment for a forcible entry cannot be supported by evidence of a mere trespass, but there must be proof of such force, or, at least, such shew of force, as is calculated to prevent any resistance. *Rex v. Smyth*, 5 C. & P. 201. [Tenterden]

A conviction for a forcible detainer under 8 Hen. 6, c. 9, must state that the entry of the party detaining by force was unlawful; and it seems that the facts which make the entry unlawful, ought to be stated upon the face of the conviction.

It should also appear, that the party convicted was summoned, so that he might have an opportunity of traversing the facts. *Rex v. Wilson*, 4 Law J. (N.S.) M.C. 114, a.c. 5 N. & M. 164; 3 Ad. & E. 817.

A conviction under stat. 8 Hen. 6, c. 9, set forth a complaint made to two Justices, of an entry into premises of the complainant, an unlawful ejectment, and a forcible detainer by the defendant; that the Justices, on personal view, found the defendant forcibly detaining, according to the complaint, and that he was, therefore, convicted by them of forcible detaining by their own view. The defendant gave a written notice to the Justices, after the conviction, denying the force, and complainant's possession. On an inquisition afterwards had, the jury found seisin in fee by the complainant, and an unlawful entry, ejectment, and forcible detainer. The Justices indorsed upon the inquisition a memorandum of having re-seized the premises, and put the complainant into possession. The conviction, inquisition, and memorandum having been returned by the Justices to a *certiorari*, requiring a return of the conviction and inquisition, and all things touching the same, the Court of King's Bench refused to grant a mandamus to amend the return by returning the information; and by returning on the face of the conviction, the evidence given touching the entry, and the facts touching the conduct of the defendant on the view, it not being suggested in affidavit that any evidence was received by the Magistrates on the view. They gave no opinion as to the validity of the conviction. *Rex v. Wilson*, 3 Law J. (N.S.) M.C. 96, a.c. 1 Ad. & E. 627; 3 N. & M. 753.

## FOREIGN JUDGMENT.

[See BANKER.]

To support an action in England, for damages awarded by an Admiralty Court abroad, the transcript of the proceedings in the Admiralty Court should shew expressly, and not by mere inference, the sentence of the Admiralty Court; and that the defendant was within its jurisdiction. *Umbragio Obicini v. Bligh*, 1 Law J. (N.S.) C.P. 99, a.c. 8 Bing. 335; 1 Mo. & Sc. 477.

A foreign judgment may be set aside in equity for fraud. *Bowles v. Orr*, 1 Y. & C. 464.

To render a foreign judgment void, on the ground that it is contrary to the law of the country where it was given, it must be shewn clearly and unequivocally to be so.

Where the law of a British colony required that, in a suit instituted against an absent party, the process should be served upon the King's Attorney General, in the colony; but it was not expressly provided, that the Attorney General should communicate with the absent party:—Held, that such law was not so contrary to natural justice, as to render void a judgment obtained against a party who had resided within the jurisdiction of the Court at the time when the cause of action accrued, but had withdrawn himself before the proceedings were commenced. *Becquet v. McCarthy*, 2 B. & Ad. 951.

The creditors of a person resident in Ireland, filed a bill in the English Court of Chancery, and obtained a decree for an account, &c.; and afterwards (the property of the debtor lying chiefly in Ireland) filed a bill in the Court of Chancery there, praying to have the full benefit of the proceedings in the English suit. The Court of Chancery, in Ireland, dismissed such second bill as for want of jurisdiction:—Held, that the judgment of the Court of Chancery, in Ireland, was erroneous; that the proceedings in the English Court of Chancery were in the nature of a foreign judgment, and were to be treated as such in Ireland, namely, as *prima facie* evidence of the right in the party who had obtained the judgment. Held also, that this House could either remit the case with directions, or appoint a receiver, and take such other proceedings as the Court of Chancery, in Ireland, might have done. *Houlditch v. Donegall*, 2 C. & F. 470, s. c. 8 Bl. n.s. 301.

#### FOREIGN LAW.

[See LIMITATIONS, STATUTE OF—WILL, Construction.]

In an action on a promissory note, drawn in a foreign country, and due about twenty years since, the defendant pleaded the Statute of Limitations; and the plaintiff replied, that he resided abroad until within six years of the commencement of the action. The Court afterwards (upon terms) allowed the defendant to add a plea, setting up a provision of the law of the country where the note was made, and the parties resided, similar in its effect to the Statute of Limitations. *Huber v. Steiner*, 4 Mo. & Sc. 828.

In an action of debt by two out of three syndics of a French bankrupt, upon an arbitral sentence and ordinance adjudging that the defendant should pay a sum of money to the bankrupt:—Held,

First,—That an examined copy of the agreement of reference, which was entered into in France, verified by the attesting witness, although the agreement was expressed to be "*fait au double*," was good evidence, as the original was deposited with a notary, and it was proved to be the usage in France, (though there was no written law upon the subject,) not to allow the removal of documents so deposited.

Secondly,—That although by the express agreement of the parties, merchants were to be appointed as arbitrators, the Tribunal de Commerce, which it

was agreed, might name the arbitrators in case of disagreement, might appoint persons not merchants; and that the proceedings of foreign tribunals must be assumed to be according to the law, unless the contrary were shewn.

Thirdly,—That an award of damages by a foreign tribunal, although inconsistent with the rules of law of this country, cannot be impeached, unless contrary to natural justice, or proved to be against the law of the foreign country.

Fourthly,—That two of three syndics of a French bankrupt, may sue without naming the third, or shewing that he has objected to the act done, or is absent, or that they have had the previous authority of the Juge Commissaire:—and *quære*, whether the objection as to the non-joinder can be taken on a plea of *nil debet*?

Fifthly,—That the allegation that the award was registered in the Tribunal de Commerce, was surplusage, and, therefore, that proof that it was registered in the Court of the First Instance, did not constitute a material variance.

Sixthly,—That the averment that the party was a bankrupt, was sustained by proof that he was "*en état de faillite*."

Where a judgment had been obtained on a decree in the Cour de Première Instance, at Paris, on an award, the Court refused to stay execution, on the ground that the defendant had lodged an appeal against the decree in the Cour de Cassation, which prevented any execution in France upon the decree and award. *Alison v. Furnival*, 3 Law J. (n.s.) Exch. 241, s. c. 1 C. M. & R. 277; 4 Tyr. 751.

A promissory note was made in France by the defendant, a French subject, and then domiciled in France. The payee of the note indorsed it in blank, which mode of indorsement is, by the sections 137, 138 of the Code de Commerce, invalid, and passes no property. The holder, an English subject, sued the defendant the drawer, then residing and carrying on business in London:—Held, that the plaintiff's right to recover was to be decided, not by the law of England, but by that of France; and as the law of the latter country, under the circumstances, would give the plaintiff no right of action, neither could he maintain one in the courts of this country. *Trimby v. Vignier*, 3 Law J. (n.s.) C.P. 246, s. c. 1 Bing. N.C. 151; 4 Mo. & Sc. 695.

Upon motion to arrest defendant for a debt, said to be contracted in Scotland, the Court must be satisfied that the defendant is liable to be sued personally by the Scotch law, for such alleged debt. *Young v. Wildey*, 4 Law J. (n.s.) C.P. 253.

Where a contract is made between persons domiciled in a foreign country, and in a form known to the law of that country, the Court, in administering the rights of parties under it, will give it the same construction and effect as the foreign law would have given it. If, therefore, a domiciled Scotchman would be held entitled in Scotland by virtue of a marriage contract executed there, and in the Scotch form, to receive whatever property accrued during coverture to his wife, this Court will enforce his right, as against any such property coming within its jurisdiction, and will not raise an equity for a settlement in favour of the wife, in opposition to the provisions of the contract. *Anstruther v. Adam*, 2 M. & K. 513.

## FOREIGNER.

[See INFORMATION.]

## FORFEITURE.

[See ASSIGNMENT—CHARTER—LEASE—LEGACY—ESCHEAT.]

By a charter of Edward 4, the Crown granted to the Corporation of Dover "all penalties forfeited and to be forfeited, &c. of all and every the barons, &c. in whatsoever Courts the same barons, &c. should happen to adjudge." By a charter of Charles 2, "all fines, forfeitures, &c. in the courts aforesaid arising," &c., were also granted to the corporation:—Held, that under neither of these charters did a forfeited recognizance to appear to answer a charge of misdemeanour pass to the corporation. *Rez v. Mayor of Dover*, 4 Law J. (n.s.) Exch. 94, s. c. 1 C. M. & R. 726.

## FORGERY.

[See BILL OF EXCHANGE—DEATH—STAMP.]

Punishment of transportation for, power to the Judge to add to, in certain cases. 3 & 4 Will. 4, c. 44; 11 Law J. Stat. 104.

Persons accused of, (in Scotland) not entitled to bail, except in certain cases. 5 & 6 Will. 4, c. 73; 13 Law J. Stat. 165.

Probability of disposition is of very little weight to negative forgery, though material to prove capacity, volition, and the absence of fraudulent imposition. *Rutherford v. Maule*, 4 Hag. Ec. 226.

Uttering in England a forged note payable in Ireland only, was within the forgery acts prior to 11 Geo. 4. & 1 Will. 4, c. 66. *Rez v. Kirkwood*, 1 M. C.C. 311.

Forging or uttering a receipt at the foot of an account, is not within 2 Geo. 2, c. 25, if such receipt is signed with initials only, and there is nothing in the indictment to explain what those initials mean, though such receipt is described as being in the handwriting of a person whose name agrees with those initials, and is stated to have been written by him as a receipt for others' money, and falsely affixed at the foot of another's account.

An indictment for forging or uttering a receipt in the name of T S, should shew that T S was the person to whom the money might have been paid. *Rez v. Barton*, 1 R. & M. C.C. 141.

Giving a forged note to an innocent agent or an accomplice, that he may pass it, is a disposing of, and putting it away. *Rez v. Giles*, 1 R. & M. C.C. 166.

Proof that the prisoner, on uttering a note, represented the maker as living at a particular place and in a particular line of business, with evidence that it is not that person's note, is sufficient to prove it a forgery; especially if the prisoner be the payee of the note. And proof that there is another person of that name, in a different line of business, will not make it necessary for the prosecutor to shew it was not that person's note. *Rez v. Hampton*, 1 R. & M. C.C. 255.

On an indictment for forging, &c. a note of the Royal Bank of Scotland, it is not necessary to prove that any of the charters gave the Bank power to

draw or issue notes; such power is sufficiently recognized by 48 Geo. 3, c. 149, s. 16, and 55 Geo. 3, c. 184, s. 23 (Stamp Acts). *Rez v. M'Keay*, 1 R. & M. C.C. 130.

In forgery, the order charged as forged ought to import that the person making it has a disposing power over the subject of the order; or there ought to be proof that the person in whose name it is made had such power. *Rez v. Baker*, 1 R. & M. C.C. 231.

A request under 11 Geo. 4. & 1 Will. 4, c. 66, s. 10, must import on the face of it to be a request; and if the words have not necessarily that effect, but are so understood in trade, there must be an innuendo to explain them.

*Scmble*—A request need not be addressed to any particular person. *Rez v. Callen*, 1 M. C.C. 300.

On an indictment on 11 Geo. 4. & 1 Will. 4, c. 66, s. 10, a request for the delivery of goods need not be addressed to any one. *Rez v. Carney*, 1 M. C.C. 351.

If several persons make distinct parts of a forged instrument, each is a principal, though he does not know by whom the other parts are executed, and though it is finished by one alone, in the absence of the others. *Rez v. Kirkwood*, 1 M. C.C. 304.

The makers of the paper and plate respectively for the purpose of forging a note, afterwards filled up by a third person, are principals in the forgery with that person, though each executed his part in the absence of the others, and without knowing by whom the other parts are executed. *Rez v. Dade*, 1 M. C.C. 307.

The 7 Geo. 2, c. 22, s. 1, was not repealed by the 46 Geo. 3, c. 89, s. 1. After the latter statute, uttering a forged acceptance was punishable under the former. *Rez v. Mather*, 1 M. C.C. 291.

Where a bill purported to be accepted by "Samuel Knight, Market-place, Birmingham," it was held, on an indictment for forgery of the acceptance, that the result of inquiries made at Birmingham by the prosecutor, who was not acquainted with the place, was evidence for the jury, though neither the best nor the usual evidence given to prove the non-existence of a party whose name is used. *Rez v. King*, 5 C. & P. 123. [Parke]

An indictment which charges a forged cheque to be "a warrant and order for the payment of money, which said warrant and order is in the words and figures following," is good. A forged cheque on the W. Bank was presented for payment at the S. Bank, where the supposed drawer never kept cash:—Held, that this was sufficient evidence of an intent to defraud the partners of the S. Bank, although there was no probability of their paying the cheque, even if it had been genuine. *Rez v. Crouther*, 5 C. & P. 316. [Bosanquet]

A count charging the prisoner with uttering a forged bill with intent to defraud A B, and setting out the bill and the acceptance upon it, is not supported by proving that the prisoner uttered the bill, and that the acceptance on it was a forgery.

A count stated that the prisoner had a bill in his possession (which was set out) with a forged acceptance on it (which was also set out), and that he, knowing the acceptance to be forged, uttered the bill with intent to defraud A B:—Held not good. *Rez v. Horwell*, 6 C. & P. 148. [Gurney]



An indictment had been found against A for an assault, on which the clerk of the peace had granted a certificate, upon which the magistrate committed A to the county gaol till he should find sureties, or otherwise be discharged by the due course of law. A wrote a forged letter, in the name of another magistrate, to the governor of the county gaol, stating that A had found sureties, and authorizing the discharge of A:—Held, that the writing and uttering of this forged letter was an indictable offence. *Rez v. Harris*, 6 C. & P. 129. [Tindal]

In an indictment for forgery, a count which, since the stat. 1 Will. 4, c. 66, charges that the prisoner "did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, and did willingly act and assist in the false making, forging, and counterfeiting" a bill of exchange, is good; as are counts charging that he did "utter and publish as true," and did "offer, dispose of, and put away" the bill. *Rez v. Brewer*, 6 C. & P. 363. [Park]

It is not any offence, under the stat. 1 Will. 4, c. 66, to forge an indorsement upon a warrant or order for the payment of money. Nor, if a party write on the back of a bill of exchange, "Received for R A," and sign his own name to it, is he guilty of forging a receipt within the provisions of the statute.

If a person presents a bill of exchange for payment, with a forged indorsement upon it, of a receipt by the payee, and the clerk to whom he presents it objects to a variance between the spelling of the payee's name in the bill and the indorsement, upon which the person alters the indorsement into a receipt by himself for the drawer,—*Semble*, that the act of presenting the bill to the clerk, previous to his objection, is sufficient to constitute the offence of uttering the forged indorsement. *Rez v. Arscott*, 6 C. & P. 408. [Littledale]

On an indictment for uttering a forged cheque in the name of J. W., on Messrs. C. G. & Co., who were army-agents and bankers, it was proved by a clerk in the former department, that he did not know of any customer named J. W., and that he had been told by other clerks that there was not any such customer in the banking department:—Held, that this was sufficient proof, on the part of the prosecutor, to call upon the prisoner to shew that there was in fact such a person as J. W. having an account with Messrs. C. G. & Co.; and, in the absence of such proof, was sufficient by itself for the consideration of the jury. *Rez v. Brannan*, 6 C. & P. 326. [Park]

Held, that a receipt, signed by a captain of a detachment, on the authority of which money is received from an army-agent, on account of the monthly subsistence for such detachment, may be properly described as "a receipt for money" under the stat. 2 & 3 Will. 4, c. 123, s. 10, relating to forgery, although it appeared that such instruments were frequently cashed (upon indorsement) by tradesmen in the neighbourhood of the place where the regiment was stationed, and the amount afterwards received by them of the army-agent. *Rez v. Rice*, 6 C. & P. 684. [Park]

Where a forged request for the delivery of goods was addressed in her maiden name to a female, who, prior to the date of it, had married, it was

held, that the party uttering it might properly be convicted, on an indictment charging the intent to be to defraud the husband. *Rez v. Carter*, 7 C. & P. 134. [Law, Recorder]

If A put the name of B on a bill of exchange as acceptor, without B's authority, expecting to be able to meet it when due, or expecting that B would overlook it, this is forgery; but if A either had authority from B, or, from the course of their dealings, *bond fide* considered that he had such authority, it is not forgery.

In a case of forging and uttering a forged bill, a letter written by the prisoner to a third person, saying, that that person's name is on another bill, and desiring him not to say that that bill is a forgery, is receivable in evidence to prove guilty knowledge; but the jury ought not to consider it as evidence that that other bill is forged, unless such bill is produced, and the forgery of it proved in the usual way. *Rez v. Forbes*, 7 C. & P. 224. [Cole-ridge]

Where three persons jointly indicted for feloniously using plates, containing impressions of forged notes, it was held, that the jury must select some one particular time after all three had become connected, and must be satisfied, in order to convict them, that at such time they were all either present together at one act of using, or assisted in such one act, as by two using, and one watching at the door to prevent the others being disturbed, or the like; and that it was not sufficient to shew that the parties were general dealers in forged notes, and that at different times they had singly used the plates, and were individually in possession of forged notes taken from them.

The word "guilder" is sufficiently an English word to justify its use in the indictment as the translation of the Polish word "zlotych," which is also called a guilder and a florin. *Rez v. Harris*, 7 C. & P. 416. [Littledale]

#### FORMA PAUPERIS.

[See PAUPER.]

#### FOUR PER CENTS.

Reduction of. 4 & 5 Will. 4, c. 31; 12 Law J. Stat. 51.

#### FRANCHISE.

By charter of Jac. 1, a lordship was granted to the Earl of Worcester, with the return of all writs "by his bailiff, for that purpose to be deputed." A mandate of the sheriff of Glamorganshire was directed to the bailiff of the lord; and it was held, that a return, made by him in his own name, without stating himself to be a deputy, was a good return; it appearing, by the practice in the lordship, that mandates were always so directed, and the return uniformly made by the bailiff in his own name. *Newland v. Cliffe*, 1 Law J. (n.s.) K.B. 179, s. c. 3 B. & Ad. 630.

## FRAUD.

[See ATTORNEY, Connexion between, and Client — PLEADING — SESSIONS, Case from — FALSE REPRESENTATIONS.]

In an action on an agreement, in which fraud is pleaded, a *wifful* misrepresentation must be shewn. *Stevens v. Webb*, 7 C. & P. 60. [Parke]

Where fraud appears on the face of a transaction, that is sufficient reason to authorize the Court to set it aside, against the parties concerned, without notice being proved against them all. A solicitor for a purchaser has a duty to perform in investigating the title, and he having notice of fraud in a former dealing with the estate, is affected with such notice, in his character of agent for the purchaser.

A bill may be filed by an insolvent against purchasers of part of his property, without alleging that his assignee refuses to join, where the assignee and the purchasers are together concerned in an unfair dealing with the property.

Where a transaction is set aside, on the ground of fraud, no account will be allowed by the Court to the parties to the fraud, of what they have laid out or advanced or expended in the committing of that fraud. *Pinning v. Rushworth*, 2 Law J. (n.s.) Chanc. 176.

Where a party who has been imposed upon, and induced, by false and fraudulent representations, to buy shares in a supposed mining company, after a knowledge of the fraud, adopts the contract, and treats the shares as his own valid shares, he is estopped from afterwards rescinding the contract; and it is immaterial whether he knew the full extent of the fraud or not. *Campbell v. Fleming*, 3 Law J. (n.s.) K.B. 136, s.c. 1 Ad. & E. 40; 3 N. & M. 884.

In cases of fraud, time runs in bar of relief from that period only at which the party injured became cognizant of his rights and injuries.

A submission to arbitration of all causes of action, &c., and an award and mutual releases resulting from it, are not binding as to a particular matter not submitted to the consideration of the arbitrator, and the fraudulent circumstances relating to which were not then disclosed. *Trevelyan v. Charter*, 4 Law J. (n.s.) Ch. 209.

A man already married, performed the ceremony with G W, and joined with her in executing an assignment of her life interest in a trust fund to a purchaser. The fraud practised upon G W by the person acting in the character of her husband, did not affect the validity of the assignment, nor was it necessary to make the supposed husband a party to a suit instituted by the purchaser to obtain the benefit of the assignment. *Sturge v. Starr*, 2 M. & K. 196.

## FRAUDS, STATUTE OF.

[See BENEFICE — FIXTURES — GUARANTEE — SHIP AND SHIPPING, Charter-party — VARIANCE, Between Pleadings and Evidence.]

Tenant for term of years agreed by parol with his landlord, that if the latter would lay out 50*l.* on the premises, he would pay an additional 5*l.* a year rent, for the remainder of his term:—Held, not to

require a written note, according to the Statute of Frauds, either as a contract for an interest concerning lands, or as an agreement not to be performed within a year. *Donellan v. Read*, 1 Law J. (n.s.) K.B. 269, s.c. 3 B. & Ad. 899.

By the stat. 29 Car. 2, c. 3, "no action shall be brought whereby to charge any person upon any contract or sale of lands, &c. unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing," &c. Where, therefore, a contract for the sale of lands, with good title, was originally in writing, not under seal, and the same was afterwards varied by parol, whereby a defect of title was waived:—It was held, that no action could be maintained upon it, as the whole contract was not in writing.

Such a contract may be discharged by parol—*comme semble*. *Goss v. Lord Nugent*, 2 Law J. (n.s.) K.B. 127, s.c. 2 N. & M. 28; 5 B. & Ad. 58.

A and B came to the plaintiff's warehouse, and agreed for a parcel of goods for A, and B said he would guarantee the payment. A afterwards came alone, and ordered other goods, when the plaintiff sent to B, and asked him whether he would engage for A. B replied, "I will pay you if he does not." The goods were subsequently delivered to A:—Held, that this was a collateral promise by B, and required to be in writing by the Statute of Frauds. *Peckham v. Faria*, 3 Doug. 13.

An agreement to pay the debt of another, must not only be in writing, but must contain the consideration, either in express terms, or by necessary implication, and as a matter of certainty: and it is not sufficient that a consideration may be fixed upon by conjecture merely:—therefore, a letter in which the defendant wrote to the plaintiff as follows—"As you have a claim on my brother for 17*l.* 10*s.* for boots and shoes, I hereby undertake to pay you the amount within six weeks from this day,—say the 14th of January 1833,"—was held not sufficient within the Statute of Frauds. *James v. Williams*, 3 Law J. (n.s.) K.B. 97, s.c. 3 N. & M. 196.

A lent money on mortgage of copyhold property, and, by the directions of A, the mortgage money was expressed to be paid by B, the brother of A; and the covenant to surrender was with B, and A was no party to the deed; and A, when he handed over the money, told the mortgagor that he intended the money to be B's; and again, when he received the first half-year's interest, he said he should receive the interest for life, but the principal was to go to B:—Held, that upon A's death the principal belonged to B;—held also, that a resulting trust under the Statute of Frauds may be rebutted as to part only;—and held also, that a mortgage debt is not an interest in land under that statute. *Benbow v. Townsend*, 2 Law J. (n.s.) Chanc. 215, s.c. 1 M. & K. 506.

A short time before the expiration of a lease of a house, the landlord agreed with the tenant to purchase his fixtures at a valuation. The lease expired; and the tenant having quitted possession of the premises without severing the fixtures, sent the key to the landlord. The broker appointed by the latter afterwards appraised the fixtures at more than 10*l.*, and signed the valuation:—Held, that the plaintiff having, at the defendant's request,

waived his right to remove the fixtures, the matter bargained for was not an interest in land within 29 Car. 2, c. 3, s. 4; and that the amount ascertained by the broker might be recovered in *indebitatus assumpsit* for fixtures and effects bargained and sold, without proving a note, &c. in writing.—*Semble*, that such note, &c. in writing was not required under section 17, respecting the "sale of goods" of 10*l*. value or upwards. *Hallen v. Runder*, 3 Tyr. 959, s. c. 1 C. M. & R. 266.

An agreement, not in writing, with the owner of a farm, in consideration that he will let, or will agree to let, the same for a term of years, and will suffer the intended lessee to take possession, and have the benefit of growing crops, and of work, labour, and materials before expended in preparing the farm ready for tillage, to pay for such crops, work, labour, and materials, at a valuation, is a contract relating to an interest in land, within the 4th section of the Statute of Frauds, and upon which, therefore, no action can be maintained for the amount of the valuation.

Neither, on demurrer, is *indebitatus assumpsit* sustainable, for crops bargained and sold, for work, labour, and materials, and on an account stated, if it appear by the pleadings, that the crops were growing at the time of a verbal contract of bargain and sale, and for the payment for work, labour, and materials before expended, in order to carry into effect a treaty for letting the land to the defendant for a term of years; and that the account was stated before the crops were cut down, concerning money to be paid for the crops, work, labour, and materials; and that there was no agreement in writing, or note, or memorandum thereof, &c. *Earl of Falmouth v. Thomas*, 2 Law J. (N.S.) Exch. 57, s. c. 1 C. & M. 89; 3 Tyr. 28.

*Query*—whether a sale of a growing crop of green wheat, is a sale of an interest in land, within the 4th section of the Statute of Frauds. *Shelton v. Livius*, 1 Law J. (N.S.) Exch. 139, s. c. 2 C. & J. 411; 2 Tyr. 420.

The defendant having proposed to the plaintiff to enter his service as bailiff, on the 20th of July wrote down certain terms, which he delivered to the plaintiff, and said "You will come on the 24th." The plaintiff took away the memorandum, and entered the defendant's service on the 24th:—Held, that the contract was made on the 20th, and, therefore, was a contract within the Statute of Frauds, not to be performed within the space of one year, and that no action could be maintained by the plaintiff against the defendant, for not continuing him in his service for that period. *Snelling v. Lord Huntingfield*, 4 Law J. (N.S.) Exch. 232; s. c. 1 C. M. & R. 20; 4 Tyr. 606.

The vendee signed a contract on the back of the conditions of sale, but there was no signature by the vendors, or by any one on their behalf:—Held, that a letter written subsequently by one of the vendors, in which he referred to this sale to the vendee, and to the conditions of sale, was sufficient to take it out of the Statute of Frauds. *Dobell v. Hutchinson*, 4 Law J. (N.S.) K.B. 201, s. c. 5 N. & M. 251; 3 Ad. & E. 355.

Where the defendant became tenant, and entered into the occupation of premises under an agreement which was void by the Statute of Frauds,—Held,

that although he could not be tenant for the term agreed upon, yet that coupling it with the occupation under that agreement, which was signed by him, he became tenant from year to year under the terms contained in that paper. *Richardson v. Gifford*, 3 Law J. (N.S.) K.B. 122, s. c. 1 Ad. & E. 52; 3 N. & M. 325.

The defendant gave the plaintiff an order for a carriage, to be completed at a future time; no reference or allusion was made to any specific price; subsequently to the completion of the work and approval of it by the defendant, he wrote a letter to the plaintiff, desiring it to be sent home with the bill. In an action against him for non-acceptance,—Held, that the letter, coupled with the order, constituted a sufficient note or memorandum in writing of the bargain, under 9 Geo. 4, c. 14, s. 7, though such letter and order were silent as to price; and that the party was entitled to recover on the *quantum valebat*. *Hoadly v. Machines*, 3 Law J. (N.S.) C.P. 162, s. c. 10 Bing. 482; 4 Mo. & Sc. 340.

If A order a waggon of B, and, whilst the work is in progress and still unfinished, A, by means of tradesmen not employed or paid by B, make certain changes and alterations, by adding iron-work, and a tilt, &c., such operation on the part of A is not within the 17th section of the 29 Car. 2, c. 3, extended by the 9 Geo. 4, c. 14, which requires the buyer to have accepted part of the goods so sold, and actually received the same; the waggon in question never having been out of possession. *Maberly v. Sheppard*, 2 Law J. (N.S.) C.P. 181, s. c. 10 Bing. 99; 3 Mo. & Sc. 436.

The delivery of goods by a merchant abroad, on board a ship chartered by the defendants, is not such an acceptance on the part of the latter as precludes a subsequent refusal of the goods upon their arrival. *Acobal v. Levy*, 3 Law J. (N.S.) C.P. 98, s. c. 10 Bing. 376; 4 Mo. & Sc. 217.

In assumpsit by an auctioneer against a purchaser for goods sold, an entry in the sale-book by the auctioneer's clerk, who attended the sale, and, as each lot was knocked down, named the purchaser aloud; and, on a sign of assent from him, made a note accordingly in the book, is a memorandum by an agent lawfully authorized within section 17 of the Statute of Frauds. For the clerk is not identified with the auctioneer (who sues); and in the business which he performs, of entering the names, &c., he is impliedly authorized by the persons attending the sale to be their agent. *Bird v. Boulter*, 4 B. & Ad. 443, s. c. 1 N. & M. 313.

On the sale of property by auction, the purchaser paid the deposit money, pursuant to the conditions of sale, and half the auction duty, for which he had a receipt, signed by the clerk of the auctioneer. The purchaser at the same time signed a memorandum of agreement at the back of the particulars and conditions of sale, for the payment of the remainder of the purchase money at a future day. This agreement was also signed by the auctioneer's clerk, professedly as a witness.

Subsequently to the auction, it being found that the vendors could not make out a marketable title, the attorneys of the vendor wrote a letter to the attorney of the vendee, in which they admitted that they could not make out a title to this property, and that if the purchaser would not take it as it appeared

upon the abstract, the better way would be for him to relinquish the purchase, &c.:—Held, that this letter could not be considered as any recognition of the authority of the auctioneer's clerk, to sign the agreement for the vendor, and that the purchaser, therefore, could not recover back the expenses of investigating the title.

*Quere*—can a party who signs a document, expressly purporting to sign it as a witness, be under any circumstances considered as signing the document, in the character of a party or agent? *Gosbell v. Archer*, 4 Law J. (N.S.) K.B. 78, s. c. 4 N. & M. 485; 2 Ad. & E. 500.

### FRAUDULENT CONVEYANCE.

Where a person in insolvent circumstances executes a voluntary conveyance without consideration, it is void, under the stat. 13 Eliz. c. 5, against creditors; and the property thereby intended to be conveyed will, after the death of the party conveying, be assets in the hands of his executor, for their benefit.

It does not require, that the party making the conveyance should be insolvent, in the strict acceptance of the word; but if, from the statement of his accounts and admissions, it appear that he is in extremely embarrassed circumstances, and, upon an application made to him for the payment of the debt, that the payment of it at that time would have left him almost destitute, he must be considered insolvent, so as to make void, as against creditors, a deed executed by him under such circumstances. *Shears v. Rogers*, 1 Law J. (N.S.) K.B. 89, s. c. 3 B. & Ad. 362.

Copyholds are within the provisions of the stat. 13 Eliz. c. 4, against fraudulent conveyances. *Doe d. Tunstall v. Boltriell*, 2 Law J. (N.S.) K.B. 158, s. c. 2 N. & M. 64; 5 B. & Ad. 181.

A party having made a post-nuptial settlement, by which he conveyed to trustees, afterwards mortgaged:—Held, that his declarations were not admissible to prove that the mortgage was for valuable consideration.

*Quere*—whether, when a woman has property at the time the settlement is made, in the hands of executors, the settlement can be considered as made without consideration, so as to be void against creditors within the statute. *Doe d. Sweetland v. Webber*, 3 Law J. (N.S.) K.B. 208, s. c. 1 Ad. & E. 733; 3 N. & M. 586.

The stat. 3 & 4 W. & M. c. 14, against fraudulent devises, which gives a remedy by action against the devisees, only applies to those cases where the relation of debtor and creditor, in the common acceptance of those terms, existed between the devisor and obligee or covenantee.

Where, therefore, the devisor covenanted in his lifetime for the payment of rent and performance of other covenants by a third person, and no breach occurred in his lifetime, it was held, that no action lay upon the statute against his devisee, upon breaches accruing after the devisor's death. *Farley v. Briant*, 4 Law J. (N.S.) K.B. 246, s. c. 5 N. & M. 42, 57.

A volunteer cannot, in equity, retain benefits which have been derived through the fraud of another; but the rule does not extend to a party who,

for valuable consideration, and without notice, takes directly, and not through the party ractising the fraud.

A solicitor, for the purpose of satisfying a debt due from him to W, induces a client to execute to W a bond for the amount. W being a purchaser for valuable consideration, and without notice, is not affected by the fraud and misrepresentations practised by the solicitor in obtaining the bond from his client. *Harrison v. Wiltshire*, 4 Law J. (N.S.) Chanc. 30.

### FRAUDULENT REMOVAL.

[See LANDLORD AND TENANT.]

### FREE BENCH.

[See COPYHOLD.]

### FREEDOM.

By the 28th section of the stat. 7 & 8 Geo. 4, c. 75, no person shall be admitted a freeman of the Watermen's Company, unless he shall have served and worked on the River Thames, as an apprentice of some freeman, for the full space of seven years. The plaintiff was apprenticed to his father's foreman, and there was contradictory evidence as to his being seen rowing on the river during the time of his apprenticeship, and of his capability to manage a craft. It was proved, however, that, during all the time, he superintended his father's business:—Held, that, notwithstanding, it was rightly left to the jury to say, whether he had actually and *bond fide* served under his apprenticeship; the fact of his superintending his father's business was not so totally inconsistent with his service as an apprentice, but that it was a question for the jury to determine whether he was acting as clerk to his father during the seven years, or as an apprentice to the party to whom he was bound—which the occasional, and which the principal, employment. *Todd v. the Watermen's Company*, 2 Law J. (N.S.) K.B. 17.

### FREEHOLD AND COPYHOLD ESTATES

Rendered assets for payment of simple contract and specialty debts. 3 & 4 Will. 4, c. 104; 11 Law J. Stat. 217.

### FRIENDLY SOCIETIES.

Time for conforming to the provisions of 10 Geo. 4, c. 56, extended. 2 Will. 4, c. 37; 10 Law J. Stat. 55.

Extension of provisions of acts relating to, to Guernsey, Jersey, and Man. 5 & 6 Will. 4, c. 23; 13 Law J. Stat. 43.

The provisions of the 10 Geo. 4, c. 56, s. 6, do not apply to societies established before the passing of that act. *Re v. the Justices of Somersetshire*, 2 Law J. (N.S.) M.C. 40, s. c. 4 B. & Ad. 549; 1 N. & M. 252.

FUNERAL.

[See EXECUTOR AND ADMINISTRATOR.]

FUR.

[See CARRIER.]

GAME.

[See MURDER AND MANSLAUGHTER.]

Prevention of trespass, in pursuit of, in Scotland. 2 & 3 Will. 4, c. 68; 1 Law J. (N.S.) Stat. 192.

To bring a party within the stat. 52 Geo. 3, c. 93, for not producing his game certificate, it is not necessary that the demand of it should be made on the land on which he was sporting; but the demand must be made so immediately after the party has left the land, as to form a part of the same transaction.

It is not necessary that the person making the demand should produce any certificate; and if the other party refuse to produce his, he takes the risk of whether the person demanding is one having a right to make such demand.

If a person refuses to produce his game certificate, or to tell his name or residence, the person demanding need not go on to ask in what place, if any, he is assessed to the game duty. *Scarth v. Gardener*, 5 C. & P. 38. [Tenterden]

In an action on the stat. 9 Anne, c. 24, s. 2, it is sufficient to allege, in the declaration, that the defendant had a hare in his possession. *Talboys v. Brown*, 3 Doug. 344.

A clergyman having a living of less than 150*l.* per annum, is not qualified, under stat. 5 Anne, c. 14, to kill game. *Lowndes v. Lewis*, 3 Doug. 88.

In an action on the game laws for several penalties, the defendant may pay one penalty into court, the plaintiff being at liberty to go on for the others. *Harcourt v. Knapp*, 3 Doug. 214.

Where the information was for keeping two lurchers, and the conviction is for one, the conviction is good. *King v. Cottrell*, 4 Doug. 350.

The 2 Geo. 3, c. 19, provided that no person should, on any pretence whatever, take, kill, destroy, carry, sell, buy, or have in his possession or use, any partridge, &c., between days therein mentioned, which by a subsequent statute were altered to the first day of February and the first day of September; and a penalty of 5*l.* was imposed upon any person who should act against the true intent and meaning of that provision:—Held, that the penalty did not attach in a case where the bird was killed before or on the 1st of February, and kept afterwards. *Simpson v. Uwin*, 1 Law J. (N.S.) M.C. 28, s.c. 3 B. & Ad. 184.

The right of shooting over a manor is an incorporeal hereditament, and cannot be granted except by deed. *Bird v. Higginson*, 4 Law J. (N.S.) K.B. 124, s.c. 2 Ad. & E. 696; 4 N. & M. 605.

If an indictment under 57 Geo. 3, c. 90, describe the place in which the defendant was found armed, by giving a name, and also stating who the owner or occupier is, a mistake in the name will be fatal; though it is not necessary, where the name of the owner or the occupier of the close is stated, to

state the name of the close also. *Rex v. Owen*, 1 R. & M. C.C. 118.

On an indictment on 57 Geo. 3, c. 90, for having entered a given close, with intent there to kill game, and being there found armed, it is necessary to prove an entry, with that intent, into the close specified. But *quære*, whether it is necessary the party charged should have such an intent in the place in which he is found armed, unless so stated in the indictment. *Rex v. Barham*, 1 R. & M. C.C. 151.

A count in an indictment for night poaching stated, that the prisoners were in a field called A, for the purpose of then and there taking game:—Held, that the prisoners could not be convicted on that count, unless the jury were satisfied that the prisoners had an intention of taking game in that particular field. *Rex v. Capewell*, 5 C. & P. 549. [Parke]

To sustain an indictment for night poaching, armed, &c., the parties must have been in the place charged in the indictment, with intent to destroy game, &c. there; and it is incumbent on the prosecutor to convince the jury that the defendants had an intent to destroy game, &c. in the particular place mentioned in the indictment. *Rex v. Gainer*, 7 C. & P. 231. [Coleridge]

On an indictment under 57 Geo. 3, c. 90, a man may be convicted of having entered a wood, and of being found armed there, though he is not seen in such wood. It is sufficient if there be evidence to shew he had been there armed. *Rex v. Worker*, 1 R. & M. C.C. 165.

To support an indictment for night poaching by three or more being armed, &c., it is not sufficient to prove that one of the prisoners was in the place laid in the indictment, and that the rest of the party were in another wood, which was separated from the place mentioned by a turnpike road. *Rex v. Doussell*, 6 C. & P. 398. [Patteson]

A count for night poaching may be joined with a count on sect. 2 of the stat. 9 Geo. 4, c. 69, for assaulting a gamekeeper, authorized to apprehend, and with counts for assaulting a gamekeeper in the execution of his duty, and for a common assault. *Rex v. Finacane*, 5 C. & P. 551. [Parke]

"A certain cover, in the parish of A," is too general a description to sustain an indictment for poaching, under the stat. 9 Geo. 4, c. 69. *Rex v. Creek*, 5 C. & P. 508. [Vaughan]

The servant of the owner of a wood attempted to apprehend a poacher whom he found there at eight o'clock in the morning of the 17th of December, and the poacher shot at him:—Held, that this was not a capital offence, within the stat. 9 Geo. 4, c. 31, ss. 11 and 12, as there was no proof that the poacher was in pursuit of game an hour before sunrise. *Rex v. Tomlinson*, 7 C. & P. 183. [Coleridge]

The 9th sect. of the stat. 9 Geo. 4, c. 69, which relates to night poaching, creates two distinct offences:—First, the entering in the night on the land, to the number of three, some one of them being armed; and second, the being in the night on the land to the number of three, some one of them being armed. The form of indictment for night poaching, given in Jerv. Archb. is good. *Rex v. Kendrick*, 7 C. & P. 184. [Coleridge]

A person who is employed by a lord of a manor as a watcher of his game preserves, is a person having authority to apprehend night poachers, and he need not have any written authority from the lord of the manor. Where a person is found night poaching on the manor of A, by one of his watchers, and is pursued off the manor, and then on to it again, and there snaps his gun at the watcher, he is guilty of the capital offence, under the stat. 9 Geo. 4, c. 32, ss. 11 and 12. *Rex v. Price*, 7 C. & P. 178. [Parke]

Whether the preferring of an indictment against a party for night poaching, which is ignored, is a commencement of the prosecution within section 4 of the statute 9 Geo. 4, c. 69, so as to warrant the conviction of the party on another indictment, preferred four years after the offence, *quære*. *Rex v. Killmaster*, 7 C. & P. 228. [Coleridge]

A game-keeper or other person lawfully authorized under 9 Geo. 4, c. 69, s. 2, may apprehend persons found offending under that act, without giving notice of his purpose. *Rex v. Payne*, 1 M. C.C. 378.

### GAMING.

[See BILL OF EXCHANGE—NEW TRIAL—SECURITIES.]

### GAMING HOUSE.

[See INDICTMENT.]

### GAOL (BUILDING.)

[See JUSTICES, Powers and Duties of.]

### GAS COMPANY.

[See RATE, Paying Rate.]

### GAS WORKS.

[See NUISANCE.]

### GIFT.

Gift by deed, subject to a power of appointment by the donor, from a person upwards of ninety years of age, to a confidential agent, who had for many years been in habits of friendship with the donor, without the intervention of a disinterested third person; the solicitor who drew the deed, being the solicitor of the person who took the benefit under it, declared void at the Rolls; but supported, under all the circumstances, upon appeal. *Hunter v. Atkins*, 3 M. & K. 113.

A partial interest given to a person, does not prevent his taking as one of a class under a subsequent general gift.

A gift of stock to A for life, and for default of legitimate issue of A, to the settlor's next-of-kin:—Held, that A's life interest did not prevent his taking a share, as one of the next-of-kin.

A limitation to the next-of-kin of A, means his nearest of kindred, and not the next-of-kin under

the Statute of Distributions. *Elmsley v. Young*, 4 Law J. (N.S.) Chanc. 200, a. c. 2 M. & K. 82, 780.

### GLASS.

Amendment of laws relating to, and alteration of duties. 2 & 3 Will. 4, c. 102; 10 Law J. Stat. 255.

### GOLD AND SILVER PLATE

Manufactured in Ireland, drawback upon, allowed. 3 & 4 Will. 4, c. 97; 11 Law J. Stat. 196.

### GOODS SOLD AND DELIVERED, AND BARGAINED AND SOLD.

[See CHURCHWARDENS AND OVERSEERS.]

Under non assumpsit to a count for goods bargained and sold, evidence may be given that the contract was made subject to conditions, which have not been complied with on the part of the vendor. *Alexander v. Gardner*, 4 Law J. (N.S.) C.P. 223, a. c. 1 Sc. 281; 3 Dowl. P.C. 146.

A, a publisher, had for some years supplied a periodical work to W, as fast as the numbers came out. W died, and A not knowing of his death, continued sending the numbers of the work by the stage coach, addressed to W. These numbers were received by B, who had succeeded to the property of W, and there was no evidence that B had ever offered to return them:—Held, that A might maintain an action for goods sold and delivered against B, though at the time of the deliveries A was not aware of the death of W. *Weatherby v. Banham*, 5 C. & P. 228. [Tenterden]

Goods were sold upon the following terms: "seven and a half per cent. discount, bill at three months; ten per cent. discount, cash in fourteen days;"—Held, that the vendors could not sue in *indebitatus assumpsit* for goods sold and delivered within the fourteen days, even if the sale had been effected by fraud on the part of the vendee, so that trover might have been maintained for the goods. *Strutt v. Smith*, 3 Law J. (N.S.) Exch. 357, a. c. 1 C. M. & R. 312.

Plaintiff declared for goods sold, and on an account stated. The particular delivered with the declaration was, "to a beast sold and delivered 13*l.* 10*s.*" The only evidence was, that the plaintiff admitted in conversation with a third person, not shewn to be an agent of the plaintiff, that he owed the latter 13*l.* 10*s.*:—Held, that this was no evidence of an account stated; and that it was not evidence on the count for goods sold, as it was not shewn to be applicable to the particular. Leave was given to the plaintiff to amend his particular, and go to a new trial on payment of costs. *Breckon v. Smith*, 1 Ad. & E. 488.

A party to whom goods to the amount of 10*l.* and upwards are delivered, subject to approval under a parol order, must refuse to accept them in a reasonable time: if he does not, he is to be treated as having accepted them. *Coleman v. Gibson*, 1 M. & R. 168. [Tenterden]

The traveller of a tradesman in London, called on his employer's debtor in the country, and being unable to obtain cash, consented, at the request of the debtor, to take an acceptance for the amount, and wrote the whole form of a bill except the name of the drawer, and sent it up to his employer, telling the debtor that he did not think it would be satisfactory. The employer kept the bill, but did not put his name to it as drawer. The traveller had no authority to sign bills, but was in the habit of sending them up without a drawer's name, to prevent risk by loss:—Held, that these facts did not amount to proof of the drawing of a bill, so as to prevent the creditor from recovering upon his original demand, before the instrument purporting to be a bill became due. *Vyes v. Clark*, 5 C. & P. 403. [Vaughan]

Where the buyer of goods hands over to the seller the promissory note of a third party, without indorsing it:—Held, that in an action for the price of the goods, the plaintiff need not prove presentment of the promissory note to the maker. *Goodwin v. Coates*, 1 M. & R. 221. [Parke]

A baker delivered bread from week to week, and was paid many sums by the housekeeper of his customer, and receipted weekly bills for a period of time, subsequent to a time for which the housekeeper had not paid him:—Held, in an action by him to recover from his customer the amount of the unpaid bills, that the question of negligence was not raised, and that the plaintiff was entitled to the verdict, as the defendant did not prove that he had given the housekeeper money for the purpose of paying the bills in question. *Miller v. Hamilton*, 6 C. & P. 433. [Denman]

The plaintiffs and defendants entered into a contract for the transmitting and receiving of certain butters, which were to be shipped in the month of October, free on board, at a price specified, and to be paid for by a bill at two months after date of arrival. The goods, however, were not shipped till the month of November, when the bill of lading and invoice were delivered to and accepted by the defendants. Upon the loss of some of the butters, and injury of the remainder, and refusal of the defendants to accept or pay:—Held, that the action for goods bargained and sold was properly brought, as the parties had waited for the time at which the bill, if given, would become due; and that a parol contract might be found by the jury, varied by parol.

*Quere*—whether the plaintiff, under such circumstances, could have maintained an action for goods sold and delivered. *Alexander v. Gardiner*, 3 Law J. (n.s.) C.P. 223, a.c. 1 Bing. N.C. 671; 1 Sc. 631.

Where it was agreed by three executors, that a certain sum, (the value of goods to be purchased by the defendant,) should be paid to one of them:—Held, that they might well join in an action for goods sold and delivered by the three: that the one to whom the money was to be paid, was to be considered, as it were, merely the banker and agent of the rest. *Pearson v. Pearson*, 3 Law J. (n.s.) K.B. 62, a.c. 5 B. & Ad. 859; 2 N. & M. 471.

The defendant agreed with the plaintiff for the completion of a machine, and made two payments in advance. During the work, he frequently saw the machine, and suggested various alterations.

Upon its completion, he saw and approved of the article, and requested time for the payment. Finally, however, he refused to accept or to pay. Upon action for goods bargained and sold,—Held, that the acts of the defendant amounted and were equivalent to an assent, and to an appropriation of the article by him; consequently, that the action was well brought, and that the plaintiff was entitled to recover. *Elliott v. Pybus*, 3 Law J. (n.s.) C.P. 182, a.c. 10 Bing. 512; 4 Mo. & Sc. 889.

If, in an action on a guarantee for payment for goods to be supplied to A, the plaintiff aver that goods were supplied to A, and the defendant plead non assumpsit, this admits the supply of the goods to A, and no proof is required in support of the averment, and the plaintiff need not give any evidence that the goods were supplied, except with a view of shewing the amount of damages. *Taylor v. Hillary*, 7 C. & P. 30. [Gurney]

If, in an action for goods sold, the question be, whether the credit was given to the defendant's wife, or to her father; evidence that other persons had given credit to the father is not receivable. *Smith v. Wilkins*, 6 C. & P. 180. [Tindal]

If there has been a contract for a sale of goods at a specific price, and a subsequent delivery of the goods, the defendant cannot set up, as a defence, that the goods were of so bad a quality, as to be useless, unless he has specially pleaded it. *Ruffay v. Smith*, 6 C. & P. 662. [Denman]

#### GOOD-WILL.

Whether the good-will of a professional business is saleable—*quere*. *Jones v. Noy*, 3 Law J. (n.s.) Chanc. 14, a.c. 2 M. & K. 125.

#### GRAND JURY CESS.

Amendment of acts relating to, in Ireland. 4 & 5 Will. 4, c. 55; 12 Law J. Stat. 109.

#### GRANT.

A being seised of a mill, and having a sole fishery in the waters of the mill, with all waters, streams, &c. necessary in working the same, "except and always reserving the right and privilege of fishing in the waters of the said mill":—Held, that this was an exception of the sole fishery, and not a reservation of a new easement. *Lord Paget v. Miles*, 3 Doug. 48.

A grant by the King of "free warren and free chase" does not extend over the king's own lands, unless the grant contain unequivocal words to shew that such was the intention.

The term "demesne lands" is correctly and usually applied to the lands of a manor, which the lord of that manor either actually has, or potentially may have, *in propriis manibus*.

Accordingly, King James I. granted the king's manor and town of Aulton, the king's hundred of Aulton, with its rights, and all other things to the said manor, town, and hundred belonging, to Sir R. Tichbourne, and that he, his heirs and assigns, should ever thereafter have free warren and free chase in all their demesne lands, in the hundred, manor, town,

tenements and hereditaments aforesaid, and in all other lands and woods being in the same hundred, manor, town, tenements, and hereditaments, although the same lands, and other lands or woods, were within the king's forest:—Held, that this grant conferred upon Sir R. T. and his heirs a right of free warren and free chase in those lands, within the manor of Aulton, which Sir R. T. had as lord of the manor, under the description of "demesne lands," and a similar right, under the term "other lands," in whatever tenemental lands Sir R. T. held in fee, either of the king or of any other lord, within the limits mentioned in the grant. *Attorney General v. Parsons*, 1 Law J. (N.S.) Exch. 103, s. c. 2 C. & J. 279; 2 Tyr. 223.

To an action of trespass, the defendant pleaded, "that Charles I. being seised of the *locus in quo*, by letters patent granted to W. Earl of Pembroke, &c. that they might have free warren, fowling, and hunting," and produced the letters patent, by which was granted "free chase and free warren in all the demesne lands, and lands holden by copy of court roll, of the manor of Rickmansworth," &c. The plea then deduced title to the free warren to J F and T D, and alleged that they were seised in fee, and that by indenture of lease and release they granted the said free warren to R W, W W, and T L, and then deduced title to defendant. To this plea the plaintiff replied, taking issue upon the release, and also pleaded *non concessit*. On the production of the lease and release, it appeared to be a conveyance, amongst other things, of "all the manor or lordship of Rickmansworth," &c., "and all other rights, liberties, franchises, &c., hereditaments and appurtenances whatsoever, to the said manor and lordship belonging, or in anywise appertaining, or to or with the same, or any part thereof, then or at any time theretofore usually held, used, occupied, or enjoyed, &c., or as were in and by the said deed of grant or letters patent granted and assured by the Crown to the said W. Earl of Pembroke, as appurtenant to the said manor or lordship":—Held, that by the letters patent, as pleaded and produced in evidence, a warren in *gross* was granted, and that the conveyance of 1818 conveyed only the manor and what was appurtenant or appendant to the manor; that the warren in *gross* being no part or parcel of the manor, therefore did not pass by that conveyance.

*Quære*—whether upon the issue *non concessit*, the party is estopped from going into the inquiry as to the title of the grantor. *Morris v. Dimes*, 3 Law J. (N.S.) K.B. 170, s. c. 1 Ad. & E. 654; 3 N. & M. 671.

R L granted by deed to the abbot and monks of S, the pasture called Brandwood to feed their animals, and that the grantees should have in that pasture 100 cows. By deed of the 26 Edward 3, reciting the former grant, Henry Duke of Lancaster, the then owner of the fee, released to the abbot and the monks, and their successors for ever, all the right and claim which belonged to him and his heirs by any title in the pasture aforesaid, and that it might be lawful for the abbot and convent, and their successors, to inclose the said pasture, and to reduce it to cultivation, or to make any other profit thereof, at their free will, without contradiction or impediment saving to the grantor and his heirs their right to hunt. On ejectment brought to recover

the land, as part of the waste of a manor belonging to the duchy of Lancaster, the above deeds were proved, and it appeared that as far back as living memory went, rights of ownership, inconsistent with the alleged title in respect of the duchy, had been exercised over the lands; and they had been inclosed sixteen years:—Held, that the abbot and monks were to be presumed to have been in possession at the time of the second deed, and that it operated as a conveyance of the soil by way of release, though there were not words to make it operate as a feoffment with livery of seisin. *Doe d. Dearden v. Madden*, 5 B. & Ad. 880, s. c. 1 N. & M. 533.

## GREAT SESSIONS.

[See WALEA.]

## GREENLAND TRADE.

[See INSURANCE.]

## GREENWICH HOSPITAL.

Contribution from seamen's wages for support of, abolished. 4 & 5 Will. 4, c. 34; 12 Law J. Stat. 57.

## GRIEVOUS BODILY HARM.

[See WOUND.]

If a person, for the purpose of accomplishing a robbery, wound by means of kicking the shin of the party whom he is endeavouring to rob, he is punishable under the statute 9 Geo. 4, c. 31, s. 12, if the jury find that his intent was, either to disable or to do grievous bodily harm. *Rex v. Shadbolt*, 5 C. & P. 504. [O.B.]

## GUARANTIE.

[See SHIP AND SHIPPING, Charter-party—STAMP, Agreement.]

- (A) ACCEPTANCE OF.
- (B) CONSTRUCTION OF.
- (C) NOTE OR MEMORANDUM, WITHIN THE STATUTE OF FRAUDS.
- (D) RIGHTS AND LIABILITIES.
- (E) PLEADINGS AND EVIDENCE.

### (A) ACCEPTANCE OF.

Guarantie in the following form: "F. informs me that you are about publishing an Arithmetic for him. I have no objection to being answerable as far as 50*l.*; for my reference apply to B." Signed "G. T." B. wrote this memorandum, and added "Witness to G. T.—J. B." It was forwarded by B. to the plaintiffs, who never communicated their acceptance of it to G. T. In an action against the latter on the guarantee,—Held, that the plaintiffs, not proving any notice of acceptance to the defendant, were not entitled to recover. *Moxley v. Tinkler*, 4 Law J. (N.S.) Exch. 84, s. c. 1 C. M. & R. 692; 5 Tyr. 416.



(B) CONSTRUCTION OF.

"Whereas W. C. is indebted to you, and may have occasion to make further purchases from you; as an inducement to you to continue your dealings with him, I undertake to guarantee you in the sum of 100*l.* payable to you in default on the part of the said W. C. for two months:"—Held, a continuing guarantie. *Allen v. Kenning*, 9 Bing. 618, s. c. 2 Mo. & Sc. 768.

A guarantie, to be responsible "that payments shall be regularly made" for goods furnished by one trader to another, is not limited to goods supplied on the usual credit of the trade, or to the credit on which the parties previously dealt; a reasonably extended credit is within the terms of the guarantie. *Simpson v. Mansley*, 1 Law J. (N.S.) Exch. 3, s. c. 2 C. & J. 94; 2 Tyr. 86.

"I do hereby engage to pay the directors of the Manchester Gas Works, or their collector, for all the gas which may be consumed in the Minor Theatre, and by the lamps outside the theatre, during the time it is occupied by my brother-in-law, Mr. N; and I do also engage to pay for all arrears which may be now due," is not an entire agreement, but the promise to pay for the future supply of gas is separate and distinct from the promise to pay the arrears.

For gas supplied upon the former promise, the plaintiff may recover on a count for goods sold and delivered; but special counts averring the entire agreement cannot be sustained, inasmuch as there is no sufficient consideration, within the Statute of Frauds, to support the engagement to pay the arrears, and, therefore, the contract proved will vary from the contract alleged in such counts. *Wood v. Benson*, 1 Law J. (N.S.) Exch. 18, s. c. 2 C. & J. 94; 2 Tyr. 93.

"Mr. R. H. C. of the office of Ordnance, Barbadoes, about to proceed thither in the *Mary*, having incurred an account with you amounting to 49*l.* 5*s.*, with the understanding that he is to transmit the amount to you three months after he shall have arrived at Barbadoes, we hereby guarantee his performance of the said engagement, and in failure thereof, we will be responsible to you"—not a valid contract, no sufficient consideration appearing on the face of it. *Ellis v. Levi*, 4 Law J. (N.S.) C.P. 294, s. c. 1 Sc. 669, n.

A guarantie to pay for goods supplied, is not to be construed strictly against the surety, but clear and plain language must be used, in order to make it a continuing guarantie.

Thus, a guarantie "to be answerable for the payment of 50*l.* for T. L; in case T. L. does not pay for the gin, &c. he receives from you, I will pay the amount:"—Held, not a continuing guarantie, but to be extinguished on the first payment for goods delivered to the amount of the sum specified. *Nicholson v. Paget*, 2 Law J. (N.S.) Exch. 18, s. c. 1 C. & M. 48; 3 Tyr. 164; 5 C. & P. 395.

A builder having contracted to perform certain works for government, his sureties entered into a contract to guarantee to a person who supplied him with bricks, payment out of the amount of the money payable by government to the builder. He performed part of the work, and received some money, which the seller of the bricks allowed him to retain.

He was employed to do some extra work, and ultimately broke his contract with government. Other persons were employed to complete it; and with the consent of the sureties, the money paid to them was deducted from the amount payable under the contract, and the balance did not cover the extra work:—Held, under these circumstances, that the seller of the bricks could not treat the money paid to those persons as paid to the contractor, and, therefore, as payment had not been made to him, the guarantie was not broken:—Held also, that the guarantie did not attach unless the whole amount was paid over by government. *Heming v. Maline*, 4 Law J. (N.S.) Exch. 245, s. c. 2 C. M. & R. 385.

(C) NOTE OR MEMORANDUM, WITHIN THE STATUTE OF FRAUDS.

An undertaking was given by the defendant in the following words: "Inclosed I forward you the bills drawn per A, upon and accepted by D, which I doubt not will meet due honour, but in default thereof, I will see the same paid." (Subscribed by the defendant):—Held, that an action could not be maintained upon such undertaking against the defendant, inasmuch as the consideration for such promise did not sufficiently appear; consequently, that the case was not within the Statute of Frauds, sect. 4. *Hawes v. Armstrong*, 4 Law J. (N.S.) C.P. 254, s. c. 1 Bing. N.C. 761; 1 Sc. 661.

"You will be so good as to withdraw the promissory note, and I will see you at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son, making in the whole 45*l.*"—Held, that upon proof that there was only one promissory note to which this could apply, the consideration was sufficiently apparent on the face of the guarantie:—Held, secondly, that there was no necessity to produce the memorandum alluded to. *Shortrade v. Cheek*, 3 Law J. (N.S.) K.B. 125, s. c. 1 Ad. & E. 57; 3 N. & M. 866.

In an agreement in writing to pay the debt of another, the consideration must be either stated in express words, or to be implied with certainty from terms used. A letter, therefore, from the defendant to the plaintiff in the following words—"As you have a claim on my brother for 5*l.* 17*s.* for boots and shoes, I hereby undertake to pay you the amount within six weeks from this day"—was held not to satisfy the Statute of Frauds. *Jarrett v. Williams*, 5 B. & Ad. 1109.

(D) RIGHTS AND LIABILITIES.

A had given a *cognovit* for 37*l.*, payable by monthly instalments; but, if default was made in payment of any instalments, judgment was to be entered up for the whole 37*l.*, or so much as remained due; and B agreed that A should attend at the office of C on the seventh day after "any notice," so that, if any of the instalments were not paid, A might be taken on a *ca. sa.* The first instalment was not paid, and the judgment was entered up for the whole sum, and a *ca. sa.* sued out. Notice was given to B for A to attend at C's office on the seventh day. A did so, but C gave him a week's time:—Held, that this was a complete performance of B's agreement; and that, if, after notice was given for A to attend on another day, and A did not attend,

no action would lie against B. *Turner v. Pyne*, 6 C. & P. 310. [Denman]

The defendant entered into a bond to the plaintiffs, reciting, that the plaintiffs, at the recommendation of the obligor, had agreed to take P J into their service, and employ him as a clerk, in their shop and counting-house; and the condition was, that, if P J should faithfully account for, &c. to the plaintiffs, all such sums as he should receive in the service of the plaintiffs, then &c. The plaintiffs afterwards took B B as a partner into their business:—Held, that the defendant was liable for money embezzled by P J after the new partnership. *Barclay v. Lucas*, 3 Doug. 324.

A tradesman can only recover against a person making a false representation of the means of one who referred to him, such damage as is justly and immediately referable to the false representation; therefore, if the tradesman gives an indiscreet and ill-judging credit, he cannot make the referee answerable for any loss occasioned by it. *Corbett v. Brown*, 5 C. & P. 363. [Tindal]

A guarantie of monies advanced by a firm, consisting of F. & Co., will not extend to a new firm, in which H. is introduced as a partner. Payments made by the principal after the alteration of the firm, and in transaction with him, are applicable to the extinction of the balance due to the old firm at the date of the alteration. *Spiers v. Houston's Executors*, 4 Bl. n.s. 515.

Guarantie in these words, "Mr. F. informs me that you are about publishing an Arithmetic for him and another person; I have no objection to be answerable as far as 50*l.*; for my reference apply to Messrs. Brooks & Co. of this place:"—Held, that this was only a proposal, which required an answer, and that the testimony of Brooks, the referee, as to the defendant's solvency, which was written on the letter, was not sufficient to prove their assent; and, therefore, nothing having been done in answer, the plaintiffs could not maintain their action. *Mosley v. Tinkler*, 4 Law J. (n.s.) Exch. 84, a.c. 1 C. M. & R. 692; 5 Tyr. 416.

A promise by a third person to pay a receiver appointed by the Court of Chancery a debt due to the estate at the end of two months if it were then unpaid, in consideration of the receiver agreeing not to adopt legal proceedings against the original debtor for that period, is a valid promise, made upon good consideration, and on which the receiver may sue in his own name. *Willatts v. James Kennedy*, 1 Law J. (n.s.) C.P. 4, a.c. 8 Bing. 5; 1 Mo. & Sc. 35.

A guarantie given by a party as an additional security to a warrant of attorney given by a debtor, will be annulled, if the creditor take from the debtor and a stranger, a fresh warrant of attorney for other sums, besides that for which the original guarantie was given, and for the payment of which a longer time than that originally specified is allowed. *Sylvester v. Anthony*, 2 Law J. (n.s.) C.P. 103, a.c. 9 Bing. 746; 3 Mo. & Sc. 191.

Upon a guarantie, for payment of goods to be sent until notice to the contrary, where the course of dealing was altered by an extension of credit, without the consent of the guarantor, he is discharged.

The taking of a bill after the time of credit is ex-

pired, is such an extension of credit. *Combe v. Wood*, 1 Law J. (n.s.) C.P. 51, a.c. 8 Bing. 156; 1 Mo. & Sc. 241.

The question whether an undertaking to be answerable for goods supplied to another is collateral or original, so as to render the party for whose use the goods are supplied liable over in an action for money paid, depends not only on the words used, but upon all the circumstances of the transaction.

Accordingly, where S introduced P to an upholsterer, and asked him, if he had any objection to supply P with furniture, and that, if he would, he would see him paid; and the upholsterer inquired how long credit he wanted, to which S replied, he would see it paid at the end of six months; and the upholsterer agreed, and S ordered the goods, which were delivered according to the direction of P, the upholsterer entering the order in his ledger—"Mr. P per Mr. S";—and at the end of six months S on being applied to by the upholsterer, paid the money:—Held, that S was entitled to recover the amount against P, if the jury were of opinion that the undertaking by S was not collateral, but that the original credit was given to him. *Simpson v. Penton*, 3 Law J. (n.s.) Exch. 126, a.c. 2 C. & M. 480; 4 Tyr. 315.

"Giving time," so as to exonerate a surety, means, extending the period at which, by the original contract, the principal debtor would be liable to pay the creditor, by a new and valid contract between the creditor and the principal debtor, to which the surety does not assent.

W. & Co., whose course of dealing as bankers was occasionally to take acceptances from their customers for the balance of their accounts, in January 1825 opened an account with B, on receiving the defendant's guarantie, to become responsible on their opening an account with B, and honouring his cheques. The defendant was the solicitor of the bankers; but was not proved to be acquainted with their course of business. The bankers ceased to make any advances to B in February 1827. In October 1827, he made a payment into the bank; and in February 1828, for the first time since the account was opened, they took his acceptance at three months for the amount of his balance:—Held, that the taking of that acceptance was a giving of time, so as to discharge the defendant as surety.

*Quere*—whether, if this had not been a discharge, the Statute of Limitations would have begun to run against the surety from the time when the last advance was made by the bankers, or when B made the payment into the bank. *Howell v. Jones*, 3 Law J. (n.s.) Exch. 255, a.c. 1 C. M. & R. 97; 4 Tyr. 543.

Where a party guaranteed for a certain amount, on condition that no application should be made to him "but on failure of the plaintiffs' utmost efforts and legal proceedings to obtain the same from the principal:"—Held, that the meaning of this was, that the plaintiffs should use their utmost efforts to obtain payment from the principal before they called upon the surety; and, where the principal made default in 1822, remaining in the country till 1824, without any means having been taken to arrest him, or by action to compel him to pay, until 1831, when he returned permanently to this country, and was arrested by the plaintiffs, and took the be-

nefit of the Insolvent Debtors Act in 1832:—Held, that the plaintiffs were guilty of laches in allowing the principal to remain in the country for two years without taking means to compel him to pay, and that the Statute of Limitations was a bar to the action against the executors of the surety, brought in 1829, on process issued in 1826, and continued on the roll. *Holl v. Hadley*, 4 Law J. (n.s.) K.B. 126, s.c. 4 N. & M. 515; 3 Ad. & E. 758.

(E) PLEADINGS AND EVIDENCE.

[*Lysaght v. Walker*, 2 D. & Cl. A.C. 211; 2 Law J. Dig. 143, s.c. 5 Bl. N.S. 1.]

To a plea in assumpsit, on a promise to pay the debt of a third person, that there was no agreement in writing, pursuant to the Statute of Frauds,—*semble*, that the plaintiff cannot reply generally, that there was such an agreement, but is bound to set it out in the replication. *Low v. Eldred*, 2 Law J. (n.s.) Exch. 81, s.c. 1 C. & M. 239; 3 Tyr. 234.

Where, to an action of assumpsit, the defendant pleads that the promise was, to be answerable for the debt of another, and that there is no memorandum in writing, within the Statute of Frauds, it is competent to the plaintiff, in his replication, to take issue upon that fact generally, and he is not compelled to set out the memorandum. *Wakeman v. Sutton*, 4 Law J. (n.s.) K.B. 33, s.c. 2 Ad. & E. 78; 4 N. & M. 114.

Assumpsit on a promise, that in consideration that plaintiff would forego a lien on goods which he had of a third person, defendant would pay the plaintiff 5*l*. Plea—That the supposed promise was a special promise to answer for the debt of another, and that there was no memorandum wherein the consideration was set forth, but that it was as follows (then setting out an agreement which, *prima facie*, was within the statute):—Held, upon demurrer, that this was sufficiently identified with the agreement declared upon, without an express averment that it was the only agreement; and that it was a good plea in law to the action. *Clancey v. Piggott*, 4 Law J. (n.s.) K.B. 75, s.c. 2 Ad. & E. 473; 4 N. & M. 496.

A guarantie in consideration of withdrawing a distress, to pay the sum due for rent "out of the produce of the effects," is a positive undertaking to pay, if the goods produce sufficient; and therefore, in an action thereon, proof that the goods produced the amount of the rent, entitles the plaintiff to recover the amount, although there were prior claims. *Stephens v. Pell*, 3 Law J. (n.s.) Exch. 214, s.c. 2 C. & M. 710; 4 Tyr. 267.

Declaration stated that the defendant guaranteed the plaintiff in the supply of goods to one Henry Holt. Plea, that, before the breach of that agreement, it was agreed that the plaintiff should supply goods to the said H H, and that they should be paid for at the end of three months by a joint bill at four months to be accepted by the defendant, which agreement, before the breach of the agreement in the declaration, the plaintiff accepted in full discharge thereof, and thereby released the defendant from the performance thereof:—Held, that the agreements were not the same; that the second was a personal undertaking, and, therefore, did not require a note in writing; and that the plea did not amount to a plea of accord and satisfaction,

and, therefore, did not require an averment that the time of credit had not expired, or that the bill had been given. Consequently, it was a good answer to the action. *Taylor v. Hillary*, 4 Law J. (n.s.) Exch. 72, s.c. 1 C. M. & R. 741; 5 Tyr. 378.

GUARDIAN.

[See INFANT—Poor, Settlement by Estate.]

Guardian cannot be allowed funeral expenses out of a fund given for the ward's maintenance. — *v. Wood*, 2 Law J. (n.s.) Chanc. 41.

HABEAS CORPUS.

[See AFFIDAVITS—PRISONER, Declaring against—SHERIFF.]

The Court will not grant a rule absolute in the first instance for a *habeas corpus ad testificandum*, to bring up a prisoner in custody for a misdemeanour, but a rule *nisi* only, to be served on the Attorney General, the gaoler, and all persons at whose suit the prisoner has been in custody.

*Semble*—The Court have no power to grant such a rule, without the consent of the Attorney General. *In re John Pilgrim*, 4 Law J. (n.s.) M.C. 120, s.c. 4 Dowl. P.C. 89; 3 Ad. & E. 486.

A *habeas corpus ad testificandum* may be obtained to bring up the body of a confined lunatic to give evidence in a cause, upon an affidavit shewing that he is not a dangerous lunatic, and that he is in a fit state to be brought up. *Fennell v. Tait*, 1 C. M. & R. 584, s.c. 5 Tyr. 218.

Though a judgment is against several, a *habeas corpus ad satisfaciendum* ought only to be issued against those who are in custody. *Wilson v. Bacon*, 1 Dowl. P.C. 118.

When a defendant is committed, under a *habeas corpus* to the custody of the marshal, it is not necessary to enter a *committitur* piece on the judgment roll. *Goodman v. —*, 1 Dowl. P.C. 128.

If a writ of *habeas corpus* to remove a cause from the Palace Court wherein judgment has been suffered by default, is not delivered till after the jury have assessed the damages on the writ of inquiry, the Court will issue a *procedendo*. *Smith v. Sterling*, 3 Dowl. P.C. 609.

Where a part of a debt has been levied, and the defendant is detained on a *habeas corpus ad satisfaciendum* for the residue, it is not necessary to refer in the latter writ to the amount of the levy made. *Green v. Foster*, 2 Dowl. P.C. 191.

A proceeding in a cause (*e.g.* suing out a *habeas corpus* to bring up a cause from an inferior court,) is not irregular because such proceeding was taken by an uncertificated attorney.

In support of a motion to set aside a Judge's order for a *procedendo* after a *habeas corpus* removing from an inferior court into King's Bench, it was sworn, that the Judge made the order in consequence of its being proved before him, by the affidavit of J N, that the *habeas* was issued by an uncertificated attorney:—Held, that this statement of the ground of the order was sufficient for the Court to act upon, without the production of the affidavit of J N, there being no statement on the other side that any different ground had existed. The *habeas corpus* was

sued out in the cause in the inferior court, by the defendant in that court. The application to set aside the order, and the *procedendo*, was made by parties who were bail for the defendant in a cause in the King's Bench, (and not in the suit below) for the purpose of bringing up the defendant to be rendered in the cause in the King's Bench. Upon their motion (though it was objected that they were not proper parties to apply) the Court set aside the Judge's order, and directed that the *habeas corpus* should stand revived, reserving it, however, for consideration, how the defendant should be dealt with as to future custody on his being brought up:—Held, no objection to the making of the last-mentioned rule, that, since the *procedendo* issued, a writ of inquiry had been executed in the cause in the inferior court, and it did not appear that final judgment had yet been signed. *Glyn v. Hutchinson*, 2 Ad. & E. 660, s. c. 3 Dowl. P.C. 529.

Where a cause is removed from an inferior jurisdiction by *habeas corpus*, and the plaintiff declares conditionally before special bail perfected, and indorses a demand of plea on his declaration, according to Rule 43, 1 Reg. Gen. Hil. term, 2 Will. 4, special bail is waived. *Law v. Stevens*, 1 Dowl. P.C. 425.

The defendant was arrested upon a *capias* out of the Court of Common Pleas. He was afterwards taken in execution under judgments obtained against him in the Palace Court:—The Court of Common Pleas granted a *habeas corpus* to bring him up to be rendered to the Fleet Prison in discharge of his bail. *Pateron v. Thompson*, 2 Mo. & Sc. 391.

Where a cause in the Palace Court had once been removed by *habeas corpus*, and then remanded, and interlocutory judgment had been signed in the court below:—Held, that the bail of the same defendant in an action in the Court of Exchequer had no right to remove that cause again by *habeas corpus*, in order that the defendant might be rendered in the former suit. But the Court allowed the bail additional time to render until fourteen days after the expiration of the custody in the Palace Court. *Lawes v. Hutchinson*, 4 Law J. (N.S.) Exch. 59, s. c. 1 C. M. & R. 766; 5 Tyr. 236.

Certiorari granted at the instance of the Attorney General to remove the record of the conviction of the prisoners for murder, and also a *habeas corpus* to bring their bodies into this court, that execution might be awarded, pursuant to the judgment passed upon them at the Assizes; and execution awarded. *Rez v. Garvide*, 4 Law J. (N.S.) M.C. 1, s. c. 2 Ad. & E. 266; 4 N. & M. 33.

Where a defendant charged with selling unstamped papers was in custody, the Court granted a *habeas corpus* for the purpose of enabling him to defend in person. *Attorney General v. Cleave*, 2 Dowl. P.C. 668.

A is charged with a felony before three Magistrates, who, upon hearing evidence, admit him to bail, and afterwards, upon additional evidence, commit him to gaol: A is not entitled to a *habeas corpus* to be discharged out of custody. *Ex parte Allen*, 3 N. & M. 35.

It is no ground for bringing up a prisoner by *habeas corpus*, that the sheriff's warrant to the officer and gaoler, under which he was arrested and detained, did not state the court, out of which the

writ issued, it not being shewn that a copy of the process was not delivered to him at the time of executing it, pursuant to 2 Will. 4, c. 39, s. 4. *Ashby v. Goodyer*, 4 Tyr. 414.

The Court of King's Bench will not grant a *habeas corpus* at the instance of a party under sentence of imprisonment for a misdemeanour, to enable him to give his vote at an election of members of parliament. *Ex parte Jones*, 4 Law J. (N.S.) K.B. 97, s. c. 2 Ad. & E. 436; 4 N. & M. 340.

#### HALF BLOOD.

[See CONVERSION.]

#### HALF PAY.

[See ARMY.]

#### HARBOUR.

[See TONNAGE DUES.]

#### HAY AND STRAW.

Amendment of 36 Geo. 3, c. 88, regulating the buying and selling of hay and straw. 4 Will. 4, c. 21; 12 Law J. Stat. 33.

#### HAYWARD.

[See RESCUE.]

#### HEIR.

Where an expectant heir, under pecuniary pressure, mortgages his reversionary interest to obtain an advance of money or credit for a purchase of goods, and the party in present possession of the property so mortgaged stands *in loco parentis* to such heir, and knows and approves of the transaction, the heir has no equity to have it afterwards rescinded.

Where an expectant heir, who under pecuniary pressure, has granted securities over his reversionary estate, subsequently allows the consideration given for the securities to be so dealt with that it can never be restored to the other party in its original condition, he will not be relieved against those securities, unless he can shew a continuance of the pressure, compelling him to act as he did.

Where goods are sold to a person in distressed circumstances by a tradesman, who knows they are bought merely with a view to raise money by selling them again, and they are charged at fair and reasonable prices, the Court will not interfere to relieve the purchaser, or set aside securities given for the price. *King v. Hamlet*, 2 M. & K. 456.

A gift of sums of stock to legatees "or their heirs, respectively," is good, though any of the legatees should die in the testator's lifetime. And, *semble*, their next-of-kin will take.

A residuary bequest to the testator's two sisters, one-half to one and one-half to the other, "and, on their deaths respectively, to their heirs;"—Held, that this bequest creates a succession, so that, in case of the death of either, the next-of-kin will take, the property being personal.

"Heirs," in equity, is construed according to the nature of the subject to which the word has refer-

ence. *Gittings v. M'Dermott*, 2 Law J. (N.S.) Chanc. 212.

Devise to A, the testator's heiress-at-law, in fee, with an executory devise over, in case she does not attain twenty-one years of age:—Held, that this does not alter the quality of the estate, and A takes as heir, and not as purchaser; and on her dying seized, intestate and without issue, her heir *ex parte maternâ* takes, the testator being her maternal grandfather. *Manbridge v. Plummer*, 3 Law J. (N.S.) Chanc. 82, a.c. 2 M. & K. 93.

In a suit by executors to carry into effect the trusts of a will affecting real estates, the heir-at-law is entitled, on the will being proved against him, to have his costs immediately paid by the executors personally, notwithstanding they may have no assets in hand to reimburse themselves. *Kirlew v. Richardson*, 4 Law J. (N.S.) Chanc. 286.

In an action against the heir for the debt of his ancestor, if the defendant plead *riens per descent*, and the plaintiff reply under the statute 3 W. & M. c. 14, s. 6, that the defendant had lands from his ancestor before action brought, and, upon issue joined thereon, the jury find the value of the lands less than the amount of the debt, damages, and costs, execution must be limited to the value of the lands descended. *Brown v. Shaker*, 1 Law J. (N.S.) Exch. 82, a.c. 2 C. & J. 311; 2 Tyr. 320.

Lease *pur autre vie*, to F P and his heirs, of a rectory, tithes, and premises. T P died, living *cestus que vie*; and by his will devised the premises to M H J, his heir-at-law, (without saying "his heirs.") with a direction to renew the lease. M H J died, devising the premises by a will attested by two witnesses:—Held, that the heir-at-law, M H J, was entitled to the estate *pur autre vie*. *Philpotts v. James*, 3 Doug. 425.

Where a real estate is directed to be sold, and a part of the produce is to be applied to a purpose which fails, and the residue of the produce is given over, the heir, and not the residuary devisee, will take the sum intended for the particular purpose.

Where the real estate is not directed to be sold, and the residuary gift is not of the produce, but of the corpus of the estate; then if a gift, intended for a particular purpose, which fails, is to be considered as an exception from the residuary gift, the heir will take; if it is to be considered as a charge upon the devised estate, the residuary devisee will be entitled to the benefit of the failure. *Cook v. the Stationers' Company*, 3 M. & K. 262.

R, by birth a Scotchman, and holding land in Scotland, which he visited occasionally, but, being domiciled in England, cohabited with an English-woman, by whom he had a natural son; after the birth of the child he went to Scotland, and there, after a residence of fifteen days, married the mother, according to the forms of law in Scotland, and remained there visiting his friends and superintending his estates for about two months, when he returned with his wife and child to England, where they remained domiciled until his death:—Held, that the child was not heir to the reputed father so as to inherit lands in Scotland. *Munro v. Saunders*, 6 Bl. (N.S.) 468. And see *Doe d. Birtwhistle v. Vardell*, ib. 479; *Patrick v. Sheddin*, ib. 487; *Strathmore Peerage Case*, ib. 487.

Quære, whether a child, born in Scotland, of

parents domiciled there, who at the time of his birth, were not married, but who afterwards intermarried in Scotland, (neither having in the meantime married any other person,) can take, as heir, lands of his father in England. *Birtwhistle v. Vardell*, 2 C. & F. 571, a.c. 6 Bl. (N.S.) 479.

If in a suit to establish a will, the heir admits the will, and dies before the hearing, the derivative heir is bound, and the will need not be proved. *Robinson v. Cooper*, 4 Sim. 131: s.p. *Lock v. Foot*, 4 Sim. 182.

## HEIR-LOOM.

[See LEGACY, of Chattels to go with a Title.]

## HEMP AND FLAX.

Repeal of acts authorizing the issue of sums of money, for the encouragement of raising or dressing. 4 Will 4. c. 14; 12 Law J. Stat. 25.

## HERITABLE BONDS.

[See WILL, Construction.]

## HIGHWAY.

[See BRIDGE—WAY.]

### 1. NOT TURNPIKE.

- (A) CONSTITUTION AND DEDICATION OF.
- (B) SURVEYORS.
- (C) MAKING AND REPAIRING.
- (D) OBSTRUCTING.
- (E) STOPPING, CHANGING, AND DIVERTING.
- (F) COSTS.

### 2. TURNPIKE.

- (A) TRUST AND TRUSTEE.
- (B) CLERKS TO TRUSTEES.
- (C) TOLLS.
- (D) MAKING AND MAINTAINING.

### 1. NOT TURNPIKE.

Consolidation and amendment of laws relating to highways. 5 & 6 Will. 4, c. 50; 13 Law J. Stat. 83.

#### (A) CONSTITUTION AND DEDICATION.

If a person opens his land, so that the public pass over it continually, they would, after the user of a very few years, be entitled to pass over it, and use it as a way; but only to give a licence, he should do some act to shew that he gives a licence only. The common course is to shut it up one day in the year.

If there is an old way near a person's land, and, by the fences decaying, the public come on the land, that is no dedication of the land as a way. By the stat. 57 Geo. 3. c. 29. s. 114, the Commissioners of Paving of the Metropolis are to enter their proceedings in a book; and such entries are made evidence: whether an entry stating that A sent a letter to the commissioners, asking their permission to erect a rail at the side of a street, is evidence of such asking of permission. *The Trustees of the British Museum v. Finnis*, 5 C. & P. 461. [Patteson]

It is no objection to a road being a public road, that it was originally set out by commissioners under an inclosure act, as a private road, and that they, in excess of their authority, directed that it should be repaired by the inhabitants of the township. Upon an indictment for an encroachment upon such a road, it was left by the Judge to the jury to say, whether there was a dedication to the public, and user by them. In fact, the road had been repaired by the inhabitants of the township. The jury found a verdict of guilty; thereby affirming the dedication and the user; and the Court held the direction to them to be proper, and refused to disturb the verdict. *Rex v. Wright*, 1 Law J. (N.s.) M.C. 74, s. c. 3 B. & Ad. 681.

The inhabitants of a parish are bound by law to repair all roads within it dedicated to and used by the public, although there be no adoption of such roads by the parish.

Where land is vested in fee in trustees for certain public purposes, they may dedicate the surface to the use of the public as a highway, provided such use be not inconsistent with the purposes for which the land is vested in them.

By an Act for draining fen lands, commissioners were authorized to make drains and other works therein prescribed, and also to make a new cut or main drain as therein mentioned, and to dispose of all earth and soil arising from the drains directed to be made in forming banks, at certain distances on each side thereof; and the banks, drains, &c., were to remain under their control, for the purposes of the act. The commissioners, under the powers of the act, made a drain according to the act, and with the earth taken from it made a bank on one side of it, of the average breadth of forty feet: this drain and bank were never part of the fen, but were old inclosed land, and bounded by old inclosures on each side; and the land upon which they were respectively made, was purchased by the commissioners for the purposes of the act. The bank had been used for about twenty-five years as a public highway, and was a convenient and useful road for the public. Upon a special case, stating these facts, it was held by Denman, C. J. and Parke, J., *Littledale, J. dissentiente*, that the dedication of this part of the bank as a road to the use of the public was not inconsistent with the purposes to which the commissioners were bound by the act to apply it, it not appearing by the case, (which, however, ought to have been more express on these points; per Parke, J.,) that the cleansing of the drains, or any other purpose of the act, had been or was likely to be interfered with by such user of the soil. *Rex v. the Inhabitants of Leake*, 5 B. & Ad. 469, s. c. 2 N. & M. 583.

#### (B) SURVEYORS.

[See, *post*, (D).]

[See 5 & 6 Will. 4, c. 50; 13 Law J. Stat. 83. (Consolidation and amendment of Highway Acts.)]

Surveyor of highway is liable, in case, to reversioner, for subtraction of a portion of his bank by the road side, although the property is the better for what the surveyor has done. *Alston and others v. Scalls*, 1 Law J. (N.s.) M.C. 95, s. c. 2 Mo. & Sc. 5; 9 Bing. 3.

Two surveyors of the highways included in their

account certain expenses incurred in supporting the appointment of one of themselves as surveyor for a previous year, against an appeal to the Quarter Sessions, which appeal was discharged; and also expenses in opposing a rule for a certiorari to remove into the Court of King's Bench their accounts, as surveyors for a previous year, which rule was discharged. These expenses had not been agreed to by the inhabitants, nor allowed by a Justice, before they were charged in the accounts. The accounts being submitted to a meeting of the inhabitants, the items referring to these expenses were objected to. The accounts were duly taken to a single Justice, who postponed the allowance to the special Sessions, at which the accounts were allowed. The items were objected to both before the single Justice and at the special Sessions:—Held, that the special Sessions had jurisdiction, under stat. 13 Geo. 3, c. 78, s. 48, to allow the accounts; and that, therefore, by the 81st section of the same stat., the order of allowance could not be removed by certiorari. *Rex v. Fowler*, 1 Ad. & E. 837, s. c. 3 N. & M. 826.

An allowance of a surveyor's account at special Sessions is irregular, as they have not first been carried before a single Justice, though the vestry did not desire it, and though no notice was taken of the omission on the accounts being discussed at the special sessions. *Rex v. Goodenough*, 2 Ad. & E. 463.

The Justices at petty sessions have no original jurisdiction in the allowance of the accounts of surveyors of the highways, but only on the refusal by one Justice to allow them. *Rex v. the Justices of Cumberland*, 1 Law J. (N.s.) M.C. 104, s. c. 4 N. & M. 374.

#### (C) MAKING AND REPAIRING.

[See BRIDGE.]

Provisions relating to the repair of highways in Ireland. 5 & 6 Will. 4, c. 31; 13 Law J. Stat. 62.

An indictment charged that the inhabitants of the townships of Bondgate in Auckland, Newgate in Auckland, and the borough of Auckland, in the parish of St. Andrew Auckland, were immemorably liable to repair a highway in the town of Bishop Auckland, in the parish of St. Andrew Auckland, and no consideration was laid:—Held bad, in arrest of judgment, as not shewing that the highway was within the defendant's district.

Held to be no objection, that the inhabitants of the three townships were charged conjointly. *Rex v. the Inhabitants of Bishop Auckland*, 1 Ad. & E. 744.

A road had been repaired by a parish, and persons on horseback had used it, but there was no evidence that any carriage had ever gone along the whole length of it:—Held, that the parish could not be convicted of non-repair of it, on an indictment stating it to be a highway for carriages; and that there should have been a count in the indictment charging it to be a way for horses. *Rex v. the Inhabitants of St. Leonards*, 5 C. & P. 579. [Parke]

If a parish be indicted for the non-repair of a pack and prime way, and it be proved that the way is a carriage way, this is a misdescription of the way, and the defendants are entitled to be acquitted.

*Rez v. the Inhabitants of St. Weonards*, 6 C. & P. 582. [Alderson]

On an indictment against a parish for non-repair of a highway, a plea of guilty to a former indictment against the same parish for non-repair of the same highway, is conclusive evidence that it is a public way.

Evidence that a parish did not put guard fences on the side of the road, is not receivable on an indictment which charges that the king's subjects could not pass as "they were wont to do," if no such fences existed before. *Rez v. Whitney*, 7 C. & P. 208. [Parke]

Where a public way crosses the bed of a river which washes over it at every high tide, and leaves a deposit of mud,—*semble*, the parish is not bound to make it good. *Rez v. the Inhabitants of Landulph*, 1 M. & Ro. 393. [Patteson]

In an indictment for the non-repair of a highway, it must be affirmatively stated that the road is within the district which is bound to repair it. Stating a road to be out of repair "from and through" a place, excludes the terminus. *Rez v. the Inhabitants of Upton-on-Severn*, 6 C. & P. 133. [Tindal]

In an indictment for non-repair of a highway, it is not necessary to state the termini; but, if they are stated, they must be proved. *Rez v. the Inhabitants of St. Weonards*, 6 C. & P. 582. [Alderson]

A local act gave power to make a new road communicating with old highways. The commissioners made a part of the proposed road, which part communicated with an old road, and was used in common with it by the public; but half a mile of the proposed road remained uncompleted. Upon an indictment against the inhabitants of the township, in which the completed part was situate, for not repairing such part,—held, that the powers given by the act formed a condition precedent, that the whole of the road should be completed; and that the user by the public of the part in question, was not such an acquiescence in the supposed dedication of the road to them, as to subject the inhabitants to their common law liability to repair. *Rez v. Cumberworth*, 1 Law J. (n.s.) M.C. 86, s.c. 3 B. & Ad. 108.

#### (D) OBSTRUCTING.

By 13 Geo. 3, c. 78, s. 10, it is enacted, that if any stone or timber, &c., shall be laid in the highway, and the party placing it there shall not remove it within a certain time after notice, the owner of lands adjacent may. By sect. 12, the surveyors of the highway may remove nuisances, encroachments, obstructions, or annoyances, made or committed, contrary to the directions of the act. By the 82nd section, in actions brought against parties for anything done in pursuance of the act, they may plead the general issue, and give the act and special matter in evidence. The defendants erected a watch-box or house, of timber, upon the highway:—Held, that there were no words in the act, which enabled the surveyor to remove such a building, as being against the directions of the act: therefore, that they could not, on action of trespass being brought against them, justify the removal under the general issue, but should have pleaded the special

matter. *Witham Navigation Company v. Padley*, 2 Law J. (n.s.) M.C. 29, s.c. 4 B. & Ad. 69.

#### (E) STOPPING, CHANGING, AND DIVERTING.

Whether an order for stopping up a highway under the 55 Geo. 3, c. 68, s. 2, may refer to a plan annexed, in aid of the description of the road—*quære*.

But, where there had been such an order, and the notice under the above statute contained no reference to any plan, but described the road to be stopped up as so many yards near a particular milestone, of the road leading from A to B:—Held, that the notice was insufficient to warrant the order. *Rez v. the Justices of Kent*, 1 Law J. (n.s.) M.C. 29.

A notice of appeal against an order for stopping up a highway, stated the grounds of appealing to be "that the appellants would be materially injured and aggrieved by being compelled to go a much greater distance to the next market-town:—Held, that this was a sufficient statement of being aggrieved by the order. *Rez v. Adey*, 4 Law J. (n.s.) M.C. 76, s.c. 4 N. & M. 365.

#### (F) COSTS.

Where the defendants were convicted on an indictment for non-repair of a highway, and obtained a rule for a new trial upon terms as to the prosecutor's costs, and upon the second trial they were acquitted:—Held, that they were not entitled to costs, although the Judge certified under the Highway Act, 13 Geo. 3, c. 78, s. 64, that the prosecution was vexatious. *Rez v. the Inhabitants of Salwick*, 1 Law J. (n.s.) M.C. 14, s.c. 2 B. & Ad. 136.

The Highway Act, 13 Geo. 3, c. 78, s. 81, does not entitle a surveyor of highways to treble cost after verdict, but only in cases of nonsuit, discontinuance, or judgment on demurrer.

*Quære*, whether he can in any case recover treble costs, if he plead a special plea. *Ward v. Bateman*, 2 Law J. (n.s.) Exch. 16, s.c. 1 C. & M. 486; 3 Tyr. 221.

#### 2. TURNPIKE.

[See MANDAMUS.]

##### (A) TRUST AND TRUSTEES.

The 7 Geo. 4. (local act) authorizes the making of the Marylebone and Finchley turnpike road. The act also provides, that the general turnpike acts above referred to, and therein recited, should be applicable to that act, except as therein altered.

The trustees of the turnpike road above mentioned, being in want of money, obtained, through their clerk, temporary loans from the plaintiff, treasurer of the trust; and the defendant, as chairman of the meeting of the trustees, having, at the desire of the meeting, signed the resolutions requesting such loans:—Held, that such loans were not duly authorized by the statutes, and that the defendant was personally liable. *Parrott v. Eyre*, 3 Law J. (n.s.) C.P. 3, s.c. 10 Bing. 283, 3 Mo. & Sc. 857.

##### (B) CLERKS TO TRUSTEES.

Two persons filled the office of clerk to the trustees of a turnpike road, and one only joined in executing a contract on the part of the trustees:—Held, that under 3 Geo. 4, c. 126, s. 57, both such clerks should have joined. *Bell v. Nixon*, 2 Law J. (n.s.) M.C. 44, s.c. 9 Bing. 393; 2 Mo. & Sc. 534.

*the Hundred of Broxtowe*, 2 Law J. (n.s.) M.C. 47, s. c. 4 B. & Ad. 273; 1 N. & M. 601.

Where a testator, in his lifetime, had duly commenced his action against the hundred, to recover compensation for an injury done to premises by a riotous assembly, and afterwards died,—Held, that the executor could not maintain a fresh action, brought after the expiration of three calendar months from the time of the offence committed. *Till Adam v. the Inhabitants of the city of Bristol*, 4 Law J. (n.s.) M.C. 25, s. c. 2 Ad. & E. 389; 4 N. & M. 144.

### HUNGERFORD MARKET.

[See COMPENSATION.]

By the 11 Geo. 4, c. lxx, the Hungerford Market Company are empowered to purchase certain premises for the purposes of the act. By the 66th section, the Building Act was repealed as to the company's buildings; and by the 68th section, parties are entitled to compensation whose house, &c. is damaged or injured by or in the taking down of any messuages or buildings to be taken down for the purposes of, or otherwise in execution of the act. The company purchased and pulled down a house adjoining a house occupied by Y, when it appeared that the party-wall between the two houses was out of repair; and surveyors appointed by the company and the landlord of Y's house, thereupon surveyed such party-wall, and certified that it must be rebuilt under the Building Act; that certificate was served on Y, and the company then, without her concurrence, proceeded to pull down the old party-wall, and erect a new one; the landlord of the premises agreeing to pay a moiety of the expenses of so doing:—Held, that an injury accruing to the tenant, in consequence of so pulling down and rebuilding the party-wall, was not an injury within the Hungerford Market Act.—Held, also, that the 66th section applied only to the buildings of the company *inter se*. *Re v. the Hungerford Market Company*, 3 Law J. (n.s.) K.B. 50, s. c. 1 Ad. & E. 668; 2 N. & M. 340.

Certain houses are scheduled, which the company have the power to compel the sale of, among which are No. 9 and No. 10, for the purpose of an avenue from Villiers Street to the market. The company, with a view to widen the avenue, purchase No. 11, and pull it down and rebuild it, and in so doing, expose the tenant of No. 12 to some injury:—Held, that this was not an injury within the 68th section of the Hungerford Market Act; and the Court refused a mandamus to summon a jury to assess the amount of compensation.

The 68th section only applies to such building, &c. as the company have a compulsory power, by the act, to take for the purposes, and in execution, of the act. *Re v. the Hungerford Market Company, ex parte Eyre*, 3 Law J. (n.s.) K.B. 168, s. c. 1 Ad. & E. 676; 3 N. & M. 622.

### IMPARLANCE.

[See PRACTICE.]

### IMPRISONMENT.

[See FALSE IMPRISONMENT.]

For small debts, abolition of, in Scotland. 5 & 6 Will. 4, c. 70; 13 Law J. Stat. 156.

### INCEST.

Criminal suit for incest—marriage of the parties annulled, and penance enjoined. *Check v. Ramsdale*, 1 Curt. 34.

### INCLOSURE.

[See APPEAL, Time of—COMMON—HIGHWAY, Constitution and Dedication—STATUTE—TITHES.]

Remedy for non-enrolment of awards, under acts of. 3 & 4 Will. 4, c. 17; 11 Law J. Stat. 171.

Allotments to cottagers, authorized in parishes inclosed by act of parliament. 2 Will. 4, c. 42; 10 Law J. Stat. 74.

The provision in the general Inclosure Act, that the commissioner's oath, and the appointment of any new commissioner, shall be annexed to and enrolled with the award, is merely directory. *Casamajor v. Strobe*, 2 M. & K. 708, s. c. 5 Sim. 87.

An inclosure act, reciting that S was entitled, as lord of the manor, to the soil and royalties, and, as lay rector, to all tithes within the manor, and that he claimed right of common on the waste, in respect of the soil and royalties, directed certain allotments to be made to him in compensation for his right to the soil of the waste and to the tithes, and that the residue of the waste should be divided among S, and other persons having right of common upon such waste, in proportion to their respective claims; and it reserved to the lord the seignory and royalties. The act made no mention of any right of warren existing in the lord; but there was some evidence that S had used part of the waste as a rabbit-warren. The award gave an allotment to S for his right of warren, and also three other allotments, which purported to be made for his right to the soil, his right to the tithes, and his right of common and other rights, and interest in the waste, respectively; which allotments were declared to be a full compensation for all his right and interest in the lands directed to be inclosed:—Held, that S's title to the warren allotment was not such as a purchaser could be compelled to take. *Ibid*.

By an act for inclosing common lands in G, after reciting that the corporation of G claimed the right of soil as lords of the manor, and that certain individuals were proprietors of the common lands intended to be inclosed, it was enacted, that the commissioners might set out and allot plots of ground out of the east and west commons in G, as a compensation for the rights of common of all the owners and proprietors of commonable messuages or cottages, for such messuages or cottages only, as well on the said common as on certain other lands named; such plots of ground to be used and enjoyed as the commissioners should by their award direct. Parties dissatisfied with the award might bring an action against the persons in whose favour the determination should be, within three months,



or might appeal, within six months, to the Justices in Quarter Sessions, who were to determine the matter, and award costs and damages. In default of such action or appeal, the determination of the commissioners was to be final.

The commissioners, by their award, allotted a plot of land on the west common, as common pasture, to the owners and proprietors of commonable messuages or cottages, and their respective tenants or occupiers of the said messuages and cottages only having right of common on the said west common; and they limited the use of the pastures as the act empowered them.

Before the passing of the act, the rights attached to the commonable messuages could only be exercised by such occupiers as were freemen of the borough of G. Subsequently to the act, one of the messuages on west common being in the hands of a person not a freeman, the corporation brought trespass against him for turning his cattle on the above-mentioned allotment.

Held, that the act, through general in its words, did not authorize the commissioners to extend the benefit of their allotments in lieu of common, to occupiers who were not freemen; and that the award itself did not purport to do so, nor could it have done so, unless the act had given power to the commissioners to ascertain who should be entitled to the newly granted rights; and consequently, that the present action was maintainable, though brought more than six months after the award. *Bailiffs of Godmanchester v. Philipps*, 5 Law J. (N.S.) K.B. 108, s.c. 5 B. & Ad. 198; 2 N. & M. 713.

Where an inclosure act does not, in express terms, give power to the commissioners to stop up or divert ancient public ways, passing over old inclosures, they cannot exercise such a power, except under the proviso of the 8th section of the general Inclosure Act, 41 Geo. 3, c. 109, with the consent of two Justices of the Peace.

An allotment of waste land, without describing or mentioning an ancient public way passing over the same, or setting out any other way in lieu thereof, does not operate as an extinguishment of the way, under the 11th section of the general Inclosure Act, if the effect of such extinguishment is, also to stop up a part of the way leading over old inclosures. *Thackrah v. Seymour*, 2 Law J. (N.S.) Exch. 10, s.c. 1 C. & M. 18; 3 Tyr. 87.

## INCORPOREAL HEREDITAMENTS.

[See SHOOTING.]

## INCUMBRANCE.

[See CHARGE.]

Priority in point of time alone, as between equitable incumbrancers, will not create a better equity, nor give precedence to one over another; and all securities which are sufficient to create an equitable charge are equally respected in equity, however informally they may be framed. But the first of two equitable incumbrancers, who gives notice of his claim to the legal owners of the property, so as to fix purchasers from them with notice of their equities, will obtain a better equity, in respect of that notice, and will thereby obtain priority, though his

Digest, 1831—35.

security should be the latest in point of time. *Foster v. Blackstone*, 2 Law J. (N.S.) Chanc. 84, s.c. 1 M. & K. 297.

## INDEMNITY.

[See BRIBERY—SHIP AND SHIPPING—PRINCIPAL AND AGENT.]

Indemnity Act (annual), 2 Will. 4, c. 24; 10 Law J. Stat. 36. 3 Will. 4, c. 7; 11 Law J. Stat. 27. 4 Will. 4, c. 9; 12 Law J. Stat. 17. 5 Will. 4, c. 11; 13 Law J. Stat. 9.

## INDIA.

[See EAST INDIA COMPANY—CHINA.]

Indemnity Act, 5 Will. 4, c. 6; 13 Law J. Stat. 5. Amendment of the law relating to the appointment of Justices of the Peace and juries. 2 & 3 Will. 4, c. 117; 10 Law J. Stat. 286.

The purchaser at a collector's sale of a part of a zemindary, is not entitled to the sias or revenue of lands situated within the part he has purchased, but not included in the permanent assessment of the zemindary.

Land which is not included in the accounts of the circuit committee, upon which the permanent assessment of the northern circars is made, is not included in that assessment. *Raja Venkata Niladry Row v. Vutchavoy Vencatapatny Raz*, 3 Kn. 23.

## INDICTMENT.

[See CERTIORARI—NEW TRIAL—and the different heads of CRIMES AND MISDEMEANORS. See also EVIDENCE, Confessions, Depositions.]

- (A) WHERE IT LIES.
- (B) FORM.
- (C) PRACTICE, PLEADING, AND TRIAL.
- (D) EVIDENCE.
- (E) EXPENSES OF PROSECUTION.

### (A) WHERE IT LIES.

A public officer is indictable for misbehaviour in his office. *Rez v. Bembridge*, 3 Doug. 327.

### (B) FORM.

A bad conclusion of *contra pacem* is as no *contra pacem*, and is cured by 7 & 8 Geo. 4, c. 64, s. 20. *Rez v. Chalmers*, 1 M. C.C. 352, s.c. 5 C. & P. 331.

A count, which charges B with shooting at A, with intent to murder him, and then charges C and D with aiding and abetting B, and at the end of the count concludes with a *contra formam statuti*, is good; and it need not state that B shot A with intent, &c., *contra formam statuti*, and that C and D aided him also *contra formam statuti*. *Rez v. Nemes*, 6 C. & P. 347. [Park]

The 7 Geo. 4, c. 64, s. 20 does not cure the want of "against the form of the statute," &c., in an indictment for what but for a statute would be no offence. *Rez v. Pearson*, 1 M. C.C. 313.

In an indictment alleging a dwelling-house to be "situate at the parish aforesaid," the parish last mentioned must be intended. *Rez v. Richards*, 1 M. & R. 177. [Park]

2 M

Where an indictment charged that the defendant, at the township of W, in and upon a common highway there, leading from a certain public road or common highway leading from the village of W, towards the parish church of C, towards and unto a certain other public road or common highway, leading from the said village of W towards and unto the township of L W, by a certain wall *there* extending into the said highway, had encroached, &c.:—Held, that the words "there" and "the said highway" could not be referred to the last, but must be referred to the first antecedent—i. e. the highway first mentioned; and, therefore, that the indictment was not bad for uncertainty. *Rex v. Wright*, 3 Law J. (n.s.) Exch. 370, s. c. 1 Ad. & E. 434; 3 N. & M. 892.

An indictment against a person charged as a bankrupt for any offence against the bankrupt laws, must aver, not only that a commission or fiat was issued, and the party adjudged and declared a bankrupt, but that he was a trader, and the other facts essential to constitute a bankruptcy. *Rex v. Jones*, 2 Law J. (n.s.) M.C. 7, s. c. 4 B. & Ad. 345; 1 N. & M. 78.

A statute passed in a session of parliament, begun in the second, and continued in the third year of a king's reign, must not be pleaded as passed in the second and third years of the reign, although such act be recited in a latter statute as "passed in the second and third years," &c.

On indictment for conspiracy, laying in the inducement that the defendants knew the party conspired against to bear a certain character, and to be liable in that character to the operation of an act passed in the second and third years, &c., adding the title of the act correctly, the judgment was arrested for such misrecital.

And this, although there was a general count, (to which the objection did not apply,) stating merely that the defendants conspired, "by false, artful, and subtle stratagems and contrivances, as much as in them lay, to injure, oppress, aggrieve, and impoverish," the prosecutors. *Rex v. Biers*, 3 Law J. (n.s.) M.C. 118, s. c. 1 Ad. & E. 327; 3 N. & M. 475.

An indictment for disobeying an order of sessions on an appeal against a conviction for not giving a list of male servants, pursuant to stat. 21 Geo. 3, c. 31, need not state the proceedings before the Justice, nor that the servant comes within the description in the statute. *Rex v. Mytton*, 4 Doug. 333.

Where a statute makes an offence, committed after a given day, triable in the county where the party is apprehended, and authorizes laying it as if committed in that county, and does not vary the nature and character of the offence, it is no objection, that the day laid in the indictment is before the day the statute mentions, if the offence were in fact committed after that day. *Rex v. Treharne*, 1 M. C.C. 295.

An indictment against overseers, for not obeying an order of Justices, must state precisely and positively that the order was served on them. *Rex v. Moorhouse*, 4 Doug. 388.

Indictment stated, that defendants intending unlawfully, &c., and by indirect means, to impoverish H B, and to hinder him from using his trade, &c.,

unlawfully conspired, &c., by indirect means, to impoverish H B, and to hinder him, &c.—Held good.

Indictment against F E, and six others. The issue stated—"And now, that is to say, &c., come the said F E, and others, by H D, their attorney; and having heard the said indictment read, they say, and each of them severally says, that they are not guilty thereof," &c. After verdict of guilty,—Held sufficient. *Rex v. Eccles*, 3 Doug. 337.

An indictment for larceny had the words "London, to wit" in the margin, and described the prisoner as "late of London," and charged the offence to have been committed in the "parish of St. Mary-le-Bow," without averring that parish to be in London.—Held bad, and that this was not aided by the 7 Geo. 4, c. 64, s. 20. *Rex v. Hart*, 6 C. & P. 123.

If a statute makes it criminal, unlawfully and maliciously to do an act, an indictment must state that it was done unlawfully—stating that it was done feloniously, voluntarily, and maliciously, is not enough. *Rex v. Turner*, 1 R. & M. C.C. 239.

If an indictment have an interlineation, and have a caret at the proper place where the interlined words are to come in, the Court will take notice of the caret, and read the indictment correctly. *Rex v. Davis*, 7 C. & P. 319. [Patteson]

An indictment which may apply to either of two different definite offences, and does not specify which, is bad. If clergy be taken away from several descriptions of compound larcenies, the indictment must specify the description charged, in order to oust a prisoner of his clergy. A charge which, though it must mean one or the other of two descriptions, but does not shew which, does not exclude clergy: as a charge of robbing a dwelling-house in the daytime to the value of 5s., not shewing whether any person was in the house or not. *Rex v. Marshall*, 1 R. & M. C.C. 168.

A count charging A with a rape, as a principal in the first degree, and B as principal in the second degree, may be joined with another count, charging B as principal in the first degree, and A as principal in the second degree. *Rex v. Gray*, 7 C. & P. 164. [Coleridge]

#### (C) PRACTICE, PLEADING, AND TRIAL.

The prosecutor of an indictment for misdemeanor may obtain the usual Crown-office certificate of his bill having been found, for the purpose of taking out a Judge's warrant against the defendant without obtaining an office copy of the indictment. *Rex v. Radfern*, 2 Ad. & E. 387, s. c. 4 N. & M. 198.

A prosecutor cannot maintain two indictments for misdemeanor for the same transaction: he must elect to proceed on one, and abandon the other. *Rex v. Britton*, 1 M. & K. 297. [Patteson]

The officers ought not to join in the same indictment counts charging prisoners as principals in stealing, and also as receivers. *Rex v. Madden*, 1 M. C.C. 277.

It is no objection in point of law, that an indictment charges prisoners in one count as principals in stealing, and in another as receivers: or that the prisoners are tried without having the prosecutor put to his election, on which charge to proceed,

though the prisoners asked it. But, *semble*, that it is reasonable to put the prosecutor to his election, and the officers ought not to join both charges. *Rez v. Galloway*, 1 R. & M. C.C. 234.

A was indicted for shooting at B, a game-keeper, there being another indictment against A for night poaching:—Held, that although both indictments related to the same transaction, yet the offences were quite distinct from each other; and that the prosecutor, therefore, ought not to be put to his election to go upon one indictment, and abandon the other. *Rez v. Handley*, 5 C. & P. 565. [Parke]

On trial of an indictment for misdemeanor, either by commission of oyer and terminer, or gaol-delivery, the defendant must appear in person, (*semble*, that this is by force of the recognizance); but, after appearance, may be dismissed on entering into another recognizance to appear to receive judgment. *Rez v. Meyler*, 4 Doug. 18.

An indictment found at the Suffolk Lent assizes 1833, on a charge of felony preferred in September 1832, was removed into the King's Bench by *certiorari*, and a motion made to award a *venire* into another county, on a suggestion, that a fair trial could not be had in Suffolk; in support of which application many affidavits were put in, sworn in the autumn of 1832, shewing that a strong prejudice existed in Suffolk against the defendants, on the subject of this charge. The Court held, that there was not sufficient grounds laid for removing an indictment from the body of a large county, and discharged the rule. *Rez v. Holden*, 5 B. & Ad. 347, s. c. 2 N. & M. 167.

A party cannot be legally convicted upon an indictment, found by the grand jury upon the testimony of witnesses, who were sworn by an officer of the Court after the session had lapsed, in consequence of its having on two successive days been opened and adjourned without the presence of any Justices. *Middlesex Special Commission*, 6 C. & P. 90.

Where one inhabitant of a parish has removed an indictment against it, for the non-repair of a road into the King's Bench, and has given the usual security for costs, in case a verdict of guilty should pass, the other inhabitants of the parish will not be permitted to plead guilty to the indictment. *Rez v. Inhabitants of Luzborough*, 1 Dowl. P.C. 527.

An indictment was removed from an inferior court, into the Court of King's Bench in Dublin, after plea pleaded and issue joined thereon: the issue thus joined is not such "an issue joined in the Court of King's Bench" as will satisfy the words of the statute 17 & 18 Car. 2, c. 20, and cannot therefore be tried under the authority of that statute, at the Nisi Prius sittings of that court. *Rowe v. Attorney General*, 2 C. & P. 42, s. c. 8 Bl. n.s. 1.

An indictment for a nuisance in keeping a common gaming-house, was preferred by a private prosecutor, who, after removing it by *certiorari*, proceeded no further. Another party then caused a *venire* to be issued, and other steps taken for bringing the case to trial, though desired by the original prosecutor to forbear. On motion by the latter for a stay of proceedings, (he alleging that the offence had been discontinued), the Court refused to interfere, the prosecution being for a public nuisance. *Rez v. Wood*, 3 B. & Ad. 667, s. c. 1 Law J. (N.s.)

M.C. 93: and see *Rez v. Oldfield*, *Rez v. Fielder*, and *Rez v. Constable*, ib. p. 659.

#### (D) EVIDENCE.

No evidence that is a confirmation of the original case, can be given as evidence in reply. The only evidence in reply must be, that which goes to cut down the defence, without being in confirmation of the original case. *Rez v. Hilditch*, 5 C. & P. 299. [Taunton]

On an indictment for an assault with intent to commit a rape, evidence that the prisoner, on a prior occasion, had taken liberties with the prosecutrix, is not receivable to shew the prisoner's intent. *Rez v. Lloyd*, 7 C. & P. 318. [Patteson]

In a case of burning, it had been opened by the counsel for the prosecution, that evidence would be given of expressions of ill-will used by the prisoner towards the prosecutor:—Held, that the prisoner's counsel might cross-examine the prosecutor, to shew that other persons besides the prisoner had used expressions of ill-will towards him. *Rez v. Stallard*, 7 C. & P. 263. [Williams]

A set fire to ricks of B, C, and D, one immediately after the other. There were three indictments, one for each fire. The rick burnt last was the subject of the indictment first tried. An accessory before the fact was called, and was allowed to give evidence of the whole transaction as to the three ricks. *Rez v. Charlotte Long*, 6 C. & P. 179. [Gurney]

In a case of felony, where the defence was an *alibi*, the witnesses for the prisoner stated, that they respectively saw him at various places on his route from Gloucestershire to Warwickshire, for two days before, and up to the time of the felony being committed:—Held, that the counsel for the prosecution might call a witness in reply, to prove that the prisoner had said he was at home on those days. *Rez v. Finden*, 6 C. & P. 182. [Tindal]

Adding a false description to the name of a person, who must be named, is fatal, though it be not necessary to give any description. *Rez v. Desley*, 1 M. C.C. 303.

In an indictment for robbery, the property was laid in J H. It appeared that the prosecutor's name was J W H:—Held, not material, if he was generally known by the name of J H. *Rez v. Berriman*, 5 C. & P. 601. [Parke]

A was indicted for stealing the property of Richard P. It appeared, that the prosecutor's name was Richard Jeremiah P, but that he was generally known by the name of Richard P:—Held, sufficient. *Rez v. —*, 6 C. & P. 408. [Storka, Serj.]

An indictment charged the murder of "Eliza Waters." It appeared, that the deceased was the illegitimate child of the prisoner, whose name was Ellen Waters; and a witness said on the trial, "The child was called Eliza. I took it to be baptized, and said it was Eleanor Waters's child." *Seemle*, that this was not sufficient proof, that the surname of the deceased was Waters. *Rez v. Waters*, 7 C. & P. 250. [Denman]

It is no objection on not guilty, that there is no such place in the county as that in which the offence is stated to have been committed. On an indictment for setting fire to a stack of pulse, a mistake as to the name of the place where the offence was

committed is immaterial; the charge is transitory, not local. *Rex v. Woodward*, 1 M. C.C. 328.

The balance sheet of a bankrupt, given on oath under his commission, is not admissible against him on a criminal charge. *Rex v. Britton*, 1 M. & R. 297. [Patteson]

#### (E) EXPENSES OF PROSECUTION.

[See MANDAMUS, When granted. *Rex v. Jeyes*, 3 Ad. & E. 416, s. c. 5 N. & M. 101.]

Where an indictment on the 7 & 8 Geo. 4, c. 30, s. 16, is removed by *certiorari* into the King's Bench, and is tried on a record issuing out of that court, the expenses of prosecution cannot be allowed under the 7 & 8 Geo. 4, c. 64, s. 22. *Rex v. Kelsey*, 1 Dowl. P.C. 481.

### INFANT.

[See BILL OF EXCHANGE—PARENT AND CHILD—MAINTENANCE—BRIDGE—PROPERTY.]

- (A) RIGHTS AND INCAPACITIES.
- (B) LIABILITIES.
- (C) MAINTENANCE.
- (D) ACTIONS AND SUITS.
- (E) GUARDIAN.

#### (A) RIGHTS AND INCAPACITIES.

[See WARRANT OF ATTORNEY.]

[*Hicks v. Morant*, 3 Y. & J. 286, 2 Law J. Dig. 150; affirmed 5 Bligh, n.s. 643, 2 D. & Cl. 414.]

An application under the 1 Will. 4, c. 47, s. 11, for an infant heir or devisee to convey, must be made by petition, and not by motion. *Anon.* 1 Y. & C. 75.

Where the Court, by its decree, declares that an infant heir is a trustee, and the right of the party entitled to a conveyance is established by that decree, the Court will at the same time direct a conveyance by the infant heir, a petition for that purpose being unnecessary. *Broom v. Broom*, 3 M. & K. 448.

The testator devised his estate to two tenants in common in fee; one died after the testator, leaving an infant heir. In a creditors' suit, after the decree for sale of the estate, the infant heir was ordered to join in the conveyance to the purchaser under the 1 Will. 4, c. 47, s. 11. *Brook v. Smith*, 2 Russ. & M. 73.

After decree in a suit for specific performance, against the infant heir of the vendor, a petition must be presented under 11 Geo. 4, & 1 Will. 4, c. 60, for an order that the infant may convey to the purchaser. The costs of the suit were ordered to be paid out of the purchase-money. *Prythorck v. Howard*, 6 Sim. 9.

An estate, of which A died seised in fee, descended on A's five infant sisters. The father and mother of the infants being both living, and the estate of the sisters being consequently liable to be divested by the birth of a nearer heir of A, it was held, that the infants were not seised or entitled to land in fee, within the meaning of the 1 Will. 4, c. 65, s. 17. *In re Eome*, 2 M. & K. 818.

C, an infant, enters into an agreement with O, to form a partnership with him at a future period, i. e. when he attains his full age, and by a clause of the agreement, he deposits with O the sum of 100*l.*, to be forfeited in case he should violate the agreement. Upon attaining his age, C repudiates the contract, and requires to have the deposit money returned:—Held, that C has a right to recover the money, inasmuch as he has received no benefit, and the parties may be placed in the same situation as before. *Corpe v. Overton*, 3 Law J. (n.s.) C.P. 24, s. c. 10 Bing. 252; 3 Mo. & Sc. 738.

Several covenants to pay annuity entered into by infant and person of full age, not void against the latter—53 Geo. 8, c. 141, s. 8. *Gillow v. Lillie*, 4 Law J. (n.s.) C.P. 222, s. c. 1 Bing. N.C. 695; 1 Sc. 597.

The Court will allow commissioners to take the acknowledgment of the execution of a deed by an infant married woman, without certifying that she was of full age—the 84th section of the 3 & 4 Will. 4, c. 74, enacting that the certificate of the commissioners should be subject to any alteration which may from time to time be directed by the Court of Common Pleas. *In re Luke*, 4 Law J. (n.s.) C.P. 65, s. c. 1 Bing. N.C. 265; 1 Sc. 80.

A clause against anticipation, annexed to a life interest in a trust fund, bequeathed to a female infant, does not prevent her, after she comes of age, and before marriage, from effectually assigning her whole interest in the legacy. *Brown v. Peacock*, 2 Russ. & M. 210.

A ward of the Court married under twenty-one, with the consent of her father, but without the consent of the Court; and prior to her marriage, a settlement was made of her property. On her attaining twenty-one, she and her husband applied to have her property transferred to the trustees; which was ordered upon her being examined separately, and consenting. *Leeds v. Barnardiston*, 4 Sim. 538.

#### (B) LIABILITIES.

[See (D), Actions and Suits; and see BRIDGE, *Rex v. Sutton*.]

An infant suing by *prochein amy*, and nonsuited, is liable to be taken in execution for costs, without a *non pros*. A writ of error, if not proceeded in on the day of its return, is to be considered as spent. *Dow v. Clark*, 2 Law J. (n.s.) Exch. 271, s. c. 1 C. & M. 860; 3 Tyr. 866; 2 Dowl. P.C. 302.

#### (C) MAINTENANCE.

Maintenance for an infant allowed to the infant's husband. *Sharman v. Heath*, 3 Law J. (n.s.) Chanc. 240.

The Court will, under peculiar circumstances, sanction an allowance to infants out of the capital of their reversionary property, although the father be living. *Kilminster v. Noel*, 4 Law J. (n.s.) Chanc. 52.

The Court will not, unless under special circumstances, sanction an allowance to a parent out of his children's fortune, for their *past maintenance*, although he be not of ability to maintain them.

The Court will not grant a reference to the Master to inquire as to the propriety of making an allowance for past maintenance, unless a special case be made for such inquiry.

The fact of the father having compounded with his creditors is not of itself a sufficient ground for such reference. *Ex parte Morgan*, 4 Law J. (n.s.) Chanc. 84.

The Court has authority to order maintenance for infants out of the jurisdiction, if the circumstances of the case require it; and where an infant had been taken by his father, who had absconded, without having surrendered to a commission of bankruptcy, to America, and the father would not suffer the infant to return to England,—the Court, upon appeal, gave liberty to the guardian to apply annually for an allowance for the infant's maintenance and education in America, on condition of producing certificates, shewing the proper application of the money. *Stephens v. James*, 1 M. & K. 627.

(D) ACTIONS AND SUITS.

A decree cannot be taken in a cause which has been set down in the paper of consent causes, if any of the parties be infants. *Wilcox v. Vincent*, 4 Law J. (n.s.) Chanc. 280.

A bill filed by a next friend of an infant, ordered to be taken off the file, with costs, without any reference to the Master; it appearing upon affidavit, that the next friend was a day labourer and a person of bad character. *Walker v. Blue*, 4 Law J. (n.s.) Chanc. 54.

Where a decree has been made against an infant defendant, who put in the common answer by his guardian, the general rule is, that such defendant on coming of age, has the privilege of putting in a new answer, stating a different case, and of going into evidence in support of that case. The privilege does not extend to foreclosure suits. *Kelsall v. Kelsall*, 2 M. & K. 409.

Where a bill has been filed on behalf of infants, under circumstances raising a strong suspicion against the motives of the next friend, the Court will direct an inquiry, whether the suit is for the benefit of the infants, and if so, whether such next friend is a proper person to conduct it; or otherwise, who is a proper person to be appointed next friend in his place. *Nalder v. Hawkins*, 2 M. & K. 243.

An heir-at-law admits the will of his ancestor in a bill filed by him for carrying into execution the trusts of such will, and afterwards dies before the hearing. The Court will not establish the will on such admission, against the heir of such heir, who is an infant. It must be regularly proved against him. *Thorns v. Boyer*, 4 Law J. (n.s.) Chanc. 68.

A commission of bankruptcy taken out against an infant is void, and not merely voidable. Whether, in an action brought by such infant against the assignees chosen under the commission for trying the validity of such commission, on the ground of infancy, notice to dispute is necessary under 6 Geo. 4, c. 19, s. 90—*quære*. *Belton v. Hodges*, 2 Law J. (n.s.) C.P. 19, s. c. 9 Bing. 365; 2 Mo. & Sc. 496.

An infant cannot maintain an action for assault and false imprisonment against a schoolmaster, who has improperly refused to deliver him up to his mother, without evidence that he knew of such refusal, and of some actual restraint upon him. *Herring v. Boyle*, 3 Law J. (n.s.) Exch. 344, s. c. 1 C.M. & R. 377; 4 Tyr. 801.

The defendant (an infant), in execution for costs and damages awarded against him in an action of slander, applied for relief to the Insolvent Debtors Court, but that Court refused to interfere, as the infant could not execute a warrant of attorney, as required by the statute:—Held, that the Court in which the action was brought had no authority to discharge the infant. *Defries v. Davies*, 4 Law J. (n.s.) C.P. 191, s. c. 1 Bing. N.C. 692; 1 Sc. 694.

If an infant assigns by attorney for error *coram nobis*, that he has improperly appeared in the action by attorney, instead of guardian, it is not a mere irregularity, but a ground of error; still the Court will on application set the assignment aside, and allow the plaintiff in error to assign by guardian. *Beven v. Cheshire*, 3 Dowl. P.C. 70.

Where an infant took a dwelling-house, in which he carried on the business of a barber:—Held, that the proper question for the jury, in an action for use and occupation, was, whether the house was necessary for the infant, or for the purpose of carrying on trade; and that, if necessary only for carrying on trade, or auxiliary thereto, the plaintiff was not entitled to recover. *Lowe v. Griffith*, 4 Law J. (n.s.) C.P. 94, s. c. 1 Sc. 458.

Held, by the Lord Chancellor, in opposition to the opinions of the Vice Chancellor and the Master of the Rolls, that an infant is liable for necessities furnished him, notwithstanding he has an adequate pecuniary allowance made to him by his guardians. That, notwithstanding an account against an infant is generally extravagant, and for articles which are not necessities, yet the creditor is entitled to recover such part as consists of necessities.

*Semble*—That a jury is the proper tribunal for trying the question, if contested. *Mortara v. Hall*, 4 Law J. (n.s.) Chanc. 63, s. c. 3 Law J. (n.s.) Chanc. 160; 6 Sim. 465.

A *stanhope* is not a necessary for a clergyman's infant son, who had been in the army. *Charters v. Bayntun*, 7 C. & P. 52. [Gurney]

If a minor is supplied with necessities suitable to his estate and degree, no matter from what quarter, a tradesman cannot recover for any further supply made to the minor just after.

If a minor has been supplied with ten coats by another tradesman, and immediately after that the plaintiff supplied him with another, the plaintiff will not be entitled to be paid for that other coat, as it was unnecessary.

If a person of full age orders clothes, however extravagantly and absurdly, and they are delivered to him, he is bound to pay for them; but with a minor it is otherwise. A minor is only liable for necessities suitable to his estate and degree; and the jury must consider, not only whether the clothes were suitable in point of quality, but also in point of quantity.

In an action for the price of clothes brought by a tailor against a minor, the defendant may go into evidence to shew, that he had all the clothes which were suitable to his estate and degree from other tailors; and if he, in fact, had such clothes from them, it makes no difference, that he has not paid for them, or even that he has successfully defended an action brought by one of them to recover the price of the clothes supplied by him. *Burghart v. Angerstein*, 6 C. & P. 690. [Alderson]

## (E) GUARDIAN.

Guardian appointed to an infant entitled to freehold property worth 80l. a year, without a reference. *Ex parte Jackson*, 6 Sim. 212.

It is of course, for the guardian *in personam* of an infant to be the guardian *ad litem*. *Sandys v. Cooper*, 4 Law J. (n.s.) Chanc. 162.

On the return of a messenger, who has been unable to find an infant, special application must be made for a Serjeant-at-arms, and, on his return, the Court will appoint one of the Six Clerks guardian *ad litem*. *Steed v. Calsey*, 4 Law J. (n.s.) Chanc. 1, s. c. 2 M. & K. 52.

A testator by his will expressly excluded his wife from the guardianship of his children, and directed that, if she should obtain possession of them, the provision he had made for their maintenance should cease; and he appointed his executors to be their guardians. After the testator's death, his widow, as the answer alleged, forcibly removed one of her daughters from a school at which her father had placed her in his lifetime, and took the child abroad. She then filed a bill, as next friend of the children, against the executors, for an account of the testator's estate. The Court directed the account to be taken, but referred it to the Master to inquire into the alleged misconduct of the mother, and ordered all proceedings under the decree to be stayed till the report was made. *Arnott v. Broadale*, 4 Sim. 387.

## INFERIOR COURT.

[See CORPORATION, Bye-Law.]

In a declaration on a judgment in an inferior court, an express allegation, that the original cause of action arose within the jurisdiction of the inferior court, is essential, and, if it be omitted, the declaration is bad on demurrer. *Read v. Pope*, 3 Law J. (n.s.) Exch. 842, s. c. 4 Tyr. 403.

## INFIRMARIES, HOSPITALS, AND DISPENSARIES.

Amendment of certain acts relating to, in Ireland. 8 & 4 Will. 4, c. 92; 11 Law J. Stat. 187.

## INFORMATION.

(A) IN GENERAL.

(B) CRIMINAL INFORMATION.

[See REVENUE.]

(A) IN GENERAL.

After exceptions had been allowed to an answer to an information, the Court, being of opinion that the interrogatories were more extensive than the purposes of the suit required, referred it to the Attorney General, to consider what course ought to be taken with respect to the exceptions, and stayed all proceedings in the suit, in the meantime. *Attorney General v. Corporation of Carlisle*, 4 Sim. 275.

An information stating bequests, for young men of a particular corporation, and also divers other bequests for young men, without alleging that these

other bequests were of an homogenous character with the former, demurrable for multifariousness.

The Court will not, however, regard minute differences in the character of such bequests, so as not to allow them to be comprised in one information. *Attorney General v. the Goldsmiths' Company*, 4 Law J. (n.s.) Chanc. 22.

An information charged that defendant, not being a subject of his Majesty, was, on the 28th of October 1834, found on board a vessel within a part of the United Kingdom, and within one league of the coast of the United Kingdom, such vessel being liable to forfeiture, under an act relating to the Customs:—Held, that a conviction, for a pecuniary penalty on this information was bad; stat. 3 & 4 Will. 4, c. 53, s. 48, not having made it an offence, in a foreigner, to be on board such vessel within any port besides those of the Isle of Man; and the offence created by the same section, of being on board such vessel within one league of the coast of the United Kingdom, having been done away with, so far as relates to the pecuniary penalty, by stat. 4 & 5 Will. 4, c. 13, (22nd of May, 1834). *Rex v. Pereira*, 2 Ad. & E. 376.

## (B) CRIMINAL INFORMATION.

A party who applies to the Court for a criminal information against a defendant for breach of duty as a magistrate, as well as an individual, must, before motion, give notice to the defendant of his intended application. *Rex v. Heming*, 3 Law J. (n.s.) M.C. 3, s. c. 5 B. & Ad. 666; 2 N. & M. 447.

A party aggrieved by a libel has to the second term after knowledge of the publication, within which to move for a criminal information. But the application must be made in the second term, in such time as to allow the defendants a reasonable time, under the circumstances, to shew cause within that term. *Rex v. Jollie*, 2 Law J. (n.s.) K.B. 144, s. c. 1 N. & M. 483; 4 B. & Ad. 867; and see *Rex v. Hartley*, 4 B. & Ad. 869.

Where the copy of the affidavit from the Stamp Office stated the place where a paper was published, to be "Union Court, Castle Street," and the paper annexed to the affidavits, on which a criminal information was moved, for a libel, purported to be "printed and published at Union Buildings, John Street;" this was held not to be sufficient evidence of identity, under the 11th sect. of 38 Geo. 3, c. 78; and the Court refused to enlarge the rule, to enable the prosecutor to amend his affidavits, and adduce some other proof of identity, on the ground that where a party applies for the special interference of the Court, he ought to come prepared with everything necessary to support his application. *Rex v. Francis*, 4 Law J. (n.s.) M.C. 23, s. c. 2 Ad. & E. 49; 4 N. & M. 251.

The Court of King's Bench will not grant a criminal information against Justices for misconduct, where no corrupt motive is attributed or attributable to them. Six days certain notice of motion must be given; and it is not sufficient that the rule is not moved for till after the expiration of six days from giving notice; nor is the service of the rule sufficient notice. *Rex v. Blanchard*, 4 Law J. (n.s.) M.C. 24.

The Court will not grant a rule nisi for a criminal information against Justices on the following

grounds only: viz.—that they held a legal party to bail for perjury, without any legal information or evidence; and that they, without legal evidence, or any opportunity given him to defend himself, bound him over to the sessions, which had no jurisdiction, to answer such charge, not binding over any prosecutor; that their conduct was in some other respects irregular; and that the party applying believes them to have acted in collusion with persons whom he had intended prosecuting, to deter him from such prosecution. More distinct evidence is requisite, that the Justices acted from corrupt motives.

Justices are entitled to six days' notice of motion for a criminal information against them; and if the notice name a day for the motion, which is less than six days, the distinct defect is not aided by the party forbearing to move within six days. *Ex parte Fentiman*, 2 Ad. & E. 127, s. c. 4 N. & M. 126.

Upon a motion for a criminal information against A, for challenging B, an affidavit, stating that in a correspondence between them, A had intimated an intention, after the settlement of accounts between himself and B, to require an apology for offensive expressions contained in a letter received by him from B, or "such satisfaction as is usual on such occasions between gentlemen;" and that afterwards C, a relation of A, came with a letter of B in his hand, settled the account by paying a balance due from A to B; and, after saying that he had come in consequence of the letter in his hand, delivered a hostile message, as from A,—was held insufficient to connect A with the challenge, and therefore the Court refused the rule. But the Court granted a rule nisi against C. *Rez v. Younghusband*, 4 N. & M. 850.

Where a rule for a criminal information had been discharged upon the merits, the Court refused to grant a rule to shew cause on a second application in the same case, upon additional affidavits. *Rez v. Smithson*, 4 B. & Ad. 861, s. c. 1 N. & M. 775.

### INHABITANTS.

[See WITNESS, Competency.]

### INHABITED HOUSE DUTY,

Repeal of, 4 Will. 4, c. 19; 12 Law J. Stat. 32.

### INHERITANCE,

Amendment of law of, 3 & 4 Will. 4, c. 106; 11 Law J. Stat. 219.

### INITIALS

Of christian names, may be used in affidavits of debt, process, and declaration, where they are used in bills of exchange, or other written instruments upon which the action is brought. 3 & 4 Will. 4, c. 42, s. 12; 11 Law J. Stat. 98.

### INJUNCTION.

[See JURISDICTION—MESNE PROFITS—LANDLORD AND TENANT—PRACTICE, C. L., Proceedings, where set aside—RETAINER—WASTE.]

- (A) WHERE GRANTED, OR REFUSED, IN GENERAL.
- (B) TO STAY OR RESTRAIN PROCEEDINGS.
- (C) EXTENDING AND CONTINUING.
- (D) BREACH OF.
- (E) DISSOLVING.
- (F) PRACTICE.
- (G) COSTS.

#### (A) WHERE GRANTED, OR REFUSED, IN GENERAL.

Where the party agree not to do a particular act, and there are other terms in the agreement which are so vague that the Court cannot enforce them, it will not grant an injunction to restrain the breach of the negative term.

The Court will not give any assistance to a party seeking to enforce a hard bargain. *Kimberley v. Jennings*, 6 Sim. 340.

The proprietors of Covent Garden Theatre agreed with an actor, that he should act for twenty-four nights, during a certain period of time, at their theatre, and that, in the meantime, he should not act at any other place in London:—Held, that the Court cannot enforce the positive part of the contract, and therefore it will not restrain, by injunction, a breach of the negative part. *Kemble v. Kean*, 6 Sim. 333.

The vendor, on the execution of a contract, received 200,000*l.*, part of the purchase-money, in Bank of England notes. After the decree for the contract being rescinded was pronounced, the purchasers of the mines identified the purchase of 192,766*l.* 8*s.* 9*d.* new 4*l.* per cent. bank annuities, with the bank notes so paid by them to the vendor; which stock was originally purchased by him, and stood in his own name, and, subsequently during the suit, was transferred, without consideration, into that of his mother. The Court, on motion, granted an injunction to restrain the transfer of such stock, on the ground, that nothing done under such a contract would pass the property in those bank notes to the vendor; that the stock was merely a substitution for those notes; and that no consideration for the transfer to the vendor's mother being shewn, she must be viewed as a trustee merely, of such stock for him. *Small v. Atwood*, 2 Law J. (N.S.) Exch. Eq. 2.

The Court will not grant an injunction and receiver against executors who have obtained probate, on the ground of proceedings in the Ecclesiastical Court to recall probate. *Anonymous*, 2 Law J. (N.S.) Chanc. 123.

An injunction to stay the erection or use of a steam-engine, in draining the fens, because the use of it was likely to do damage to the banks of a river, into which the water would be emptied—refused.

No instance of injunction granted to stay an eventual or contingent nuisance. *Ripon v. Hobart*, 3 Law J. (N.S.) Chanc. 145, s. c. 3 M. & K. 169.

Order to restore a canal, which had undergone improvements and alterations, to the state in which it was when first completed—refused.

Jurisdiction of the Court, as to abatement of nuisance. *Blakemore v. the Glamorganshire Canal Company*, 2 Law J. (N.S.) Ch. 95, a.c. 1 M. & K. 154.

Injunction granted to prevent the obstruction of ancient lights against a lessee of an ecclesiastical corporation subject to the plaintiffs' establishing their right to the easement, in an action. *Sutton v. Lord Montfort*, 4 Sim. 559.

Injunction granted to restrain the Commissioners of Woods and Forests, from building on part of the site of Carlton Palace, in violation of one of the terms of an agreement entered into by them with the plaintiffs for a building lease of an adjoining part of the site. *Ranker v. Huskisson*, 4 Sim. 13.

The defendant pulled down posts and rails, with which the plaintiff had fenced a small plantation, and threatened to do so as often as they were put up. The plaintiff had brought an action of trespass in the Common Pleas; but a demurrer to a bill for an injunction was overruled. *Ryder v. Williams*, 4 Law J. (N.S.) Chanc. 55.

On dissolution of a partnership between two sleeping, and one managing partners, (nurserymen,) and bill filed for taking partnership accounts, &c.; an issue was directed to try whether the partnership deed was usurious or not. A motion for an injunction and a receiver, against the managing partner, refused, in consideration of the nature of the business. *Fyson v. Miller*, 2 Law J. (N.S.) Chanc. 158.

The Court will grant an injunction to restrain the breach of a covenant in a deed of partnership, although the bill does not pray a dissolution of the partnership.

The Court will not, in general, by injunction, enjoin the defendant to do a positive act; yet, where there is a continuing violation of a covenant, the Court will by an injunction restrain its continuance. Thus, where one partner abstracted a partnership book from the counting-house of the firm, contrary to an express covenant, the Court restrained him by injunction from continuing to violate the covenant. *Taylor v. Davis*, 4 Law J. (N.S.) Chanc. 18.

A manufacturer restrained from using certain letters and figures, which a patentee was in the habit of using. *Ransome v. Bentall*, 3 Law J. (N.S.) Chanc. 161.

By articles of partnership, the partnership, which was for twenty-one years, was to be carried on for the first fourteen years under the style of A & Co., and for the last seven years under the style of A & B. During the first fourteen years, and for rather more than a year afterwards, the name of A alone was stamped upon certain manufactures of the partnership. An injunction, restraining the use of the name of A upon the goods, or of any other name than that of A & B, for the remainder of the term, refused. *Powell v. Allarton*, 4 Law J. (N.S.) Ch. 91.

A granted a lease of twenty-one years to B, with a proviso determining the lease, and giving A a right of re-entry, on non-performance of any of the covenants in the lease, and A covenanted that, at the end of the term, if it should not be sooner determined by B's acts or defaults, he would grant to B a lease for a further term of fourteen years. B paid all his rent, and continued in possession after the term had expired. A then brought an eject-

ment against him for breaches of covenant during the term. B filed a bill for a specific performance of the covenant to renew, and for an injunction to restrain the action. A, in his answer, set up the breaches of covenant, and denied having had notice of them till after the end of the term. Motion for the injunction refused. *Thompson v. Guyon*, 5 Sim. 65.

Injunction granted upon affidavit, before answer, to restrain the defendants, trustees of a chapel erected by a Presbyterian congregation for religious worship, according to the usage, discipline, and doctrine of the Church of Scotland, from electing as minister a person not duly licensed by that Church; but an injunction to restrain them from allowing persons, not so licensed, to officiate, and from preventing persons so licensed and otherwise duly authorized from officiating during the intermediate period prior to such election, was refused. *Milligan v. Mitchell*, 1 M. & K. 446.

#### (B) TO STAY OR RESTRAIN PROCEEDINGS.

The Court will not grant a special injunction against the assignees of a bond, to restrain an action brought by them in the name of the assignor. *Lord Portarlington v. Graham*, 5 Sim. 416.

A party to a suit was committed for disobedience of an order, and moved to be discharged, on the ground that there was an error in the tests of the writ of execution, and for costs and damages for false imprisonment. The Court, upon itself observing an error in the dates, ordered the party's immediate discharge only. He then brought an action for damages in a court of law, and the Court restrained him by an injunction from proceeding, but allowed him his costs of the motion. *Brandon v. Brandon*, 1 Law J. (N.S.) Chanc. 172.

An injunction granted to stay proceedings at law, on a bill, given in the name of the firm by one of the partners, to secure the share of partnership capital brought in by him. *Bennett v. Brooks*, 3 Law J. (N.S.) Chanc. 133.

A special injunction to restrain proceedings at law will be granted in the first instance, where the plaintiff has not had an opportunity of obtaining the common injunction in time by the ordinary rules.

An injunction granted to stay outlawry on terms. *Drummond v. Pigou*, 4 Law J. (N.S.) Chanc. 24, s. c. 2 M. & K. 168.

An action brought after a decree, upon the subject matter referred to the Master, and pending the proceedings in his office, will be restrained, upon motion, by special injunction; and if a supplemental bill be filed, praying such injunction, it is not necessary to obtain, in the first instance, the common injunction. *Frank v. Bassett*, 2 M. & K. 618.

A bill in equity, to set aside a verdict, is not sustainable where the facts on which the bill is founded, though discovered since the trial, might have been established at the trial upon cross-examination. *Taylor v. Sheppard*, 1 Y. & C. 271.

#### (C) EXTENDING AND CONTINUING.

A motion to extend the common injunction refused, because it was supported by the affidavit of the solicitor alone, and no satisfactory explanation was given, why the plaintiff himself had not made the usual affidavit. *Spalding v. Reiley*, 4 Law J. (N.S.) Chanc. 109.



Injunction to restrain the defendants from suing in Ireland upon a bill of exchange given by the plaintiff for a gambling debt, under the circumstances, continued. Jurisdiction of the Court of Chancery to stay the proceedings of parties in foreign courts. See *Lord Portarlington v. Soulby*, 3 M. & K. 104.

Where an answer was reported insufficient, and the plaintiff obtained the common injunction, and also an order for liberty to amend, and that the defendants should answer the exceptions and amendment at the same time, a motion for the extension of the injunction, to stay trial, was refused. *Mellor v. Cresswell*, 2 M. & K. 616.

#### (D) BREACH OF.

An annuity was granted to A, in consideration of certain services performed by him. A assigned the annuity, for a valuable consideration, to B, the deed of assignment containing the usual power of attorney to sue and give discharges, and which power was declared to be irrevocable. A, shortly after the assignment, quitted England. B having brought an action, in the name of A, for arrears of the annuity, the grantors filed their bill against A and B, to restrain the proceedings at law, alleging, that the annuity had been obtained through fraud and misrepresentation, and that it had been assigned to B colourably, and without consideration. B, by his answer, denied all knowledge of the alleged fraud or misrepresentation, and claimed to be a purchaser for a full consideration. No answer being put in by A, who continued abroad, an injunction, obtained by the plaintiffs against A and B, was dissolved as to B, who proceeded to trial in the action at law commenced by him in the name of A, (the plaintiffs in equity appearing on such trial,) and recovered a verdict. The plaintiffs subsequently moved for an attachment against the solicitor of B, for a breach of the injunction; but the Court refused the application. *Imperial Gas Light Company v. Clarke*, 1 You. 580.

#### (E) DISSOLVING.

Upon the overruling of the demurrer of two defendants, who were out of the jurisdiction, the plaintiff obtained the common injunction against them for want of an answer; and the Court, upon the application of the third defendant, who had answered, refused to grant an order nisi to dissolve the injunction. *Bowles v. Orr*, 1 Y. & C. 474.

An injunction obtained *ex parte*, dissolved with costs, on account of the plaintiff not having stated in his bill material facts, which were within his knowledge at the time of filing his bill. *Hatch v. Borsley*, 4 Law J. (N.S.) Chanc. 160.

The common injunction till answer and further order to stay proceedings at law upon a bond, alleged to be for gaming, dissolved, before the answer of the obligee, who was abroad, had been put in under the circumstances. *Lord Portarlington v. Graham*, 3 Law J. (N.S.) Chanc. 154.

#### (F) PRACTICE.

The Court will not order that service of an injunction at the house of a party, who avoids being served, may be good service.

A party who has notice of an injunction, is  
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bound thereby, although the writ of injunction has not been served on him.

Service of an ordinary subpoena at the house of the defendant, is good service, and no special order is necessary. *Robinson v. Elton*, 4 Law J. (N.S.) Chanc. 197.

A motion before the Master of the Rolls, upon the coming in of the answer, to dismiss an order for an injunction, granted *ex parte* by the Vice Chancellor upon affidavits, refused with costs, it being a motion to vary the order of one Judge by another jurisdiction. *George v. Walmouth*, 4 Law J. (N.S.) Chanc. 61.

An attachment issued after notice of motion will not prevent the motion from being made.

A common injunction obtained against two defendants after one had answered—discharged for irregularity. *Jeyes v. Foreman*, 3 Law J. (N.S.) Chanc. 97, s. c. 6 Sim. 384.

#### (G) COSTS.

Where the plaintiff is entitled to have the injunction made perpetual, the defendant will have to pay the costs of the suit, however trivial the subject-matter of the suit may be, if he did not, after the injunction was granted, tender the costs up to that time. *Fraddella v. Waller*, 2 Russ. & M. 247.

### INNKEEPER.

[See CONTRACT, Valid of void—LIEN.]

In trespass for taking carriage-horses which the plaintiff had hired of the defendant to take him away from the defendant's inn, the defendant pleaded, that the plaintiff refused to pay his bill for entertainment, and that the defendant did so to prevent the removal of the plaintiff's carriage. To this plea the plaintiff replied, that he had "tendered" the defendant 45*l*.; and the defendant rejoined, denying the tender. It was proved that the plaintiff put down the money, and offered it, if the defendant "would take it in full of the bill":—Held, that this was not a valid tender; and that this evidence did not support the replication.—Held, also, that on these pleadings the jury are not to consider the reasonableness of the defendant's bill. *Gordon v. Cox*, 7 C. & P. 172. [Coleridge]

A guest drove up to an inn with a horse and gig, and the horse was taken out by the ostler in the presence of the guest, and put into the inn stable. The gig was left in a yard, which was an open carriage-way, communicating with the public road, and on the other side of the way from the inn, forming no part of the premises belonging to the inn, but used by the innkeeper for placing the carriages of his guests there. It being stolen from thence,—Held, that although this was a case very near the limits, the innkeeper was liable. *Jones v. Tyler*, 3 Law J. (N.S.) K.B. 166, s. c. 1 Ad. & E. 522; 3 N. & M. 576.

An innkeeper is liable to answer for goods which are lost by a guest at his inn, from his bed-room, although the goods were, at the time they were taken, in the actual care of the guest.

He is equally liable to answer for money lost as for any other property. *Kemp v. Shuckard*, 1 Law J. (N.S.) K.B. 1, s. c. 2 B. & Ad. 803.

An indictment lies against an innkeeper who refuses to receive a guest, he having room in his house at the time; and it is not necessary for the guest to tender the price of his entertainment, if his rejection is not on that ground. And it is no defence for the innkeeper, that the guest was travelling on a Sunday, and at an hour of the night after the innkeeper's family had gone to bed: nor is it any defence that the guest refused to tell his name and abode, as the innkeeper had no right to insist upon knowing those particulars; but if the guest come to the inn drunk, or behave in an indecent or improper manner, the innkeeper is not bound to receive him. *Res v. Ivens*, 7 C. & P. 213. [Coleridge]

### INQUIRY, WRIT OF.

[See Costs.]

On a motion to set aside a writ of inquiry by reason of short notice of the execution thereof, the defendant need not negative his residence within forty miles of London at the time of the service of process or of the notice; but it is sufficient to state generally, that he resides more than forty miles from London.

On receiving a short notice of executing a writ of inquiry, the defendant's attorney ought to return the same, otherwise he may not obtain the costs of setting it aside for irregularity. *Stevens v. Pell*, 3 Law J. (n.s.) Exch. 38, s.c. 2 C. & M. 421; 4 Tyr. 6.

A rule to set aside a writ of inquiry need not be drawn up on "reading the sheriff's notes;" but a copy verified by affidavit may be used. *Stevens v. Pell*, 3 Law J. (n.s.) Exch. 214, s.c. 2 C. & M. 710; 4 Tyr. 267.

The Court will compel the plaintiff's attorney to file the inquisition upon a judgment by default, in order that the defendant may move in arrest of judgment, or to vacate the judgment and execution, and will make him pay the costs, if, on being applied to, he has refused to file the inquisition, and has not offered to give a copy thereof. *Townsend v. Burns*, 2 Law J. (n.s.) Exch. 30, s.c. 1 C. & M. 177; 3 Tyr. 104; 1 Dowl. P.C. 629.

Where the defendant has not appeared, and has not been served personally with process or notice of declaration, notice of inquiry may be served, by leaving a copy at the last place of residence of the defendant, and fixing a copy in the Office of Pleas. *Watson v. Delcroix*, 3 Law J. (n.s.) Exch. 94, s.c. 2 C. & M. 425; 4 Tyr. 266.

Where a plaintiff has obtained a judgment *non obstante veredicto*, he may execute a writ of inquiry to assess his damages without leave of the Court. *Shepherd v. Hall*, 2 Dowl. P.C. 453.

In an action for work and labour, the defendant, on a judgment by default, is at liberty to cross-examine the plaintiff's witnesses who are called to prove the work done, as to whether the work was done on the defendant's retainer or not. *Williams v. Cooper*, 3 Dowl. P.C. 304.

### INSANE PERSONS.

[See LUNATIC—PARTNERSHIP.]

Regulations for the care and treatment of. 2 & 3 Will. 4, c. 107; 10 Law J. Stat. 261. 3 & 4 Will. 4, c. 64; 11 Law J. Stat. 112.

Provisions for diminution of inconvenience and expenses of commissions in the nature of writs *de lunatico inquirendo*, and for care of persons found idiot, lunatic, &c. by inquisition. 3 & 4 Will. 4, c. 36; 11 Law J. Stat. 87.

Continuation, for three years, of 2 & 3 Will. 4, c. 107, and 3 & 4 Will. 4, c. 64, relating to the treatment of. See 5 & 6 Will. 4, c. 22; 13 Law J. Stat. 43.

### INSOLVENT DEBTOR.

[See BANKRUPT, Assignment of the Bankrupt's Property—COGNOVIT—JUDGMENT, Voluntary.]

- (A) STATUTES.
- (B) OF THE ASSIGNMENT.
- (C) OF THE ASSIGNEES.
- (D) OF THE SCHEDULE.
- (E) OF FRAUDULENT PREFERENCE, VOLUNTARY CONVEYANCES, AND GROUNDS OF OPPOSITION.
- (F) OF THE DISCHARGE OF.
- (G) APPROPRIATION OF PENSION.
- (H) PRACTICE.

#### (A) STATUTES.

His Majesty authorized to direct the Judges of the Bankruptcy Court, other than the Chief, to act in the Insolvent Debtors Court, as Commissioners. 3 & 4 Will. 4, c. 47; 11 Law J. Stat. 106.

Insolvent Debtors Acts, 7 Geo. 4, c. 57, and 1 Will. 4, c. 58, continued for three years. 2 Will. 4, c. 44; 10 Law J. Stat. 76.

Provisions for granting superannuation allowances to officers of the courts for relief of insolvent debtors. 5 & 6 Will. 4, c. 42; 13 Law J. Stat. 73.

Continuation of an act for relief of insolvent debtors in Ireland. 4 & 5 Will. 4, c. 56; 12 Law J. Stat. 113.

Relief of insolvent debtors in India. Provisions of an act of 9 Geo. 4, continued till 1st March 1836. 2 Will. 4, c. 43; 10 Law J. Stat. 76.

Amendment of law relating to, in India. 4 & 5 Will. 4, c. 79; 12 Law J. Stat. 160.

#### (B) OF THE ASSIGNMENT.

If, after the commencement of the imprisonment of a party, who obtains the benefit of the Insolvent Debtors Act, and before the appointment of the provisional assignee, the sheriff levy on the goods of the insolvent, under an execution sued out on a *cognovit actionem*, and proceed to sell, notwithstanding notice, he (the sheriff) is liable in trover to the general assignee, as the 34th section of the statute 7 Geo. 4, c. 57, operates as a statutory supersedeas to such execution, and enacts, "that the creditor by whom such execution is sued out should come in with the others, and receive *pro rata*." *Groves v. Cowan*, 2 Law J. (n.s.) C.P. 196, s.c. 10 Bing. 5; 3 Mo. & Sc. 552.

The assignment of an insolvent debtor, under the 11th section of 7 Geo. 4, c. 57, does not relate back to the commencement of his imprisonment.

Therefore, in an action of assumpsit by the assignees of an insolvent for the value of goods sold by the insolvent to the plaintiff, a creditor, after his imprisonment, but before his petition and assignment,—Held, that the sale could not be considered as a sale made by the insolvent as the agent of the assignees, and, consequently, that a plea of set-off of a larger amount due from the insolvent, was a good answer. *Sims v. Simpson*, 4 Law J. (n.s.) C.P. 35, s. c. 1 Bing. N.C. 306; 1 Sc. 177.

The profits of an ecclesiastical living do not pass to the assignees of an insolvent debtor under the 11th section of 7 Geo. 4, c. 57. The effect of the 28th section is to put the assignees after the adjudication with respect to ecclesiastical livings, in the same situation as other creditors:—Held, therefore, that a judgment creditor by verdict, and a judgment creditor under a warrant of attorney obtained before adjudication, were entitled to retain their priority.—Held, likewise, that the words of section 34, by which a person is prevented from availing himself after the imprisonment of the insolvent of any execution upon judgment on warrant of attorney, "either by seizure or sale," apply only to such executions as are necessarily attended with seizure or sale, and that they do not apply to a writ of sequestration. *Bishop v. Hatch*, 3 Law J. (n.s.) K.B. 127, s. c. 1 Ad. & E. 171; 3 N. & M. 498.

(C) OF THE ASSIGNEES.

[See LEGACY, Assignment of.]

The want of consent of creditors, required by the Insolvent Act, to enable assignees to institute suits in equity, cannot be taken advantage of by the debtors to the estate, against whom proceedings are instituted. *Piercy v. Roberts*, 2 Law J. (n.s.) Chanc. 17, s. c. 1 M. & K. 4.

The assignees of an insolvent debtor are entitled to avail themselves, as "parties grieved," of the provisions of the statute 13 Eliz. c. 5, where a conveyance has been fraudulently made by the insolvent within the prohibited terms of that statute. *Butcher v. Harrison*, 2 Law J. (n.s.) K.B. 189, s. c. 1 N. & M. 677; 4 B. & Ad. 129.

7 Geo. 4, c. 57, s. 26, does not apply to the case of provisional assignee defendant. *Mendham v. Robinson*, 2 Law J. (n.s.) Ch. 56, s. c. 1 M. & K. 217.

Trover lies against the execution creditor for the sale of goods taken in execution upon a judgment entered on a warrant of attorney, after the imprisonment of the insolvent has commenced.

*Semble*—The execution creditor is the person against whom the action is properly brought, no notice being given to the sheriff of the commencement of the imprisonment of the debtor, and of his intention to take the benefit of the statute. *Kelsey v. Minter*, 4 Law J. (n.s.) C.P. 208, s. c. 1 Bing. N.C. 721; 1 Sc. 616.

An agreement for a lease is not annulled by the insolvency of the intended lessor. *Crosby v. Tooke*, 1 M. & K. 215.

To a bill filed by the assignee of an insolvent debtor, the defendant pleaded that the consent of the creditors, and of the Insolvent Debtors Court, to the institution of the suit, had not been obtained. Plea overruled. *Casborne v. Bersham*, 6 Sim. 317.

The plaintiffs, assignees of an insolvent legatee, sought to recover from the defendants, executors, a sum of 622l. 3s. 10½d. In the account stated by the defendants, which alone made them liable for the legacy in a court of law, they admitted a balance of 187l. 3s. 10½d., but stated the assignment of the remainder by the insolvent to one of the defendants, in payment of a just debt:—Held, that such account was not conclusive or binding upon the plaintiffs, but that it was competent to them to invalidate the claim, by shewing that the assignment, being fraudulent, was a nullity. *Rose v. Savory*, 4 Law J. (n.s.) C.P. 275, s. c. 2 Bing. N.C. 145; 2 Sc. 199.

In an action by the assignee of an insolvent, it is necessary to prove the provisional assignment, although by the Insolvent Debtors Act, 7 Geo. 4, c. 57, it must be executed at the time of signing the petition, on which the adjudication of the Insolvent Debtors Court (which is a court of record) is founded. *Jeffery v. Robinson*, 5 C. & P. 230. [Tenterden]

A received from B, an insolvent, the pawnbroker's duplicate of a harp, which was an undue preference under sect. 32 of the Insolvent Act, 7 Geo. 4, c. 57. A took the harp out of pawn:—Held, that, as against the assignees, A had no lien on the harp for the sum he paid to take it out of pawn. *Ayling v. Williams*, 5 C. & P. 399. [Vaughan]

(D) OF THE SCHEDULE.

[See PERJURY, Evidence.]

*Semble*—The discharge of an insolvent under 7 Geo. 4, c. 57, applies only to the debts named in the schedule, and not to all the debts due to the creditors named. *Bishop v. Polhill and Deacon*, 1 M. & Ro. 363. [Patteson]

If an insolvent debtor knows, at the time of filing his schedule, that a bill of exchange had been indorsed to a particular person, some time before, he is bound to give notice to that person, although he cannot tell whether he continues to be holder at the time of filing the schedule. *Pugh v. Hookham*, 6 C. & P. 376. [Tindal]

If a party, who takes the benefit of the Insolvent Debtors Act, is induced by his attorney to omit out of his schedule a debt due from him to the attorney, and by such procurement the debt is omitted out of the schedule, the attorney cannot afterwards recover that debt from the party in an action. *Howard v. Bartolozzi*, 6 C. & P. 13. [Denman]

(E) OF FRAUDULENT PREFERENCE, VOLUNTARY CONVEYANCES, AND GROUNDS OF OPPOSITION.

A transfer made by a debtor under apprehension of arrest, is not fraudulent and void as voluntary under the Insolvent Debtors Act, 7 Geo. 4, c. 57, s. 32. *Corbould v. Broadhurst*, 1 M. & Ro. 189. [Tenterden]

A deed executed by an insolvent debtor in prison, for the benefit of all his creditors, is not a voluntary deed, which is avoided by the 7 Geo. 4, c. 57, s. 32. (*Dubitante* Alderson, B.)

Where the insolvent, when in prison, was informed by the agent of his creditors, that unless he executed a trust deed for the benefit of all of them, they would make a bankrupt of him, and would not consent to his discharge from prison, and thereupon, after three days deliberation, executed it re-

luctantly:—Held, that it was not a voluntary deed within that section. *Davies v. Acocks*, 4 Law J. (n.s.) Exch. 251, s. c. 2 C. M. & R. 461.

A being in insolvent circumstances, and having sold his goods by public auction, (the proceeds remaining in the hands of the auctioneer,) the defendant, under pretence of having issued a fiat of bankruptcy against A, prevailed upon the auctioneer to pay over to him the amount of his debt, and subsequently procured the assent of A to such payment. A, more than three months afterwards, petitioned the Insolvent Debtors Court for his discharge under the act. In an action by his assignee to recover back the sum so paid,—Held, that it ought to have been left to the jury to say, whether the transaction did not amount to a voluntary charging of his estate by the insolvent, and whether he did not at the time contemplate taking the benefit of the act. *Wainwright v. Miles*, 3 Mo. & Sc. 211.

*Semble*—That to make a judgment void as being voluntary under the 32nd section of the Insolvent Act, 7 Geo. 4, c. 57, there must be collusion between the party suffering it, and the creditor recovering it, for the purpose of giving the latter a preference.

At any rate, the mere circumstance of the judgment being suffered by default, does not make it void under that section, if there be a *bond fide* debt. *Thorpe v. Eyre*, 1 Ad. & E. 926, s. c. 3 N. & M. 214.

A creditor writes to his debtor reminding him of his debt, and requires payment within a few weeks, otherwise he will employ an attorney. The debt is discharged without any subsequent act on the part of the creditor, in three weeks from the receipt of the letter. The debtor is insolvent, and takes the benefit of the act, 7 Geo. 4, c. 57. His imprisonment commences within three months of the time of the payment. The assignee brings an action against the creditor, to recover the sum thus paid, and upon special case, stating, that the debtor (insolvent at the time,) made the payment in consequence of the letter:—Held, that this was not a voluntary payment, or fraudulent and void within the 32nd section of the statute. *Reynard v. Robinson*, 2 Law J. (n.s.) C.P. 115, s. c. 9 Bing. 717; 3 Mo. & Sc. 127.

Conveyance to a creditor, made for full valuable consideration, if made on suggestion of insolvent, is voluntary; so, if made for the purpose of giving a preference to one creditor over another. *Stuckey v. Drewe*, 2 Law J. (n.s.) Chanc. 19, s. c. 2 M. & K. 190.

In trespass, where the defendant pleaded that plaintiff was unlawfully, and without licence, in his house, the plea was sustained by an assignment to the defendant, of all the estate and effects of the assignor, who rented the house, made in consideration of an advance to prevent a distress for rent, in trust to secure the present advance and an antecedent debt; although the assignor was in insolvent circumstances, and a fortnight afterwards rendered to prison, and took the benefit of the Insolvent Act, and the plaintiff had authority from the provisional assignee.

The word "voluntary," in the 32nd section of 7 Geo. 4, c. 57, differs from "fraudulent."

A further advance by a creditor, to relieve a debtor from a distress, is a good consideration for the purchase of a security for an antecedent debt,

where no actual fraud is suggested. *Arnell v. Bean*, 1 Law J. (n.s.) C.P. 38, s. c. 8 Bing. 87; 1 Mo. & Sc. 151.

An authority to proceed in an action to recover a debt due from a party, does not sanction opposing his discharge in the Insolvent Debtors Court. *Drake v. Lewis*, 4 Tyr. 730.

#### (F) OF THE DISCHARGE OF.

[See PRISONER, Discharge of—INFANT.]

If a claim against an insolvent at the time of making his schedule depends upon a contingency, it is not barred by the act. *Lawrence v. Walker*, 3 Dowl. P.C. 614.

Section 37 of the 7 Geo. 4, c. 57, (the Insolvent Act,) which authorizes execution in certain cases against an insolvent who has obtained his discharge, does not apply to a *ca. sa.* *Rivett v. Lark*, 3 Dowl. P.C. 62.

The person of a defendant is discharged by certificate, after prior insolvency, although 1*ss.* in the pound was not paid. In such case the certificate being proved, but the verdict entered generally, the Court will make use of affidavits to ascertain the fact of such proof. After such general finding, the defendant being taken in execution, he may at once apply to be discharged, without moving to restrict the judgment. *Carew v. Edwards*, 2 Dowl. P.C. 613.

A promissory note given by an insolvent after his discharge, for the amount of a promissory note given before such discharge, in order to prevent the surety therein from being sued, is a new contract or security for payment of an old debt within the protection of 7 Geo. 4, c. 57, s. 61, and in respect of which, therefore, the insolvent is not liable. *Evans v. Williams*, 2 Law J. (n.s.) Exch. 41, s. c. 1 C. & M. 30; 3 Tyr. 226.

The Insolvent Debtors Act does not, like the Bankrupt Act, discharge the insolvent from the action of his surety, for money paid after the insolvent's discharge, upon a security entered into before taking the benefit of the act. *Powell v. Eason*, 1 Law J. (n.s.) C.P. 12, s. c. 8 Bing. 23; 1 Mo. & Sc. 68.

In an action against a defendant who has taken the benefit of the Insolvent Debtors Act, 7 Geo. 4, c. 57, he must plead his discharge under the statute; it cannot be given in evidence upon the general issue. In such case the Court will not allow the defendant to withdraw the plea of the general issue, and plead specially, if they perceive upon the face of his schedule, that he has not complied with the forms prescribed by the statute. *Bircham v. Creighton*, 2 Law J. (n.s.) C.P. 245, s. c. 10 Bing. 11; 3 Mo. & Sc. 346.

A bond was entered into by the defendant in order to secure the reinvestment of, and the payment of dividends which would have become due on, certain bank annuities. The defendant, after having made default, and given a warrant of attorney to enter up judgment if the principal was not paid before the 9th of October 1820, before that time became insolvent, and took the benefit of the act:—Held, that the bond, having been forfeited, became a debt at law to the amount of the penalty; and, although there might be some difficulty in ascertaining the real amount to which the plaintiff

was entitled, the defendant was discharged from that bond. *Sammon v. Miller*, 1 Law J. (N.S.) K.B. 168, s. c. 3 B. & Ad. 596.

(G) APPROPRIATION OF PENSION.

A pension during his Majesty's pleasure, granted by an order in council on petition, for past services as advocate of the Admiralty, and charged on the Navy estimates, may be appropriated, under the Insolvent Act, 7 Geo. 4, c. 57, s. 29, with the consent of the Lords of the Admiralty, for payment of the creditors. *Quere*—whether the Court of King's Bench could have granted a prohibition to the Insolvent Debtors Court, against proceeding upon an order for such appropriation, if it had not been warranted by the statute. *Ex parte Bathine*, 4 B. & Ad. 690, s. c. 1 N. & M. 579.

(H) PRACTICE.

The assignee of an insolvent debtor, having filed his bill to set aside a decree of foreclosure, which had been obtained by collusion with the insolvent, who was the mortgagor, the Court, being of opinion that this was substantially the suit of the insolvent himself, would only give relief to the extent of the claims of the unsatisfied scheduled creditors of the insolvent. *Edwards v. Jones*, 1 Law J. (N.S.) Chanc. 113.

Proceedings in the Insolvent Court, under stat. 1 Geo. 4, c. 119, may be proved in the manner prescribed by 7 Geo. 4, c. 57, s. 76.

Section 7 of the latter statute, as to proceedings previous to a sale, is, it seems, directory only, and, therefore, a purchaser may maintain ejectment without proving that the requisites thereof have been complied with. *Doe d. Phillips v. Evans*, 2 Law J. (N.S.) Exch. 179, s. c. 1 C. & M. 450; 3 Tyr. 339.

The petition of an insolvent is, in legal import, fled when it reaches its place of final custody, and not when it first comes to the hands of the officer of the court. *Garlick v. Sangster*, 1 Law J. (N.S.) C.P. 155, s. c. 9 Bing. 46; 2 Mo. & Sc. 68.

In an action of trover, by an insolvent debtor, to recover property acquired subsequently to adjudication, the Court will not direct him to give security for costs, unless the Insolvent Debtors Court, on an application by the assignees, under 7 Geo. 4, c. 57, s. 57, have permitted execution to issue in respect of such property. *Clapworthy v. Collier*, 1 Law J. (N.S.) Exch. 229, s. c. 2 C. & J. 631.

In order to bring up an insolvent debtor under the compulsory clause of 33 Geo. 3, c. 5, the debt, inclusive of costs, for which the debtor is charged in execution, must be under 300*l.* *In re Creswell*, 1 Law J. (N.S.) K.B. 12.

Where the provisional assignee is made a defendant in a bill for foreclosure of property mortgaged by a person who has been discharged under the Insolvent Act:—Held, that he is entitled to his costs from the plaintiff. *Woodward v. Haddon*, 1 Law J. (N.S.) Chanc. 106, s. c. 4 Sim. 606.

In a foreclosure suit against an insolvent mortgagor and the provisional assignee of the Insolvent Court, who claims no interest, the plaintiff must pay the costs of the assignee, and add them to his debt. *Wearing v. Count*, 6 Sim. 439.

If an insolvent gives a new security for a debt from which he was discharged, and in an action

upon that security, does not plead his discharge, but gives a warrant of attorney, the Court will not set aside the warrant of attorney. *Philpot v. Aslett*, 3 Law J. (N.S.) Exch. 344, s. c. 1 C. M. & R. 85; 4 Tyr. 729.

A plaintiff cannot rule the sheriff, bailiff, or other officer, to return the writ, after the defendant has taken the benefit of the Insolvent Act, and the plaintiff has been chosen assignee, and accepted of the assignment, even although there had been a previous escape in law. *Hepworth v. Sanderson*, 1 Law J. (N.S.) C.P. 15, s. c. 8 Bing. 19; 1 Mo. & Sc. 64.

INSPECTION OF BOOKS.

[See MANDAMUS—PRODUCTION OF DEEDS, &c.]

INSURANCE.

[See RIOT.]

- (A) INTEREST.
- (B) VOYAGE.
- (C) POLICY.
- (D) WARRANTIES.
- (E) REPRESENTATIONS AND CONCEALMENT.
- (F) RETURN OF PREMIUM.
- (G) LOSS.
- (H) BOTTOMRY.
- (I) INSURANCE ON LIVES.
- (K) INSURANCE AGAINST FIRE.
- (L) INSURANCE BROKER.
- (M) ACTIONS.
  - (a) *In general.*
  - (b) *Pleadings and Evidence.*
- (N) WAGERING POLICY.

(A) INTEREST.

A squadron of ships of war, assisted by land forces, having captured two Spanish register ships,—Held, that the officers and crews of the squadron have an insurable interest in the ships captured under the Prize Act, 19 Geo. 3, c. 67, before condemnation. *Le Cras v. Hughes*, 3 Doug. 81.

By a policy "on goods and merchandise," the interest which a carrier has in the goods which he carries, the property of third persons, arising from his liability at common law to the owners, is covered; and it is unnecessary that the policy should state the special property which, as a carrier, he has in the goods. *Crowley v. Cohen*, 1 Law J. (N.S.) K.B. 158, s. c. 3 B. & Ad. 478.

(B) VOYAGE.

Insurance at and from the coast of Africa to the West Indies, with liberty to exchange goods and slaves. The ship stayed at the coast of Africa several months, and was employed as a receiving ship for slaves, afterwards put on board other ships, which was the employment of a factory ship:—Held, that this was a deviation. *Hartley v. Buggin*, 3 Doug. 39.

Plaintiff effected an insurance on freight, &c. by a ship, subject to certain regulations, which provided, that vessels should not sail from ports in Ireland, after the 1st of September; and that the time of clearing at the custom-house should be

deemed the time of sailing, provided the ship were then ready for sea. The plaintiff's ship being in the port of Sligo, dropped down the river before the 1st of September, in readiness for sea, except that she had not her full quantity of ballast, there being a bar at the mouth of the river, which the ship could not have crossed with that quantity on board. Boats were in waiting on the outside, on the 1st of September, to ship the remainder of the ballast; and the vessel crossed the bar on that day, but struck in doing so; and the master, to ascertain what damage she had received, put into an adjacent port without taking the rest of his ballast, which was not done till the 4th, and the vessel proceeded on her voyage on the 8th:—Held, that the ship dropping down the river, and crossing the bar, without her full ballast, was not a sailing; and that, until the ballast was completed, she was not ready for sea within the rule referred to by the policy. *Pettegrew v. Pringle*, 3 B. & Ad. 514.

Policy of insurance effected in London, on the 28th of February 1824, on freight of goods aboard the *Agular*, from Singapore to London. The *Agular* sailed from England in September 1823, but did not arrive at Singapore until 30th March 1825. The jury found, that the ship was well manned and seaworthy, at Singapore, but that there was unreasonable and unjustifiable delay, between the making of the policy and the risk:—Held, that such delay was equivalent to a deviation, and varied the risk of the underwriter, who was therefore discharged from his liability. *Mount v. Larkins*, 1 Law J. (N.s.) C.P. 20, s.c. 8 Bing. 108; 1 Mo. & Sc. 165, 357.

Insurance, January 28th, on a yacht afloat, at and from Bristol to London. The vessel was not fitted out for sailing till the May following, and did not sail till the 17th of that month:—Held, that the circumstance of her being a yacht was no justification of such delay, and that the underwriters were discharged. *Palmer v. Fenning*, 9 Bing. 460, s.c. 2 Mo. & Sc. 624.

Goods and freight were insured at and from Liverpool to Monte Video and Buenos Ayres, if open, or the ship's final port of discharge in the River Plate, with liberty to wait two months at Monte Video, if needful, at a premium of 5 guineas per cent, to return 2½ per cent. for risk ending at Monte Video, on arrival. The vessel arrived on the 2nd of August at Monte Video, which was then blockaded by an enemy's fleet to prevent vessels passing to Buenos Ayres. The blockade did not cease till the 4th of October. The vessel afterwards sailed for Buenos Ayres, and was lost:—Held, that the risk was at an end as soon as the vessel had stayed two months at Monte Video; and that the underwriters were therefore discharged. *Doyle v. Powell*, 4 B. & Ad. 267, s.c. 1 N. & M. 678.

Under a policy insuring a brigantine, "at and from L to S," and thence to Barcelona, and at and thence and two "other ports in Spain, to a port in Great Britain":—Held, that Saloe, a place lying in a bay, having warehouses and a jetty, with a depth of water sufficient for feluccas, but not for large ships, and a good roadstead anchorage where ships lie, and are loaded by means of small craft; having also a custom-house and offices, is a "port" within the meaning of the policy. *The Sea Insurance Company of Scotland v. Gavin*, 4 Bl. N.s. 578.

A ship was insured from April 1st, 1831, to January 1st, 1832, warranted not to sail foreign after the times limited in certain club rules. The rules or warranties of the club limited the times of sailing to different parts of the world; and by a distinct warranty (the ninth) it was declared, that the time of clearing at the custom-house should be deemed the time of sailing, provided the ship was then ready for sea. The vessel insured was bound for the Bay of Fundy, from Dublin, and the last day of sailing, by the rules, was the 1st of September. She cleared out on the 31st of August, and dropped down the Liffey on the 1st of September, with an incomplete crew, (though a full complement was engaged before the ship cleared out,) to a place within the port of Dublin, where she lay at anchor the rest of the day. During that day the whole crew came on board, and on the 2nd she proceeded on her voyage, having been prevented from doing so on the 1st by an unfavourable wind. She was afterwards lost:—

Held, per Littledale, J., and, *semble*, per Taunton, J., that the policy must be construed as incorporating the ninth article of warranty, and not merely the several directions as to the times of sailing. (Denman, C.J. and Patteson, J. *dubitantes*.)

Held, by all the Court, that the ship did not actually sail till after the 1st of September, and that she was not ready for sea at the time of clearing out, the whole crew not being then on board; also, (Littledale, J. *dubitante*), that the words in the ninth article of warranty, "provided the ship is then ready for sea," if incorporated with the policy, must be limited to the point of time at which the clearances were obtained, and that as the vessel was not then ready, for want of a full crew, there had not been a constructive sailing on or before the 1st of September, according to the ninth warranty.

By one of the rules, it was provided, that vessels might sail after the limited time on payment of an additional premium as per scale; and by another rule, every member of the club, before the commencement of each voyage, was to give his acceptance for the premium, and parties "neglecting to give notice" were subject to a penalty:—Held, (assuming that these rules could be incorporated with the present policy,) that a party whose ship had sailed too late, and been lost, could not afterwards obtain the benefit of the extended time, by submitting to the penalty, and paying the extra premium. *Graham v. Barras*, 5 B. & Ad. 1011, s.c. 3 N. & M. 125.

### (C) POLICY.

Policy "on goods, specie, and effects," at and from London to Madras and China, with liberty to touch, stay, and trade at any ports, &c. until the vessel shall arrive at her last loading port in the East Indies or China:—Held, that, by the usage of the East India trade, this policy covers an intermediate voyage from Madras to Bengal, the vessel arriving too late at Madras to proceed that season to China.

The words "goods, specie, and effects," by the usage of the trade, cover a sum of money advanced by the captain for the benefit of the ship, and for which he charges respondentia interest. *Gregory v. Christie*, 8 Doug. 419.

An insurance upon a ship employed in the Greenland trade, on "ship, tackle, apparel, and furniture," does not, by the usage of the trade, cover the fishing-tackle. *Huskins v. Pickersgill*, 3 Doug. 222.

An average loss opens a valued policy. *Le Cras v. Hughes*, 3 Doug. 81.

An insurance was effected on goods on board any ship or ships from B to L, sailing within certain dates; and another insurance was effected on the same terms, on the same voyage within certain other dates. The insurer shipped goods on board two vessels, and not having the policies, made a declaration before a Magistrate, that he had shipped goods to the amount of 4,889*l.* on board vessel A, under the first policy. Both vessels sailed within the time mentioned in the first policy, and A was lost:—Held, that this was sufficient appropriation of the first policy to the goods on board of A. *Henchman v. Offley*, 3 Doug. 135.

Policy upon any kind of goods, &c. valued at 1,000*l.*, being on profits expected to arise on the cargo of the ship in the event of her safe arrival at Quebec; and in case of loss the insurers agree to pay the same without any other voucher than the policy:—Held, that this policy was not void within 19 Geo. 2, c. 37, but that the insured were entitled to recover. *Grant v. Parkinson*, 3 Doug. 16.

Policy on ship, at and from a place, attaches immediately the ship is at the place, from the date of the policy.

The agency of the persons effecting policy, on behalf of owner, must be expressly proved. *Palmer v. Marshall*, 1 Law J. (n.s.) C.P. 19, s.c. 8 Bing. 79, 155, 317; 1 Mo. & Sc. 161, 252, 454. See also *Williamson v. Jones*, 8 Bing. 81.

Policy on a ship "at and from St. Vincent, Barbadoes, or all or any of the West India colonies, to her port or ports of discharge and loading in the United Kingdom, during her stay there, and thence back to Barbadoes and all or any of the West India colonies, to continue until the ship, &c. should be arrived at her final port as aforesaid:"—Held, to cover the ship only until she arrived at her port of discharge, and not to extend to protect her whilst she was a seeking vessel from island to island. *Moore v. Taylor*, 3 Law J. (n.s.) K.B. 132, s.c. 1 Ad. & E. 26; 3 N. & M. 406.

Policies effected in a mutual insurance club containing this memorandum: "All ships are to be inspected and approved by a committee of the club before admission: all ships hereby insured to be well found, &c., and otherwise in a seaworthy state, as to the committee, or their inspector, shall from time to time seem meet: all chain cables to be properly tested: all ships to be subject to survey by the committee, or their surveyor, at such times as the committee shall think proper; and subscribers neglecting to get such repairs done to their ships as shall from time to time be ordered by the committee, or their inspector, after notice, to be uninsured until the same shall be done:"—Held, in an action on such a policy for a total loss, that the clause respecting chain cables is merely directory to the committee, and does not create a condition precedent, imposing on the assured the necessity of proving, that his chain cable had been properly tested. *Harrison v. Douglas*, 5 N. & M. 180, s.c. 3 Ad. & E. 396.

Policy on a ship and goods thus:—"At and from

the coast of Africa, to her port of discharge in the United Kingdom; beginning the adventure upon the said goods and merchandises from the loading thereof on board the said ship, twenty-four hours after her arrival on the coast of Africa." There was a memorandum, that the ship was valued at 1,200*l.*, and the cargo at 4,800*l.*

The ship went out on her voyage to Africa, with cargo, for barter. A great part of the cargo was actually bartered; but all her substituted cargo was not on board when she was lost. A part of the outward cargo was still on board at the time:—Held, first, that the outward cargo was not covered by the policy; second, that the policy was not a valued policy as to the cargo, at the time of the loss. *Rickman v. Carstairs*, 3 Law J. (n.s.) K.B. 28, s.c. 5 B. & Ad. 651; 2 N. & M. 562.

A policy of insurance on a ship "lost or not lost," executed by the underwriter after the ship is actually lost, the assured and underwriter both being aware of that fact at the time, is binding on the underwriter. Thus, where the members of a mutual insurance company, to which plaintiff and defendant belonged, executed a policy by their agent, appointed under a general power of attorney, to execute policies according to the rules and regulations of the society, on a ship "lost or not lost," and the ship, at the time of executing the policy, was lost, which fact was known to all parties:—Held, a valid policy. *Mead v. Davison*, 4 Law J. (n.s.) K.B. 193, s.c. 4 N. & M. 701; 3 Ad. & E. 303.

#### (D) WARRANTIES.

Policy on the ship *Elizabeth*, from Tortola to London, with warranty to sail with convoy for the voyage. The commander of the convoy sent a ship to bring up the merchantmen from Tortola, (the usual mode of conveying ships from that place); but the ship so sent was not to form part of the convoy for the remainder of the voyage. The *Elizabeth* sailed with the ship so sent, but was lost before she joined the commander of the convoy:—Held, that the warranty was complied with. *Manning v. Gist*, 3 Doug. 79.

Sailing under the protection of an armed ship not appointed by government as the convoy, is not a compliance with a warranty to depart with convoy. The general rule is, that, in order to constitute a sailing with convoy, sailing orders must be obtained. *Hibbert v. Pigou*, 3 Doug. 224.

Warranty that a ship had twenty guns. It is no breach of the warranty that she had only twenty-five men, and that it required sixty men to man twenty guns. *Hide v. Bruce*, 3 Doug. 213.

In an action on a policy of a ship warranted to depart with convoy, if the ship sails without convoy, the assured is entitled to recover the premium. An usage in such case to return the premium, deducting a half per cent., is good. *Long v. Allan*, 4 Doug. 276.

A warranty not to sail after a particular day, is satisfied by hauling the vessel out of dock and warping her down a river which is a part of the harbour on the day named, (although it is impossible she can proceed on her voyage on that day,) if the vessel be moved with an intention and for the purpose of placing her in a more favourable position to prosecute her voyage, or partly with that intention and

for that purpose, and partly to comply with the terms of the warranty.

In such a case it is a fact for the jury whether the vessel was moved merely and solely to comply with the letter of the warranty, or with the intention and for the purpose above stated. *Cochran v. Fisher*, 3 Law J. (N.S.) Exch. 185, a.c. 2 C. & M. 581; 4 Tyr. 424.

A policy of insurance was effected on a ship for twelve months, with a warranty not to sail for British North America after the 15th of August. On that day, having her cargo on board, and being ready for sea, she was hauled out of the dock, and warped down the river Liffey, which is part of the harbour of the port of Dublin, the captain and crew intending to proceed on her voyage, and to put themselves in a better situation for the purpose of prosecuting it; but the weather at the time preventing any further progress:—Held, that the warranty was complied with.

*Quere*—What is the proper signification of the words to sail from in a warranty? *Fisher v. Cochran*, 4 Law J. (N.S.) Exch. 328, a.c. 1 C. M. & R. 809; 5 Tyr. 496.

#### (E) REPRESENTATIONS AND CONCEALMENT.

The concealment of letters stating that the vessel is about to sail early next month, is a material concealment, and avoids the policy. *Shirley v. Wilkinson*, 3 Doug. 41.

Two prizes being carried into Liverpool, the captor gave orders to effect an insurance on them in London. One of the prizes arriving on Sunday, the owner sent a dispatch to his agent in London stating that fact, and expressing fears as to the other ship. The express reached the broker on Tuesday; on that day an entry was made at Lloyd's of the arrival of the vessel at Liverpool. On Wednesday the captor's agent effected an insurance on the other vessel at a premium of 50 guineas per cent., without communicating to the underwriters the fact of the express:—Held, that this was not a concealment which vitiated the policy. *Court v. Martineau*, 3 Doug. 161.

Where material facts are known to the assured at the time of effecting a policy, he is bound to communicate them; and the circumstance of their being contained in what are called 'Lloyd's List,' which the underwriter has the power of inspecting, will not dispense with the necessity of such communication.

In a question of marine insurance, a material concealment is a concealment of facts, which, if communicated to the underwriter, would induce him either to refuse the insurance altogether, or not to effect it, except at a larger premium than the ordinary premium; and a letter containing facts, which, if communicated, would lead to inquiry, which would produce important information, ought to be shewn by the assured to the underwriter.

A party is not bound, at the time of effecting a policy, to communicate the time of sailing of the ship, unless at the time it is a missing ship; neither is he bound to communicate any knowledge he may have of the time of sailing of another vessel from the same place, either before or at the same time as his own, unless he knows of something particular having happened to such other vessel, which might

affect the insurance of his own. *Elton v. Larkins*, 5 C. & P. 385. [Tindal]

The announcement in the foreign list, filed at Lloyd's, of the sailing of a ship out of the port from which she is insured, does not, where such communication is material, dispense with the assured's disclosing a letter received from his captain before the policy is effected, announcing the day of his intended departure. *Elton v. Larkins*, 8 Bing. 198, a.c. 1 Mo. & Sc. 323.

#### (F) RETURN OF PREMIUM.

[See, *ante*, Warranties.]

Policy of insurance "at and from Jamaica to Liverpool, warranted to sail on or before the 1st of August:—Held, that the vessel not sailing before the 1st of August,—Held, that the risk was not divisible, and that the assured was not entitled to a return of any part of the premium. *Meyer v. Gregson*, 3 Doug. 402.

#### (G) LOSS.

A Portuguese ship was insured and warranted neutral. She carried an English supercargo, a fact which was not known to the underwriter, and which was contrary to the French ordinance. On this ground she was captured, and condemned as a prize:—Held, that the underwriter was liable. *Hague v. Waller*, 3 Doug. 79.

Insurance on ship, cargo, and freight from Tortola to London. The ship was driven back to Tortola, and being found unfit for the voyage, and it being impossible to repair her, was sold. There were no other vessels at Tortola by which the cargo could be forwarded, and it was accordingly sold for nearly the sum insured. The insured having abandoned,—Held, that this was a total loss. *Manning v. Newnham*, 3 Doug. 130.

Insurance on goods, with the usual memorandum, "corn, fish, &c., warranted free from average, unless general, or the ship should be stranded." A quantity of fish, part of the goods insured, was so much damaged by the perils of the seas, that on putting into the port of Lisbon, on a survey by the Board of Health at that place, the fish was declared to be, and in fact was of no value:—Held, that this was not a total loss of the fish. *Cocking v. Fraser*, 4 Doug. 295.

A ship was captured by pirates, and partially plundered. On receiving intelligence of the capture, the assured gave notice of abandonment; but it afterwards turned out, that, at the time the notice was given, she had been left by the pirates in a Dutch port, whence she was afterwards taken by the British authorities for the owners. The ship afterwards arrived at her place of destination:—Held, that the assured could not recover against the underwriters for a total loss. *Connell v. Macle*, 2 Law J. (N.S.) K.B. 160.

The plaintiff had insured hides from a port in the Pacific Ocean to Bordeaux, free of particular average, unless the ship were stranded. Upon her voyage, the ship was driven by stress of weather into Rio, where, upon inspection, the hides were found in such a state of decay, that they could not, by possibility, reach the port of destination. They were accordingly landed, and sold at a loss. The ship continued her voyage, and, on her arrival off



the French coast, she was stranded in the Garonne. In an action against the underwriters, upon the insurance of the hides sold at Rio,—held, that they were not liable for an average loss on the stranding, inasmuch as, though the event took place during the voyage insured, yet the hides on which the insurance was effected were not on board at the time, and, consequently, the adventure as to them had terminated: neither were they liable for a total constructive loss, as the insured had not given notice of abandonment. *Roux v. Salvador*, 4 Law J. (N.S.) C.P. 156, a.c. 1 Bing. N.C. 526; 1 Sc. 491.

Insurance of ship *Duras*, "at and from, &c. during her stay and trade, &c. until her safe arrival back at her last port of discharge, &c. upon any kind of goods, and upon the body, &c. of the ship." The ship being lost on the voyage, the goods were transhipped and forwarded by another vessel:—Held, that the underwriters were liable for an average loss on the goods arising from the capture of the last-mentioned vessel. *Plantamour v. Staples*, 3 Doug. 1.

On the memorandum, "free from average under 3l. per cent.," the underwriter is liable for the amount of the aggregate of several partial losses, each less than 3l. per cent., but amounting together to more. *Blackett v. the Royal Exchange Assurance Company*, 1 Law J. (N.S.) Exch. 101<sup>a</sup>, a.c. 2 C. & J. 244; 2 Tyr. 266.

#### (H) BOTTOMRY.

Action on bottomry bond, containing a clause, that if a ship should be taken by the enemy, &c., the bond should be void. The ship was captured and recaptured, and afterwards arrived at her destination, and earned her freight:—Held, the obligee was entitled to recover upon the bond. There is no average or salvage on a bottomry bond. *Joyce v. Williamses*, 3 Doug. 164.

A bottomry bond uncanceled, and not delivered up, as paid, held not to be discharged by an agreement, on a settlement of accounts between the owner and the charterer, that the latter should pay the bond, to which agreement the agent of the bondholder was, as partner of the charterer, privy, but under which there was no evidence that, as agent of the bondholder, he had acted or received the money. Bond pronounced for, with costs. *Huntcliff (Cole)*, 2 Hag. 281.

A bottomry bond, given for the necessities of the voyage by an owner on board the vessel, who could not otherwise obtain money, is valid, and supersedes a previous mortgage of the ship; the master, who was on board, but to disposes whom a suit had been instituted, being privy, and receiving the supplies as necessary, though refusing to sign the bond. *Duke of Bedford (Morris)*, 2 Hag. 294.

Sea stores, particularly for the subsistence of passengers, are objects of a bottomry bond. 1b. 301.

Though the Court of Admiralty has jurisdiction to reduce the premium on bottomry bonds, yet it must act, in the exercise of such power, with great caution, and take into consideration all the circumstances of each particular transaction. The registrars' and merchants' report, reducing the premium on a bond (given in France for a voyage to London) from 20l. to 12½l. per cent., overruled; but sustained

where it disallowed a charge of commission for the unshipping and care of the cargo, at 5l. per cent., as unreasonable, though agreeable to the custom of the place; and in lieu thereof substituted an allowance of 5l. per cent. on the disbursements; and the Court also sustained the report, where it disallowed a charge for wages advanced to the crew abroad, on the ground that the payment might never have become due. *Cognac (Eussen)*, 2 Hag. 377.

The Court of Admiralty, if required to enforce bottomry contracts, must proceed on principles of equity. 1b. 388.

The Court pronounced for the modified amount of the bond, with interest at 4l. per cent., from the time it became payable to the date of the decree, and with costs. 1b. 398.

The report of the registrar and merchants, disallowing, as irregular, and unusual where there is a bottomry premium, a charge of insurance on money advanced to the master on bottomry, and forming part of the amount of the bond, confirmed; bottomry bonds, given by the master, binding the owners only for sums necessary for repairs, and for the furtherance of the voyage, and maritime interest being only allowed as a compensation for maritime risk. *Boddington (Noyes)*, 2 Hag. 422.

Lenders on bottomry, if not restrained by special regulations, may insure their advances in a distinct contract on their own account. 1b. 425.

The master of a vessel bound himself and the vessel, for the repayment of a sum of money borrowed, to repair her in a foreign port, with twelve per cent. bottomry premium, eight days after his arrival in London.

The lender effected an insurance on the risk, and in the policy described his interest to be on bottomry:—Held, that, "after his arrival" must be construed to mean, after his arrival with the ship in the port of London; and that it was, consequently, well described in the policy as an interest on bottomry. *Simonds v. Hodgson*, 1 Law J. (N.S.) K.B. 51, a.c. 3 B. & Ad. 50.

#### (I) INSURANCE ON LIVES.

A person effecting an insurance on his debtor's life, for the amount of the debt, and paying the premiums on the policy, is not entitled to more than what he has expended, where the increased value of the policy exceeds the amount due, unless an intention to that effect is shewn. *Stimpson v. Walker*, 2 Law J. (N.S.) Chanc. 55.

In general, the assignee of a policy of insurance, effected upon a life, can be in no better situation than the person who effected the policy; and such assignee is liable to all the questions which the assurers would be entitled to raise against such person.

And *semble*, that, if such a policy be effected in fraud of the assurance office, and be afterwards assigned, the office and the assignee being at the time equally ignorant of the fraud, and the office afterwards pay the money to the assignee, both parties being in the same ignorance as to the fraud, the office, upon a discovery of the fraud, may recover back the money so paid. *Lefevre v. Boyle*, 1 Law J. (N.S.) K.B. 199, a.c. 3 B. & Ad. 877.

A declaration of the state of health, &c., previous to effecting a life policy, contained a stipulation,

that if "any true averment" were contained therein, or if the facts required to be set forth were not "truly stated," all monies paid on account of the assurance should be forfeited, and the assurance itself be absolutely null and void:—Held, that the premiums were forfeited by a statement as to the health of the life insured, untrue in point of fact, though not within the knowledge of the party making the statement. *Duckett v. Williams*, 3 Law J. (N.S.) Exch. 141, s.c. 2 C. & M. 348; 4 Tyr. 240.

A policy of insurance on the life of another person, who, at the time of the insurance, is in a good state of health, is not vitiated by the non-communication by such person, of the fact of his having, a few years before, been afflicted with a disorder tending to shorten life, if it appear that the disorder was of such a character as to prevent the party from being conscious of what had happened to him, while suffering under it. *Sweete v. Fairlie*, 6 C. & P. 1. [Denman]

#### (K) INSURANCE AGAINST FIRE.

Where insurers have paid the amount of the loss, occasioned by the demolition of a house by rioters, they may maintain an action in the name of the insured against the hundred, under stat. 1 Geo. 1, c. 5, s. 6. *Mason v. Sainsbury*, 3 Doug. 61.

An insurance office having paid the assured the amount of the loss sustained by him in consequence of a demolishing by rioters, sued the hundreders under the statute 1 Geo. 1, stat. 2, c. 5, s. 6, in their own names:—Held, by Lord Mansfield, and Buller, J. (Willes, J. and Ashurst, J., dissentient,) that the office was not entitled to recover. *The London Assurance Company v. Sainsbury*, 3 Doug. 245.

In a policy of insurance against fire on certain cotton mills, mill-wright's work, including standing and going gear therein, engine-house adjoining, and the steam-engine therein, &c. it was recited, that the "buildings were brick-built and slated, warmed exclusively by steam, lighted by gas, &c. worked by the steam-engine above mentioned, in the tenure of one firm only, standing apart from all other mills, and 'worked by day only.'"—Held, that the words "worked by day only," referred to the mill only, and not to the steam-engine, or any part of the gear; and that it was no breach of the policy, that the steam-engine was kept going by night, and that some parts of the machinery were turned by it, the cotton-mill not being worked except by day only.

One of the conditions indorsed on the policy provided, "that every insurance attended with particular circumstances of risk, arising from the situation or construction of the premises, or the nature of the trade carried on, was to be specially indorsed on the policy, so that the risk might be fairly understood: if not so expressed, or if any misrepresentation should be given, &c. or if, after the insurance should be effected, the risk should be increased by the erection of any stove, the carrying on any hazardous trade, operation, or process, or hazardous communication, the insured would not be entitled to any benefit under the policy." In an action of covenant on this policy by the assured, the defendants pleaded, "that, after the making of the policy, the

steam-engine, in the said policy of assurance mentioned, was worked by night, and not by day only, whereby the risk in the said policy of assurance was increased:"—Held, that the plea was bad, and that the plaintiff would be entitled to judgment, notwithstanding a verdict were entered upon this plea. *Whitehead v. Price*, 2 C. M. & R. 447.

The profits of a business are insurable, but they must be insured *quid* profits.

Under an insurance by A of his "interest in the Ship Inn and offices," A cannot recover compensation for the loss of his business as an inn-keeper, in the interval between the fire and the rebuilding. *In the matter of Arbitration between the Sun Fire Office Company and Wright*, 3 N. & M. 819.

Goods insured were described in the policy, to be in the dwelling-house of the insured. The insured had only one room as a lodger, in which the goods were:—Held, correctly described within a condition, that "the houses, buildings, or other places where goods are deposited and kept, shall be truly and accurately described," such condition relating to the construction of the house, and not to the interest of the parties in it. *Friedlander v. London Assurance Company*, 1 M. & R. 171. [Tenterden]

#### (L) INSURANCE BROKER.

An insurance broker has no implied authority to pay to the assured losses, either total or partial, for the underwriter who employs him. *Bell v. Auldjo*, 4 Doug. 48.

A trustee suing as a plaintiff in a court of law, must be treated in all respects as a party to the cause, and any defence against him, is a defence in that action against the *cestui que trust*, who uses his name: and therefore, where a broker, in whose name a policy of insurance under seal was effected, brought covenant, and the defendants pleaded payment to the plaintiff, according to the tenor and effect of the policy, and the proof was, that after the loss happened, the assurers paid the amount to the broker, by allowing him credit for premiums due from him to them; it was held, that although that was no payment as between the assured and assurers, it was a good payment as between the plaintiff on the record and the defendants, and, therefore, an answer to the action. *Gibson v. Winter*, 5 B. & Ad. 26, s.c. 2 N. & M. 737.

H, the managing owner of a ship, directed an insurance broker to effect an insurance on the entire ship, upon an adventure in which all the part-owners were jointly interested; the amount of the entire premium was carried to the ship's account in H's books, which were open to the inspection of all the part-owners, who saw the account and never objected to it. It did not appear, that the insurance-broker knew the names of all the part-owners, or whether or not they had given authority to H to insure:—Held, that the jury were warranted in inferring a joint authority to insure, and that all the part-owners were jointly liable for the premium to the insurance-broker, notwithstanding he had debited H alone, and divided with him the profits of commission upon effecting the insurance. *Robinson v. Gloster*, 2 Bing. N.C. 186, s.c. 2 Sc. 250.

## (M) ACTIONS.

## (a) In general.

The defendant having chartered a ship, put her up at Lloyd's, with notice that she would sail with the first convoy. The plaintiffs shipped goods on board, and insured them, with a warranty that the ship should sail with convoy. Before the ship sailed, the preliminaries of peace were gazetted, and hostilities on the part of the king's subjects were forbidden, and ships taken by the various powers within certain limits and certain times, were to be restored. Government appointed no convoy, and the ships sailed without, but with French, Spanish, and American passports. No notice was given by the defendant to the plaintiffs, that the ship was about to sail without convoy. The ship was run down and lost the day after she sailed. In an action against the defendant for a breach of his contract, whereby the plaintiffs were deprived of the benefit of their policy:—Held, that the plaintiffs were entitled to recover. *Phillips v. Baillie*, 3 Doug. 374.

Where actions against underwriters have been consolidated by rule of court, and the defendant has obtained a verdict in one, the Court will not restrain the plaintiff from trying a second cause, included in the same rule, till the costs of the first are paid. *Doyle v. Douglas*, 4 B. & Ad. 544; and see *Long v. Douglas*, ib. 545.

Where a plaintiff brings several actions upon the same policy of assurance, against several underwriters, the Court will not, without the consent of the plaintiff, make a consolidation rule upon the terms of both plaintiff and defendant being bound in all the actions by the event of one. *Doyle v. Anderson*,—*Doyle v. Stewart*, 1 Ad. & E. 635, s. c. 4 N. & M. 873.

By payment of money into court upon a count on a policy, the defendant is estopped from shewing that the vessel is unseaworthy, or that the action is brought too soon. *Harrison v. Douglas*, 5 N. & M. 180.

## (b) Pleadings and Evidence.

Where goods were insured, warranted neutral, on board the *Thetis*, "a Tuscan ship," and the ship and goods were captured by the Spaniards, and condemned "as a good and lawful capture:" it was held, that this sentence was not conclusive evidence, that the goods were not neutral. *Salucci v. Woodman*, 6 Doug. 345.

The sentence of a foreign Court of Admiralty, that a ship warranted neutral is lawful prize, is not conclusive evidence that the ship is not neutral, if the grounds of the sentence appear, and do not shew a breach of neutrality. *Salucci v. Johnson*, 4 Doug. 224.

Where the captain of a slave ship mistook Hispaniola for Jamaica, whereby the voyage being retarded, and the water falling short, several slaves died for want of water, and others were thrown overboard;—it was held, that these facts did not support a statement in the declaration, that by the perils of the seas, and contrary winds and currents, the ship was retarded in her voyage, and by reason thereof so much of the water on board was spent that some of the negroes died for want of suste-

nance, and others were thrown overboard for the preservation of the rest. *Gragson v. Gilbert*, 3 Doug. 232.

A ship warranted Dutch, and sailing under a Dutch name with a Dutch sea-brief, was captured by the French, and condemned by sentence of the French Court of Admiralty as English property, and by an English name, the sentence not stating the particular grounds of condemnation:—Held, that this sentence was conclusive evidence that the ship was not Dutch. *Semble*, that the parties warranting a ship to be neutral, are bound to see that she is documented according to the regulations of the belligerent states. *Barzillai v. Lewis*, 3 Doug. 126.

Usage is admissible in evidence, to explain the construction of a policy of insurance in the parts written by the parties, as well as in the common printed form. If the question be, whether the addition of a place by name in the policy would have varied the risk, or whether, on the other hand, such place was implied in the words actually used, it is material evidence in favour of the latter construction, that the premium in either case would have been the same. *Preston v. Greenwood*, 4 Doug. 28.

In an action on a policy of insurance in the usual form, on ship, boat, &c., evidence of usage, that the underwriters never pay for loss of boats on the outside of the ship, slung upon the quarter, is inadmissible. *Blackett v. Royal Exchange Assurance Company*, 1 Law J. (N.S.) Exch. 101\*, s. c. 2 C. & J. 244; 2 Tyr. 266.

The defendant, a policy broker, having effected certain insurances to certain ports, upon a vessel of the bankrupt, and the vessel having proceeded upon her voyage as insured, the supercargo addressed a letter to his owner, advising an alteration in the policies for the purpose of obtaining a better market. The bankrupt delivered such letter to the defendant, at the same time desiring him to do the needful. In an action against the defendant for a breach of duty, in not taking such steps as would enable the assignees to recover against the underwriters, upon a loss,—Held, that the opinion of other policy brokers, to whom the policies, invoices, and letter were submitted, was admissible as evidence of what the conduct of a careful broker ought to have been, in the circumstances in which the defendant was placed, and under the instruction by which he was bound to regulate his conduct. *Chapman v. Walton*, 2 Law J. (N.S.) C.P. 213, s. c. 10 Bing. 57; 3 Mo. & Sc. 389.

Upon a question as to the materiality of a fact not communicated by the assured to the assurer,—*semble*, that the opinions of underwriters and others engaged in insurance business are not receivable in evidence: they can only be allowed to speak to facts in the course of their practice, upon which the jury are to form their opinion as to the supposed materiality. *Campbell v. Rickards*, 2 Law J. (N.S.) K.B. 204, s. c. 2 N. & M. 542; 5 B. & Ad. 840.

Upon the ebbing of the tide, a vessel took the ground in a tide harbour, in the place where it was intended she should; but, in so doing, struck against some hard substance, by which two holes were made in her bottom, and the cargo damaged:—Held, not

a stranding within the meaning of a policy of insurance on corn warranted free from average, unless general, or the ship stranded. *Kingsford v. Marshall*, 1 Law J. (N.S.) C.P. 135, s. c. 8 Bing. 458; 1 Mo. & Sc. 657.

A ship having on board goods, which were insured on a voyage from London to Hull, but, "warranted free from average, unless general, or the ship should be stranded," arrived in Hull harbour, which is a tide harbour, and proceeded to discharge her cargo, at a quay on the side of it; this could be done at high water only, and could not be completed in one tide. At the first low tide, the vessel grounded on the mud, but, on a subsequent ebb, the rope by which her head was moored to the opposite side of the harbour stretched, and the wind blowing from the east at the same time, she did not ground entirely on the mud, which it was intended she should do, but her forepart got on a bank of stones, rubbish, and sand, near the quay, and the vessel having strained, some damage was sustained by the cargo, but no lasting injury by the vessel:—Held, by Lord Tenterden, C.J., Littledale J. and Taunton J., (*Parke J. dissents*), that this was a stranding within the meaning of that word in the policy. *Wells v. Hopwood*, 3 B. & Ad. 20.

#### (N) WAAGERING POLICY.

Where, in consideration of forty guineas for 100l., and so according to that rate for every greater or less sum—several persons, each for themselves, severally engaged to pay the several sums set opposite their names, in case Brazilian mining shares should, on or before a certain day, be done at or above a certain sum:—Held, that such contract was a policy of insurance, and void under 14 Geo. 3, c. 48;—and the rule of law being, that if money be paid on an illegal contract to receive a larger sum upon a certain event, the contract is executed when the event takes place, and the premium paid cannot be reclaimed:—Held also, that such contract was executed on the event taking place; and, consequently, that the plaintiff had no claim to a return of the premium paid. *Peterson v. Powell*, 2 Law J. (N.S.) C.P. 13, s. c. 9 Bing. 320, 620; 2 Mo. & Sc. 399, 773.

#### INTENTION.

[See MOTIVE.]

#### INTERDICTOR.

[See LUNATIC, Committee.]

#### INTEREST.

[See BANKER—BANKRUPT, Dividend—BILL OF EXCHANGE, Interest.]

- (A) WHERE PAYABLE.
- (B) ON JUDGMENTS.
- (C) IN ERROR.

#### (A) WHERE PAYABLE.

The jury are now empowered in certain cases, to

allow interest on debts, and in certain actions to give damages in nature of interest: and interest is to be allowed on all writs of error, for the time that execution has been delayed. 3 & 4 Will. 4, c. 42, s. 28, 29, 30; 11 Law J. Stat. 98.

Defendant, at J's request, consented to transfer to the plaintiff's account, money which defendant had received for J, and for which it had been the course of dealing between defendant and J to allow interest:—Held, that plaintiff in suing for this money, could not recover interest on the amount. *Frühling v. Schroeder*, 4 Law J. (N.S.) C.P. 290, s. c. 3 Bing. N.C. 77; 2 Sc. 143.

Interest paid by a purchaser upon money borrowed by him to complete the purchase and kept idle, (pending an endeavour by the vendor to clear up the title,) may be recovered as damages against the latter, in an action for breach of his contract. *Sherry v. Oke*, 3 Dowl. P.C. 549.

Interest is not payable on a sum recovered, on a lost policy, from a Life Assurance Company. *Beahan v. Morgan*, 5 Sim. 635.

Vendor filed a bill for specific performance, but not being able to make a good title, his bill was dismissed, and he was ordered to return the deposit with interest. *Lord Anson v. Hodges*, 5 Sim. 227.

A party recovering back a deposit paid on the purchase of real property, is not entitled to interest. *Bradshaw v. Bennett*, 5 C. & P. 48. [Tenterden]

Interest cannot be recovered on money had and received, or money paid, without a special agreement; but, if money was at first had and received, and there is a subsequent agreement to pay interest, the plaintiff may recover such money and interest on a count for money had and received, and on a count for interest, and need not declare specially. *Hicks v. Mareco*, 5 C. & P. 498. [Lyndhurst]

#### (B) ON JUDGMENTS.

M having obtained judgment against L, upon warrants of attorney which carried interest, and having been in possession and receipt of the rents of lands belonging to L, upon which he was by decree made accountable, with interest:—Held, that the judgments ought to carry interest. *Morgan v. Evans*, 8 Bligh, N.S. 777, (reversing a c. *Lowes v. Morgan*, 3 Y. & J. 394, 2 Law J. Dig. 162.)

Where executors, having money of their testator to lay out at interest, lend that money on an agreement that the borrower shall give a mortgage to secure the repayment, and the borrower dies without having repaid the money, and without having given any mortgage or security, and a judgment is obtained at law for the debt against his executors: no interest will be allowed on the judgment in the Master's office, in a creditors' suit, to the party claiming under the judgment.

A common judgment at law does not carry interest generally at law or in equity; but in cases in equity where a party asks indulgence from the Court, as, an extension of time, there the Court will impose on him the condition of paying interest; or where specialty creditors are restrained from proceeding at law to recover a specialty debt, because of a suit in equity, there, *semble*, the Court will not grant the injunction without making the executors allow interest to the specialty creditors who are restrained by the injunction from recovering their

debts and interest at law. *Gault v. Taylor*, 3 Law J. (n.s.) Chanc. 135, s. c. 3 M. & K. 302.

(C) IN ERROR.

[See 3 & 4 Will. 4, c. 42, cited *ante*.]

The Court of Exchequer Chamber cannot, under 3 & 4 Will. 4, c. 42, s. 30, allow interest upon the damages recovered in a personal action in which error is brought, except when the writ of error is tested subsequently to the day on which that act received the royal assent. *Burn v. Carvalho*, 4 N. & M. 893.

INTERPLEADER.

[In Equity, see PLEADING—PRACTICE—COSTS. At Law, see JUDGE AT CHAMBERS.]

The 1 & 2 Will. 4, c. 58, does not apply to claims in equity. *Sturgess v. Claude*, 1 Dowl. P.C. 505.

The Interpleader Act does not apply to the case of a wharfinger, sued in trover for goods on which he has a lien, where the property in such goods is in dispute between the plaintiff and a third party. *Braddick v. Smith*, 1 Law J. (n.s.) C.P. 154, s. c. 9 Bing. 84; 2 Mo. & Sc. 131.

A party who makes merely a claim of freight upon certain goods in his possession, the property in which is sought by two others, has not such a distinct interest in the goods as will deprive him of the benefit and protection of the Interpleader Act, 1 & 2 Will. 4, c. 58; inasmuch as such claim attaches to the goods themselves, and must be satisfied by that party, whoever he may be, into whose hands the goods may come. The party who applies for and obtains the protection of the statute, is entitled to his costs out of the fund, or of the proceeds of the goods which form the subject of discussion. *Cotter v. the Bank of England*, 2 Law J. (n.s.) C.P. 158, s. c. 3 Mo. & Sc. 180.

The Court cannot give relief under the Interpleader Act to stakeholders, who are only threatened with proceedings; an action must be brought, and the plaintiff declare, before the Court can interfere. *Parker v. Linnett*, 2 Dowl. P.C. 562.

A party who voluntarily places himself in a situation to be sued, is not authorized under the Interpleader Act, 1 & 2 Will. 4, c. 58, to call on the Court to substitute another defendant. *Belcher v. John Smith*, 1 Law J. (n.s.) C.P. 167, s. c. 9 Bing. 82; 2 Mo. & Sc. 184.

A defendant, who is indemnified by the third party claiming goods in his possession, has no right to a rule for relief under the Interpleader Act, and will be ordered to pay costs, on discharging such a rule. *Tucker v. Morris*, 2 Law J. (n.s.) Exch. 1, s. c. 1 C. & M. 73; 1 Dowl. P.C. 639.

A claim for warehouse rent is not such an interest in the subject-matter of a suit, as will exclude a defendant from the protection of the Interpleader Act.

Neither is it requisite that the right claimed by the third party should be an absolute right of property. It is enough, that the defendant has received notice not to deliver the goods over to the plaintiff, until a demand made by the third party, in respect of such goods, has been satisfied. *Harwood v. Betham*, 1 Law J. (n.s.) Exch. 180.

A contested claim to a reward advertised for the apprehension of a felon, cannot be made the subject of a motion under the Interpleader Act. *Grant v. Fey*, 4 Dowl. P.C. 135: s.p. *Allis v. Lee*, 5 Law J. (n.s.) C.P. 83.

No rule for interpleader will be granted after a suit has been stayed by injunction. *Arayne v. Lloyd*, 1 Bing. N.C. 720.

*Semble*, that a notice of claim to goods seized by a sheriff need not be given by the actual claimant, in order to entitle the sheriff to protection under the Interpleader Act. *Lewis v. Bicke*, 3 Law J. (n.s.) Exch. 23, s. c. 2 C. & M. 321; 4 Tyr. 157.

One Court cannot relieve the sheriff under the Interpleader Act with respect to process issued out of another Court. *Wills v. Hopkins*, 2 Dowl. P.C. 151. *Bragg v. Hopkins*, ib.

To entitle the sheriff to protection under the Interpleader Act, a claim must have been made to the goods.

Notice from some person, whose name is not mentioned, that "a fiat of bankruptcy has been issued against the defendant, and that assignees have been chosen," does not amount to a sufficient claim. *Bentley v. Hook*, 3 Law J. (n.s.) Exch. 87, s. c. 2 C. & M. 426; 4 Tyr. 229.

A sheriff is not entitled to relief under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 6, where he has paid over the proceeds of the execution to the judgment creditor, before notice of an act of bankruptcy. *Scott v. Lewis*, 4 Law J. (n.s.) Exch. 321, s. c. 2 C. & M. & R. 289.

A sheriff is not entitled to relief under the act 1 & 2 Will. 4, c. 58, s. 6, where he has paid over the proceeds of a sale under a *f. fa.*, to the execution creditor.

Therefore, a rule calling upon such creditor to appear will be discharged, with costs.

Where execution creditors do not appear in pursuance of a rule under this act, the Court will direct their claims to be barred, leaving it to them to apply to open the rule. *Anderson v. Calloway*, 2 Law J. (n.s.) Exch. 82, s. c. 1 C. & M. 182; 3 Tyr. 237.

A sheriff who has delivered over goods taken in execution to a claimant, is not entitled to relief under the Interpleading Act. *Kirk v. Almond*, 2 Law J. (n.s.) Exch. 13.

The sheriff must be prepared in the first instance with sufficient affidavits, and will not be allowed to file a supplemental affidavit accounting for delay.—*Semble*, that he must deny collusion. *Cook v. Allen*, 2 Law J. (n.s.) Exch. 199, s. c. 1 C. & M. 542; 3 Tyr. 536; 2 Dowl. P.C. 546.

The sheriff need not deny collusion, in order to obtain relief under the Interpleader Act. *Dobbins v. Green*, 2 Dowl. P.C. 509.

Where the sheriff applies for relief under the Interpleader Act, he need not, in the affidavit in support of the application, deny collusion with the claimants.

Where an execution creditor does not appear on being served with the sheriff's rule, the Court cannot bar his claim. *Donniger v. Hinzman*, 2 Dowl. P.C. 424.

Where a sheriff seizes under one *f. fa.*, and the question is whether that writ ought to have precedence of another, the Court will not grant the sheriff relief under the 1 & 2 Will. 4, c. 58, s. 6. *Day v. Waldoek*, 1 Dowl. P.C. 523.

A sheriff who, under a *f. fa.*, seizes goods which have been distrained for rent, is not entitled to relief under the Interpleader Act, or to an indemnity from the execution creditor. *Haythorn v. Bush*, 3 Law J. (N.S.) Exch. 210, s.c. 2 C. & M. 689; 2 Dowl. P.C. 641.

If the sheriff do not give notice to the execution creditor, of an adverse claim, and of his intention to apply to the Court under the Interpleader Act, before motion for an attachment for not returning the writ, the Court will grant the attachment, or require the sheriff to pay the costs of that motion.

Where the sheriff, after notice of claim, delivers over part of the goods taken in execution to the claimant, he is not entitled to the interference of the Court under the Interpleader Act. *Braine v. Hunt*, 3 Law J. (N.S.) Exch. 85, s.c. 2 C. & M. 418; 4 Tyr. 243.

Where the sheriff applied for relief under the Interpleader Act, but it appeared that an attachment had been already obtained against him for not returning the writ, the Court would only make the rule absolute on the terms of his paying for moving for the attachment. *Alemore v. Adeane*, 3 Dowl. P.C. 493.

The Court will relieve the sheriff under the 1 & 2 Will. 4, c. 58, s. 6, in case of conflicting claims on property seized by him, though that claim is only of a lien, and not of the whole property. *Ford v. Baynton*, 1 Dowl. P.C. 357.

Where the sheriff has levied under a *f. fa.*, and while in possession he receives notices that other writs of execution have been issued against the defendant's goods, and that the first execution creditor is not entitled to the whole proceeds of the levy, —the sheriff is not entitled to relief under the 1 & 2 Will. 4, c. 58, s. 6. *Salmon v. James*, 1 Dowl. P.C. 367.

Where a sheriff has seized goods under a *f. fa.*, and a claim to them is put in by another person, he is not bound to accept an indemnity from the execution creditor, but may obtain relief under the 1 & 2 Will. 4, c. 58, s. 6. *Levy v. Champneys*, 2 Dowl. P.C. 454.

The Court refused to interfere in favour of the sheriff under the Interpleader Act, where the undersheriff's partner appeared to be concerned for the same parties. *Dudden v. Long*, 1 Bing. N.C. 299, s.c. 1 Sc. 281.

The Court will not interfere, under the Interpleader Act, for the sheriff, *quia timet*, unless a claim to property is actually made. *Isaac v. Spilsbury*, 10 Bing. 3, s.c. 3 Mo. & Sc. 341.

A sheriff will not be entitled to relief, under the 1 Will. 4, c. 58, s. 6, unless he comes in the first instance, on receiving notice of an adverse claim. *Devereux v. John*, 1 Dowl. P.C. 548.

The sheriff, in applying for relief under the Interpleader Act, should come promptly, but a late application will, under special circumstances, be allowed.

Where there was great delay on the part of the sheriff in applying to the Court, in consequence of negotiations between the parties, and the execution creditor afterwards abandoned his claims, the Court refused to make the latter pay costs. *Dixon v. Ensell*, 2 Dowl. P.C. 621.

To obtain the protection of the Interpleader Act,

the sheriff must apply promptly to the Court:—Held, therefore, that an application on the last day of Hilary term, where the levy was on the 10th of December preceding, was too late, and that the delay was not excused by the fact, that a rule obtained by the defendant to set aside the judgment for irregularity, was not discharged until the 23rd of January. *Cook v. Allen*, 2 Law J. (N.S.) Exch. 199, s.c. 1 C. & M. 542; 3 Tyr. 586; 2 Dowl. P.C. 546.

If a sheriff receives notice on the 23rd of January of a claim to goods seized by him under a *f. fa.*, he will not be entitled to relief under the Interpleader Act, unless he comes to the Court in Hilary term. *Ridgway v. Fisher*, 3 Dowl. P.C. 567.

If a sheriff, who has seized goods under a *f. fa.*, receives notice of an intended fiat of bankruptcy against the defendant, he will be entitled to relief under the Interpleader Act, if he comes to the Court on the second day of term after the assignees are appointed. *Barker v. Phipson*, 3 Dowl. P.C. 590.

Under the 1 & 2 Will. 4, c. 58, s. 6, (the Interpleader Act,) the sheriff need not wait for proceedings to be taken against him before he applies to the Court for relief. *Green v. Brown*, 3 Dowl. P.C. 337.

The sheriff having seized goods under a *f. fa.* notice was given to him on the 18th of January, that a fiat was about to be sued out against the defendant; and on the 28th a claim was made to the goods by the assignees:—Held, that an application by the sheriff on the 29th for relief under the Interpleader Act, was sufficiently prompt. *Skipper v. Lane*, 4 Mo. & Sc. 283.

When the sheriff applies to the Court for protection under the Interpleader Act, no one has a right to be heard against the rule, unless he is called upon by the rule, though he is in fact a claimant; and if he is called on in one character, he cannot appear in the other.

Where the landlord has a claim for rent, and gives notice in proper time, the sheriff ought to pay him, otherwise the Court will make the sheriff pay the costs of appearing.

Where the rule called upon assignees of a bankrupt, who had made a claim under the fiat of bankruptcy, but which was afterwards superseded, the Court refused to make the sheriff pay the costs of the assignees' appearance. *Clark v. Lord*, 2 Dowl. P.C. 55.

Where application is made by the sheriff for relief under the Interpleader Act, the Court will not try the merits of the respective claims upon affidavit. *Bramidge v. Adishead*, 2 Dowl. P.C. 59.

A sheriff, who has taken goods in execution, will be allowed to withdraw from possession, if the execution creditor should not appear upon a rule under the Interpleader Act; but the Court will not direct either the execution creditor or the claimant to pay the costs of retaining possession. *Field v. Cope*, 1 Law J. (N.S.) Exch. 175, s.c. 2 C. & J. 480; 2 Tyr. 468; 1 Dowl. P.C. 567.

Where a sheriff had taken goods in execution, and on an adverse claim being made to them, obtained a rule under 1 & 2 Will. 4, c. 58, s. 6, to which the claimant did not appear, the Court barred the claim, and ordered him to pay the execution creditor his costs of shewing cause against the rule,

unless cause was shewn in six days from service of such order. *Perkins v. Benton*, 3 Tyr. 51. See *Towgood, Dimock, & others, v. Morgan*, ib. 52; 2 Dowl. P.C. 108.

Where an application is made to the Court by the sheriff under the Interpleader Act, the Court cannot try the right of the different claimants upon affidavit, but must direct an issue. The circumstances of the goods seized being in the possession of a stranger, and not of the defendant, against whom the execution issued, does not prevent the sheriff applying under the Act. *Allen v. Gibbon*, 2 Dowl. P.C. 292.

Unless the execution creditor indemnify the sheriff, the Court will direct an issue in relief of the sheriff, although the undisputed facts on a rule under the Interpleader Act shew that the claimant has no title to the goods. *Allen v. Evans*, 3 Law J. (N.S.) Exch. 53.

Levy under *fi. fa.* against defendant, who afterwards became bankrupt. The sheriff upon application, under 1 & 2 Will. 4, c. 58, was ordered to pay the levy to the plaintiffs, upon their security, and in default of security, then into court; and the Court directed an issue between the plaintiffs and the defendant's assignees, to try the right to the money levied. *Parker v. Booth*, 1 Law J. (N.S.) C.P. 57, s. c. 8 Bing. 85; 1 Mo. & Sc. 156.

Where the sheriff obtains a rule for relief under the Interpleader Act, the claimants may appear without taking office copies of the affidavits on which the rule was obtained. *Mason v. Redshaw*, 2 Dowl. P.C. 595.

Where the sheriff has been allowed to withdraw from possession by authority of a rule under the Interpleader Act, he cannot afterwards, and after he is out of office, be compelled to re-enter. *Wilton v. Chambers*, 3 Dowl. P.C. 12.

Held, that where a sheriff obtains a rule under the Interpleader Act, calling upon an execution creditor and a third party, who claims goods seized by the sheriff under a *fi. fa.*, to appear, and state the nature of their claims, such third party must appear and state, by affidavit, the nature of his claim. *Powell v. Lock*, 4 N. & M. 852, s. c. 3 Ad. & E. 315.

On application to the Court by a sheriff under section 6th of the Interpleader Act, a third party served with the rule, and not appearing, is barred by section 34. from further prosecuting any claim brought in question by the rule, as well as where such application is made by a defendant under sect. 1.

The Court, on such application, will, on proper grounds shewn, order the sheriff, or the execution creditor to pay to a third party appearing and successfully prosecuting his claim, his costs of such appearance. *Ford v. Dilly*, 5 B. & Ad. 885, s. c. 2 N. & M. 662.

A motion by the sheriff, under the Interpleader Act, must be made in court; but cause may be shewn at chambers. *Braines v. Cross*, 4 Dowl. P.C. 122.

Held, that cause may be shewn at chambers against a rule obtained by the sheriff under the Interpleader Act. *Sed quare. Haines v. Disney*, 2 Sc. 183.

A rule under the 1st section of the Interpleader Act cannot be drawn up for a stay of proceedings, unless notice has been given.

Such a rule may be drawn up to shew cause at chambers. *Smith v. Wheeler*, 3 Dowl. P.C. 431.

A party seeking the benefit of the Interpleader Act must state in the affidavit, upon which his motion is founded, the specific sum or goods in his hands which are claimed by a third person. His affidavit must also negative any collusion with such third claimant. *Butler v. —*, 3 Law J. (N.S.) C.P. 62.

Where an auctioneer has one action brought against him in the Common Pleas, and another in the King's Bench, by different claimants for the same property, he must, to relieve himself under the Interpleader Act, obtain rules in both courts.

If a part of a sum, claimed by the parties, has been paid to one of them before adverse claim made, the adverse claimant has a right to have the whole sum he claims paid into court, on the holder applying for relief under the Interpleader Act. *Allen v. Gilby*, 3 Dowl. P.C. 143.

Goods consigned to A, and warehoused at the London Docks, were claimed by B. The Dock Company required an indemnity of A, the original consignee, before delivering them to him. A refused, and brought an action of trover, with counts for special damages for the detention. On motion by the company for relief under the Interpleader Act, 1 & 2 Will. 4, c. 58, B, upon due notice, not appearing, the Court held, that the claim of B against the company was barred, but that A ought not, by reason of the act, to be precluded from recovering for his special damages, if any. The rule was made, that on the defendants' undertaking to deliver up the wine, then, if A should accept the same, the action should be discontinued on payment of costs by the defendants; but if A should go on with the action, the count in trover should be struck out, and A proceed for the special damage only. *Lucas v. the London Dock Company*, 4 B. & Ad. 378.

On a proceeding, under the Interpleader Act, at the instance of a sequestrator to settle the rights of several sequestration creditors of a beneficed clergyman, a creditor claimed under a warrant of attorney, which appeared, by memorandum indorsed, to be given by the clergyman for the purpose of securing an annuity granted by deed:—Held, that the creditor need not shew the deed, in order to prove that it was free from objection under statute 13 Eliz. c. 20, the warrant of attorney being, on the face of it, regular. *Johnson v. Brasier*, 1 Ad. & E. 624, s. c. 3 N. & M. 654.

Upon an issue under the Interpleader Act, where money is paid into court to abide the event, the successful party is not allowed to take the money out of court after verdict and before judgment. *Cooper v. Lead Smelting Company*, 9 Bing. 634, s. c. 2 Mo. & Sc. 810.

Service of a rule to appear, under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 6, on the agent to the plaintiff in the execution, is good service.

The Court will not make any final order in the absence of a party, without an affidavit that he has been served with the rule to appear.

*Quære*, whether a Judge at chambers has authority, on an enlarged rule of court, to adjudicate

under the 6th section of the act;—*semble* that he has. *Phillips v. Spry*, 1 Law J. (N.s.) Exch. 115.

A motion by the sheriff under the Interpleader Act must be made in court; but cause may be shewn at chambers. *Beames v. Cross*, 4 Dowl. P.C. 122.

Where the sheriff applies to the Court for a rule under the Interpleader Act, cause cannot be shewn at chambers. *Shaw v. Roberts*, 2 Dowl. P.C. 25.

The 1 & 2 Will. 4, c. 58, s. 7, (Interpleader Act,) enacts, that all rules, orders, and matters, to be made and done in pursuance of this act (which rules, orders, &c. have, by the same section, the force and effect of a judgment), may be entered of record, with a note in the margin expressing the true date of such entry. The Court will not allow such rules, orders, and matters, &c. to be entered of record *nunc pro tunc*, though there be no judgment entered up on which the plaintiff can sue out a *scire facias* to enable him to pursue his claim against the executor or representative of a deceased defendant. *Lambreth v. Barrington*, 4 Law J. (N.s.) C.P. 310, a.c. 2 Bing. N.C. 149; 2 Sc. 263.

Where the declaration in an issue under the Interpleader Act states, that "divers goods and chattels" were seized under a *f. fa.*, and avers that "the said goods and chattels were the property of the plaintiff," unless the plaintiff proves that the whole of the goods belong to him, the defendant will be entitled to a verdict; but, *semble*, that, if part of the goods belonged to the plaintiff, the Judge would ask the jury to find specially. *Morewood v. Wilkes*, 6 C. & P. 144. [Tindal]

Practice under the Interpleader Act. *Quere*—as to costs of motion under the Interpleader Act. *Northcote v. Beauchamp*, 1 Mo. & Sc. 158.

The costs of the applicant under the Interpleader Act, where he has acted *bond fide*, will, in the first instance, be directed to be paid out of the fund, or the produce of the thing in dispute, to be repaid by the party ultimately unsuccessful. *Ducar v. Mackintosh*, 3 Mo. & Sc. 174.

On a rule obtained by the sheriff, under the Interpleader Act, the Court ordered that one of the claimants should take the amount of his claim out of court, on giving security to return the same, if found liable so to do, on the trial of the issue, and that the sheriff should pay him his costs occasioned by the rule:—Held, that the expenses of the security were a part of those costs, and properly allowed by the Master. *Clark v. Lord*, 3 Law J. (N.s.) Exch. 20, a.c. 2 Dowl. P.C. 227.

In general, the unsuccessful party in an issue directed under the Interpleader Act, is liable to the costs thereof, and of the application to the Court.

But he is not liable to the costs of a rule to shew cause why he should not pay those costs, and why money deposited in court to abide the event of the issue, should not be paid out of court to the successful party, without a previous application for his consent thereto.

What an affidavit for payment of money out of court, or for costs, by the successful party in an issue, ought to contain. *Bramadge v. Adshead*, 3 Law J. (N.s.) Exch. 54, a.c. 2 Dowl. P.C. 59.

Where a claimant, after an application under the Interpleader Act, abandons his claim after an issue

directed, the sheriff is entitled to his costs from the time of directing the issue, and of the application of those costs. *Scales v. Sargeason*, 4 Dowl. P.C. 231.

The sheriff, under a writ of *scire facias*, levied on the defendant on the 25th of February, and took goods which were admitted to belong to others. On the 7th of May, without any reference to the plaintiff, he applied to the Court, under the Interpleader Act, and obtained an issue between the plaintiff and the persons whose goods were taken. On the 23rd of May, the goods were sold by consent, and the money was paid into court, and on the 7th of July the plaintiff disclaimed all right to the goods. On an application by the sheriff for his costs—Held, that he was entitled to the costs of the sale, and of keeping possession to the time of the sale, and to the costs of the application; such costs to be defrayed and borne by the plaintiff. *Dabbs v. Humphries*, 4 Law J. (N.s.) C.P. 101, a.c. 1 Bing. N.C. 412; 1 Sc. 325.

Where in consequence of a claim made to goods seized by a sheriff in execution, the Court ordered the claimant to proceed to trial upon paying a sum of money into court, which he neglected to do; and a rule was then obtained to compel him to pay the costs occasioned by his false claim:—Held, that he was liable to pay those costs as well as the costs of that rule, though no previous application had been made. *Scales v. Sargeason*, 3 Dowl. P.C. 707.

Before the sheriff applies to the Court under the Interpleader Act, he is bound to inquire into the nature of the claims set up; and therefore, if he brings parties before the Court in consequence of a claim which is clearly bad in point of law, the Court will compel him to pay the costs. *Bishop v. Hinman*, 2 Dowl. P.C. 166.

Where a claim is made by one on behalf of another to goods seized by the sheriff in execution, and upon rule being obtained under the Interpleader Act, neither party appears to shew cause, the plaintiff is not entitled to receive his costs from the sheriff; but the sheriff and plaintiff are both entitled to their costs from the claimant or his agent upon a rule to shew cause. *Philby v. Ikey*, 2 Dowl. P.C. 222.

Where the sheriff applies to the Court for relief under the 1 & 2 Will. 4, c. 58, s. 6, (the Interpleader Act,) and no blame appears to attach either to the execution creditor, the claimant, or the sheriff, each party will pay his own costs. *Morland v. Chitty*, 1 Dowl. P.C. 520.

Where a sheriff is relieved under the 1 & 2 Will. 4, c. 58, s. 6, and an issue is directed to try the right of adverse claimants, the Court may adjudicate after the trial on the costs of appearing to the sheriff's rule and of the issue. *Seaward v. Williams*, 1 Dowl. P.C. 528.

Where an adverse claim is set up to goods seized by the sheriff, and the latter applies to the Court for relief under 1 & 2 Will. 4, c. 58, s. 6, and the adverse party does not appear to support his claim, the Court will bar his claim as to the sheriff, and make him pay the judgment creditor his costs of appearing on the sheriff's rule, but will not allow the sheriff his costs. *Bowdler v. Smith*, 1 Dowl. P.C. 417.



This Court will not allow the sheriff applying to be relieved under the Interpleader Act, his costs, where the claimant does not appear; nor will the plaintiff be allowed his costs, except in the event of extremely improper conduct in the parties. *Oraw v. Sheldon*, 3 Dowl. P.C. 640.

Where an issue is directed to be tried between an execution creditor, and a claimant brought before the Court by the sheriff under the Interpleader Act, but the latter refuses to try, and abandons his claim, he will be liable to pay the execution creditor's costs down to the time of the claim being abandoned, and of applying to take the money paid by the sheriff out of court. *Bragg v. Hopkins*, 3 Dowl. P.C. 346.

The sheriff is not entitled to costs under the Interpleader Act, unless his application to the Court is rendered necessary by gross misconduct on the part of the claimant. *Thompson v. Sheldon*, 1 Sc. 697.

Where a *f. fa.* has issued, goods seized under it, an adverse claim set up, the sheriff has applied for relief under the Interpleader Act, and the execution creditor does not appear to support his *f. fa.*, the Court will grant the costs of the adverse claimant's appearing to support his claim, to be paid by the execution creditor, but not those of the sheriff: yet, if the execution creditor afterwards appear and opens the rule, the Court will grant the sheriff the costs of his second appearance. *Bryant v. Ikey*, 1 Dowl. P.C. 428.

Two attempts to serve a rule to appear, under the Interpleader Act, personally, and a service on the wife of the claimant, at his dwelling-house, is not good service.

Where on a notice of motion under the Interpleader Act, to be made on the first day of Hilary term, or as soon after as possible, served on the 12th of December on the claimant, and a rule obtained on the second day of that term, the officer who had obtained the rule did not attempt to serve the same until the 26th of January, and on the 30th the claimant did not appear: the Court held this delay and negligence; and, on enlarging the rule by reason of insufficient service, directed the costs of the rule to be paid by the officer. *Lambert v. Townsend*, 1 Law J. (n.s.) Exch. 113.

The Court will, when necessary, apportion the costs of an issue under the Interpleader Act, among the different parties, according to the result of the issue upon their different interests. *Dixon v. Yates*, 2 Law J. (n.s.) K.B. 198, a.c. 2 N. & M. 177; 5 B. & Ad. 313.

### INTOXICATION.

The case of *Res v. Gundley*, in which it was said, that the intoxication of a party, charged with murder, was a proper circumstance to be taken into consideration, in order to shew whether the act was premeditated, or done only with sudden heat and impulse, is not law. *Res v. Carroll*, 7 C. & P. 147. [Parke]

### INTRUSION.

[See REAL ACTION.]

### INVENTORY AND ACCOUNT.

[See EXECUTORS, LIABILITIES.]

### IRELAND.

[See various heads of STATUTES.]

Facilitation of loans upon landed securities in. 4 & 5 Will. 4, c. 29; 12 Law J. Stat. 45.

### IRISH JUDGMENT.

[See ARREST, Re-arrest, where allowed.]

### ISLE OF MAN.

Act for the regulation of trade of. 3 & 4 Will. 4, c. 60; 11 Law J. Stat. 110.

### ISSUE.

[See REFLEADER—PRACTICE—WILL.]

- (A) WHERE DIRECTED.
- (B) PRACTICE.

#### (A) WHERE DIRECTED.

[*Nichol v. Vaughan*, 2 D. & Cl. A.C. 420; 2 Law J. Dig. 162, a.c. 5 Bligh, n.s. 305. And see *Noel v. Rockfort*, 5 Bligh, n.s. 667.]

Nature and amount of the evidence, upon which the Court will direct an issue to investigate a title depending on a question of pedigree. *Monkton v. Attorney General*, 2 Russ. & M. 147.

Where trust money in the hands of a debtor, was applied by a banker in payment of his debt,—Held, that it was a proper case for issues to be directed to inquire how much of the money had been so applied, and whether the creditor at the time of the appropriation knew that it was trust money. *Taylor v. Forbes*, 7 Bligh, n.s. 417.

Where bail apply to enter an exoneration on the bail-piece, if fraud is imputed to the bankrupt in obtaining the commission and certificate, and the trading be disputed, the Court will direct an issue to try, whether the commission was duly issued. *Willison v. Smith*, 3 Doug. 96.

On a motion to cancel a bail-bond, on the ground that the defendant (a bankrupt) had since obtained his certificate, it being suggested that the certificate had been obtained by fraud, the Court (the parties consenting) directed an issue to try that fact. *Duncan v. Eggey*, 1 Mo. & Sc. 521.

R having a lease of lands near London, adapted for building, and improving in value, with which advantage he was well acquainted by residence on the spot, employed T, the confidential solicitor of his landlord, to apply for a new lease.

An agreement for a long lease, at a gross under-value, and upon terms very disadvantageous to the landlord, was obtained by the co-operation of the solicitor, at a time when the landlord, a very old man, was confined to his bed by illness, it being supposed by the solicitor that he was dying.

The agreement, which contained a proviso that T should be employed in preparing the underleases on the property, was signed on a Saturday. On the following day (Sunday), instructions were sent by the solicitor to a conveyancer, to prepare the lease on behalf of the lessee, and many of the covenants usual in such leases were omitted. The lease was prepared and executed on the following Wednesday, the landlord not being duly apprised that his solicitor was thus acting for his tenant. The proviso in the agreement for the employment of the solicitor in the underleases, was not inserted in the lease. But by arrangement between the tenant and the solicitor it was omitted; and as a substitute to secure this advantage, a bond for 10,000*l.* was given to the solicitor by the tenant, who also gave him a gratuity of 100*l.* upon the settlement of his bill. The landlord died some months after signing the agreement and executing the lease, and a party entitled under his will to a life estate in the premises, with a remainder in fee, subject to intervening contingent uses, accepted rent from the tenant for some time after the death of the deviser, but in ignorance of the facts as to the procurement of the lease. Having discovered the facts, he filed a bill to set aside the lease, on the ground of fraud and imposition; and by decree in Chancery the lease was set aside, as unfairly and improperly obtained. On appeal, this decree was varied, by directing issues on the following questions:—First, was the lease granted by Peter Beauvoir to the defendant William Rhodes, obtained by fraud and imposition? Secondly, did Peter Beauvoir know, when he executed the agreement in the pleadings mentioned, that Thomas Tebbutt the elder, therein named, was the defendant William Rhodes's solicitor, and acting for him in the matter of the said agreement, or of the lease in the pleadings mentioned, as well as for himself, the said Peter Beauvoir? Thirdly, was the lease bearing date the 17th day of January 1821, in the pleadings mentioned, granted at an undervalue? Fourthly, did Peter Beauvoir intend to favour the defendant, William Rhodes, in respect of the terms on which the lease should be granted? Fifthly, was the lease granted at an undervalue, supposing Peter Beauvoir intended to favour the defendant William Rhodes? *Rhodes v. Beauvoir*, 8 Bligh, n.s. 195.

#### (B) PRACTICE.

Evidence of a testatrix being of unsound mind shortly after the execution of her will, not a sufficient ground for granting a new trial, to try the validity of the will. *Warne v. Swift*, 1 Law J. (n.s.) Chanc. 203.

An order of the Court of Chancery directed the new trial of an issue, and a commission for examination of witnesses abroad; and that the trial of the issue should be stayed until the return of the commission. The parties having improperly delayed the execution and return of the commission, upon application to the Court the whole of the original order was discharged. But upon appeal,—held, that the laches as to the commission ought not to affect the right to proceed to a new trial of the issue; and as regarded this last point the order was reversed, with special directions. *Colvin v. Campion*, 8 Bligh, n.s. 523.

A motion for a new trial of two issues was made upon three grounds: 1st, the alleged improper summing up of the Judge: 2ndly, because the weight of evidence was against the verdict: and, 3rdly, because only one of the attesting witnesses was examined at the trial. The motion was refused on the ground that, upon the evidence alone, without regard to the summing up of the Judge, the Court would not have been satisfied, if the jury had given a different verdict; and, because the two attesting witnesses, who were not examined, were present in court on the trial of the issue, and tendered to the party moving for a new trial, who declined to examine them.—*Semble*, the rule is not universal, that, on the trial of an issue *deviseavit vel non*, all the attesting witnesses must be examined at law.—*Semble*, that rule does not apply, where the bill is filed by the heir-at-law, to restrain the devisee from setting up a legal estate as a bar to the ejectment. *Tatham v. Wright*, 2 R. & M. 1.

Where a new trial has been directed, and the terms of the issue have been somewhat varied, though substantially the same as before, on motion that the evidence of a witness on the former trial, who had since died, might be read as evidence on the new trial, order made. *Jones v. Powell*, 2 Law J. (n.s.) Chanc. 56.

Upon the sale, under a trust, of an estate called G, which was subject to a mortgage to J S, an attorney, J, became the purchaser, and in part of the purchase-money agreed with J P, who, jointly with W P, was interested in the proceeds of the estate G, to convey an estate called M, valued at 2,000*l.* This estate was accordingly conveyed to T J, a partner in the business with J S, who in the deeds appeared to be a trustee for J P. The deeds so executed were left in the possession of J S, who upon some few occasions, had acted as the solicitor of J P.

J P having in 1817, upon the security of this estate of M, borrowed 700*l.* of W W, applied to J S for the deeds, in order to complete the security, and they were accordingly delivered by J S to J P, and were placed in the hands of W W as mortgagee. In 1818, J P borrowed a further sum of 1,500*l.* of A G, whereupon W W conveyed the estate to A G, and the deeds were delivered up to him. Part of the 1,500*l.* so borrowed, was applied in discharge of the principal and interest due to W W, and other part in satisfaction of two judgments, which had been entered up against J P by creditors, for whom T J, the partner of J S, acted as solicitor. Upon this occasion, T J having refused to join in the conveyance to A G, a bill in Chancery was filed to compel him to convey; and he, by his answer, having suggested that he held the estate in trust for J S as well as J P, the bill was amended by making J S a co-defendant. He by his answer swore, that the estate of G was, by agreement between him and J P, sold for their joint benefit, in moieties; that the estate of M, was for reasons of convenience, conveyed in trust nominally for J P, but that T J, being his partner, was on that account made the trustee in the deed; and for the same reasons the deeds were left in the possession of J S, and that an account respecting the estate had been settled and signed by the plaintiff, in which it appeared that J S was jointly interested with him. On the part

of the plaintiff the facts as before stated were proved; and it was also proved, that in various transactions and conversations relating to the sale and mortgage of the estate in question, they were considered and spoken of as the estates of J P, and that J S never claimed any interest in them; but one of plaintiff's witnesses deposed, that J S, in conversation with him, said that "he thought J P had bought the estate for him, but J P took it for himself: that he (J S) and W P, who was part-owner with J P of the estate to be sold, were not friends, but that J P and W P, who was his uncle, were friends, and that J P could make a better bargain. There was also evidence that J S refused to deliver the deeds to J P, until J P had signed the account set up by the answer. On the part of J S, the defendant in the suit, it was sworn by T J, his partner and co-defendant, that he was made trustee for J S, as well as J P, and that the account shewing their joint interest, was fairly settled and signed by J P after a deliberate investigation:—Held, under these circumstances, in the Court below, and upon appeal, that J S, upon the proposal of the Court, not having acceded to the suggestion, that an issue would be directed if the parties had any further evidence to offer, it was properly decreed, that T J was a trustee for J P only. *Jones v. Price*, 5 Bligh, n.s. 419.

#### JOINDER.

[See TRUSTEE, Power and Duty—TENANTS IN COMMON.]

#### JOINT CONTRACTORS.

[See ACCORD AND SATISFACTION.]

#### JOINT ORDER.

A and B, who were not in partnership together, but who joined in giving an order for a quantity of corn—Held, not to be liable jointly to the sellers, it appearing upon the whole transaction, that it was the intention of the parties that they should be only severally responsible to the extent of their respective interests in the corn so purchased. *Gibson v. Lupton*, 2 Law J. (n.s.) C.P. 4, s. c. 9 Bing. 297; 2 Mo. & Sc. 371.

A, B and C having agreed for the purchase of certain mines, for 10,000*l.*, and to form a joint stock company for working them, and that the mines should be sold to the company for 25,000*l.*, of which 10,000*l.* should be paid to F, the proprietor, and the remainder divided amongst themselves and certain of their friends, whom they nominated to be directors and officers of the company; at a meeting of the persons so nominated, at which A, B and C were present, but before the company was established, it was resolved, that the company should purchase the mines for 25,000*l.*, to be paid to F; and a conveyance was afterwards taken from F to the trustees of the company, and the 25,000*l.* was paid out of the funds of the company, and distributed in the manner agreed upon. A suit having been instituted, by some of the shareholders, on behalf of themselves and the others, against the persons who

had participated in the 15,000*l.* the latter were decreed to refund what they had received; and one of the defendants having become bankrupt after he had paid what he had received, into court, under an order upon motion,—held, that the plaintiffs were entitled to receive that sum, and were not to be put to prove their demand under the commission. *Hichens v. Congreve*, 4 Sim. 420.

#### JOINT-TENANCY.

A joint tenancy in personality may be severed by a letter, or other assent by parol. *Gould v. Kemp*, 1 Law J. (n.s.) Chanc. 176, s. c. 2 M. & K. 304.

#### JOINTURE.

[See RENT-CHARGE.]

#### JUDGE.

[See CHANCELLOR—SALARIES—PRACTICE, In the House of Lords.]

The Judges declined to answer a question proposed to them by the House of Lords, in terms which rendered it doubtful, whether it did not extend to the construction of a bill before the House. *In the matter of the London and Westminster Bank*, 1 Bing. N.C. 197, s. c. 1 Sc. 4.

#### JUDGES OF ASSIZE.

[See SHERIFF, Compensation.]

The Judges of the King's Bench and Common Pleas are Judges of Assize for Middlesex, by virtue of their office, and may try assizes for that county, without any patent or commission.

Accordingly, held, that the 55 Geo. 3, c. 50, s. 10, which provided for the abolition of fees or liberates of debtors, and for compensation to sheriffs for the abolition, such compensation to be settled by the Justices at Sessions, subject to the approbation of the Judges of Assize, applied to the county of Middlesex as to the compensation, as well as to the abolition. *Rex v. the Justices of Middlesex*, 1 Law J. (n.s.) M.C. 13, s. c. 3 B. & Ad. 100.

#### JUDGE IN BAIL COURT.

A rule *nisi* was obtained for an attachment against defendant, for non-payment of money pursuant to an award; and on argument in the Bail Court, the Judge there made the rule absolute. The sheriff levied for the amount claimed. A rule was then obtained, calling on the sheriff to shew cause, among other things, why he should not retain the sum levied till further order of the Court; and upon such rule being discussed in the full Court, it was admitted, that the object in applying for the rule was, to obtain a reversion of the judgment given in the Bail Court:—Held, that the matter, having been decided by a Judge in that court, ought not now to be re-heard; and that the proceedings since the attachment did not entitle the defendant to re-open it. *Rex v. Sheriff of Devon*, 2 Ad. & E. 296.

## JUDGE AT CHAMBERS.

[See COSTS, Motions and Rules—INTERPLEADER—  
EVIDENCE, Admissions—PRODUCTION AND IN-  
SPECTION OF DOCUMENTS.]

*Quare*, whether a Judge at chambers has authority, during vacation, to quash a demurrer appearing to be sham and pleaded for delay. *Foster v. Burton*, 2 Law J. (N.S.) Exch. 161, a. c. 3 Tyr. 388; 1 Dowl. P.C. 683.

A Judge cannot grant costs at chambers. *Anonymous*, 1 Dowl. P.C. 52.

A Judge at chambers has power to award costs. *Prescott v. Roe*, 1 Law J. (N.S.) C.P. 174, a. c. 9 Bing. 104; 2 Mo. & Sc. 119; 1 Dowl. P.C. 274.

*Semble*—that a Judge at chambers has now a power to order costs to be paid by either party, according to his discretion. *Hughes v. Brand*, 2 Dowl. P.C. 131.

A Judge has power to give costs on proceedings at chambers, but it will be exercised only in extreme cases. *In re Budge and Wright*, 2 Ad. & E. 48, s. c. 4 N. & M. 4.

Upon a motion for an attachment for non-payment of money, the Court refused to allow cause to be shewn at chambers, though it was at the end of the term. *Fall v. Fall*, 2 Dowl. P.C. 88.

Where upon a matter decided at chambers, a Judge has entertained the question of costs, an appeal to the Court on the subject of such costs ought not to be made. *Davy v. Brown*, 1 Bing. N.C. 460, s. c. 1 Sc. 384.

And see further as to when cause may be shewn at chambers. *Rowell v. Brendon*, 3 Dowl. P.C. 324.

Where upon a summons attended at chambers, the Judge indorses a minute of an order, it is at the option of the party by whom the summons was taken out, to have an order drawn up in pursuance of such minute or not. If the party summoned considers that the order pronounced is in his favour, he should take out a cross-summons for the purpose of obtaining a similar order. If parties, being before a Judge at chambers, go by consent into matter not within the summons, and the Judge makes a minute of an order, the party in whose favour such minute is made, is entitled to draw up an order accordingly, *semble*. *M'Dougall v. Nicholls*, 3 N. & M. 366, s. c. 3 Ad. & E. 813.

## JUDGE AT NISI PRIUS.

[See PRACTICE, Trial, Mode of conducting in Court.]

## JUDGMENT.

- (A) IN GENERAL.
- (B) FOR WANT OF A PLEA.
- (C) OF NON PROB.
- (D) SIGNING.
- (E) ENTERING UP.
- (F) DOCKETING.
- (G) ARREST OF.

- (H) SETTING ASIDE.
- (I) JUDGMENT RECOVERED.
- (K) AS IN CASE OF A NONSUIT.
- (L) JUDGMENT NON OBSTANTE.
- (M) PLEADING.
- (N) IN COUNTY COURT.

## (A) IN GENERAL.

All judgments relate to the first day of the term, and the priority of one or two judgments signed on the same day cannot be averred. *Lord Porchester v. Petrie*, 3 Doug. 265.

In debt for goods sold and delivered, and work and labour done, the pleas were, first, *nunquam indebtedus*; secondly, as to parcel of the sum demanded, to wit, 338*l.*, payment of 338*l.* in discharge of that parcel; thirdly, a set-off for money paid. The plaintiff proved a special contract for "good, sound, saleable bricks," to be made for him by the defendant, at a certain price per thousand, and delivery of as many thousands as, at that price, amounted to 396*l.* The defendant failed in making out a payment of 338*l.*, as laid in the second plea; only proving 314*l.* to have been paid. He proved a set-off of 21*l.*, and also that the bricks delivered were of bad quality. The jury found that the value of the bricks delivered did not exceed the 335*l.*; viz., the 314*l.* which had been paid, and the 21*l.* which the defendant was entitled to set off against the plaintiff's demand. On a special finding of these facts under 3 & 4 Will. 4, c. 22, s. 24, the Court directed a verdict to be entered for the defendant, on the plea of *nunquam indebtedus* as to the whole sum demanded, except 335*l.*: for the defendant on the plea of payment as to 314*l.*, and as to the residue for the plaintiff: for the defendant on the plea of set-off as to 21*l.*, and as to the residue for the plaintiff, so as to give the defendant judgment on the whole record. *Cousins v. Paddon*, 5 Law J. (N.S.) Exch. 49, s. c. 2 C. M. & R. 547; 5 Tyr. 535.

A judgment creditor has no claim on a fund, the produce of land over which a discretionary power of sale is given, and which is limited to the debtor in default of sale if the power should at any time be exercised. Thus, where lands were limited to trustees, in trust to sell at discretion, and to pay certain debts, and to pay the surplus of the monies to B, and in default of sale, the lands were limited to B in fee:—Held, that B's judgment creditors could claim no lien on the produce of the lands when sold. *Forster v. Blackstone*, 2 Law J. (N.S.) Chanc. 84, s. c. 1 M. & K. 297.

A judgment entered up on a warrant of attorney, given by a beneficed clergyman in the North Riding of Yorkshire, to secure payment of an annuity, need not be registered under 8 Geo. 2, c. 6; for though it may be enforced by sequestration, the benefice is not affected by the judgment.

The judgment was for 1,800*l.* The warrant of attorney provided, that on the death of the defendant, and full payment of arrears of the annuity, satisfaction should be entered on the record. A second judgment having been signed by a different creditor, who sued out a *sequestrari facias* thereupon, it appeared, that at that time the former

creditor had by sequestrations, levied more than 1,800*l.* for arrears of his annuity, and there were arrears still due. The Court ordered, that satisfaction should be entered on the roll of the former judgment, as of the date when judgment was signed by the second creditor; and that the sums levied since should be paid over to him. But they refused to order payment to this creditor, of the surplus over 1,800*l.*, levied before the signing of his judgment. *Cottle v. Warrington*, 5 B. & Ad. 447, s. c. 2 N. & M. 227.

A being possessed of a leasehold house, deposited the lease with B as a security for a debt; C afterwards obtained a judgment against A, and sued out a *f. fa.* The sheriff sold some of A's goods, but not the house, and returned the writ: whilst the writ was in the sheriff's hands, D with A's consent paid the debt due to B, and had the lease deposited with him as a security for the amount, and for other sums due to him, from A:—Held, that C having allowed the writ to be returned, without requiring the sheriff to sell the house, had no priority over D. *Williams v. Craddock*, 4 Sim. 313.

#### (B) FOR WANT OF A PLEA.

[See PRACTICE, Plea.]

Where the declaration is delivered in one term, judgment for want of a plea, may be signed in the succeeding term, without a fresh rule to plead as of the latter term. *Pryer v. Smith*, 2 Law J. (N.S.) Exch. 273, s. c. 1 C. & M. 855; 3 Tyr. 820; 2 Dowl. P.C. 114.

Where the defendant pleads several pleas, each applicable to a particular count in the declaration only, without expressly limiting each plea to the count which it is intended to answer, the plaintiff, under rule 9 of Hilary term, 4 Will. 4, which declares, "that all pleas, unless otherwise expressed, shall be taken as pleaded respectively in bar of the whole action," cannot treat the pleas as a nullity, and sign judgment, but must proceed by special demurrer. *Vere v. Goldsborough*, 4 Law J. (N.S.) C.P. 65, s. c. 1 Bing. N.C. 353; 1 Sc. 265.

Where the defendant delivers several pleas unsigned by counsel, and without a rule to plead double, the plaintiff is not prevented from signing judgment by reason of the additional pleas containing matters which are inadmissible, or put nothing in issue. *Hockley v. Sutton*, 3 Law J. (N.S.) Exch. 303.

Where, by the plaintiff's own laches, on a plea of judgment recovered, no time remains to obtain a judgment of the term in the regular course, the Court will not give leave to sign judgment as for want of a plea, on an affidavit that the plea is false, or, *semble*, that the plaintiff's attorney has admitted it was put in merely for delay. *Poole v. Salter*, 1 Law J. (N.S.) Exch. 65, s. c. 2 C. & J. 85; 2 Tyr. 139; 1 Dowl. P.C. 297.

To debt on a judgment, the defendant pleaded a release of December 1831, destroyed by accident. Upon affidavit that the plea was false, the Court allowed the plaintiff to sign judgment as for want of a plea. *Smith v. Hardy*, 1 Law J. (N.S.) C.P. 130, s. c. 8 Bing. 435; 1 Mo. & Sc. 676.

Where the defendant pleads *nil debet* as to part, and a tender as to the residue of the plaintiff's de-

mand, but omits to pay the money tendered into court, the plaintiff cannot sign judgment on the entire demand for want of a plea, but only for the residue. *Chapman v. Hicks*, 3 Law J. (N.S.) Exch. 219, s. c. 2 C. & M. 633.

Where a single plea is calculated to perplex, and renders it necessary for the plaintiff to consult counsel, the Court, upon an affidavit that it is false, will allow judgment to be signed as for want of a plea.

Thus, in an action on a bill of exchange by the indorsee against the acceptor, where the defendant pleaded "that the bill was obtained without consideration; that a blank piece of paper on a 2*s.* 6*d.* stamp was handed to him, with a request that he would put his name as acceptor; that he accepted the bill payable at a particular place only; and that these facts were known to the plaintiff,"—the Court gave the plaintiff leave to sign judgment as for want of a plea, on an affidavit that all the allegations in the plea were false. *Miley v. Wallis*, 2 Law J. (N.S.) Exch. 170.

A plea of the Statute of Limitations requires to be signed; but although a nullity if unsigned, judgment cannot be signed until the time for pleading has expired. *Macher v. Billing*, 4 Law J. (N.S.) Exch. 16, s. c. 1 C. M. & R. 577; 4 Tyr. 812.

Where a plea was delivered after the time for pleading had expired, but before judgment actually signed, of which the plaintiff's attorney was informed, but afterwards, on the ground that the time for pleading was out, signed judgment,—the Court set aside the judgment for irregularity, on payment of costs by the plaintiff's attorney. *Amphill v. Semple*, 1 Law J. (N.S.) Exch. 102, s. c. 2 C. & J. 358; 2 Tyr. 212; 1 Dowl. P.C. 316.

A plea pleaded before appearance, although a nullity, does not entitle the plaintiff to sign judgment before the time for pleading has expired. — *v. Sherwin*, 1 Law J. (N.S.) Exch. 95; s. c. as *Nolleken v. Severn*, 2 C. & J. 333, 1 Dowl. P.C. 320.

A declaration was delivered on the 4th of August, with notice to plead in four days:—Held, that judgment could not properly be signed till the afternoon for want of a plea. *Kemp v. Fyson*, 3 Dowl. P.C. 265.

The judgment signed in term for want of a plea, where the plea was delivered before eleven o'clock of the day after that on which the time for pleading expired,—Held, irregular. *Leigh v. Bender*, 4 Dowl. P.C. 201.

A plaintiff has no right to sign judgment for want of a plea, before the time for pleading is out, although a bad plea may have been delivered.

*Semble*, that the word "till" is inclusive of the day to which it is prefixed. *Dakins v. Wagner*, 3 Dowl. P.C. 535.

Where the declaration was delivered on the 7th, to plead in four days, and on the 10th an order for particulars was obtained, which were delivered on the 13th:—Held, that judgment for want of a plea, signed at ten o'clock on the 15th, was regular.

The afternoon in the Exchequer, for the purpose of signing judgment, does not commence, in term, till three o'clock. *Tate v. Bodfield*, 3 Dowl. P.C. 218.

A declaration in assumpsit, indorsed to plead in

four days, being delivered, with particulars of demand annexed, the plaintiff, two days afterwards, finding that the particular was wrongly entitled, delivered a fresh particular, properly entitled; and for want of a plea, within the four days signed judgment:—Held, that the judgment was regular, the accepting the amended particular being a waiver of the objection to the first. *Jones v. Fowler*, 4 Dowl. P.C. 232.

A plea being delivered after nine o'clock in the evening, cannot be treated as a nullity; and a judgment signed on that ground, and no notice having been given of the objection to the defendant, was set aside. *Horsley v. Purdon*, 2 Dowl. P.C. 228.

The plea of "not guilty," in an action of assumpsit, cannot be treated as a nullity. *Ioemy v. Parant*, 1 Dowl. P.C. 453.

Action on a charter-party for not loading a ship. The defendant (being under terms to plead issuably) pleaded, that a survey of the ship was had by order of the Admiralty Court of St. Kitt's, and she was declared insufficient; wherefore, &c.—Held, that this was not an issuable plea, and the plaintiff might sign judgment. *Valle v. Gardiner*, 3 Doug. 354.

In an action against an administrator, the defendant, after obtaining time to plead upon the usual terms, pleaded a judgment recovered since the commencement of the action, but did not aver that there were no assets ultra. The Court gave leave to the plaintiff to sign judgment as for want of a plea, the defendant having, since the commencement of the action, admitted by letter the possession of assets sufficient to cover the judgment, and also the plaintiff's demand. *Roberts v. Wood*, 3 Dowl. P.C. 797.

An affidavit in support of a rule for setting aside a judgment, signed by the plaintiff for want of a plea, alleged, that the defendant had merits and a good cause of defence to the action:—Held, insufficient: the affidavit must express that the defendant hath a good defence on the merits thereof. *Lane v. Isaacs*, 3 Dowl. P.C. 652.

8 Reg. Gen. H. T. 4 Will. 4, does not apply to judgments in other cases pleaded by an executor. *Power v. Fry*, 3 Dowl. P.C. 140.

The Court will not set aside a judgment by default, to let in a plea of bankruptcy. *Stafford v. Rountice*, 3 Doug. 400.

An interlocutory judgment, signed without an appearance, is a nullity, and cannot be waived. *Roberts v. Spurr*, 3 Dowl. P.C. 551.

Where a judgment by default is set aside on payment of costs, the plaintiff is to be placed in the same situation as if it had not been set aside. *Anonymous*, 3 Doug. 431.

#### (C) OF NON PROS.

The word "peremptorily," in a rule to declare, will only prevent a plaintiff from taking out more rules for time to declare; and therefore, if the defendant signs judgment of *non pros.*, after the rule to declare has run out, but the plaintiff has declared, the judgment is wrong. *Gray v. Pennell*, 1 Dowl. P.C. 120.

If a demand of declaration has been served, and time to declare is obtained, the defendant may sign

judgment of *non pros.* without a fresh demand of declaration. *Wells v. Hare*, 1 Dowl. P.C. 366.

The affidavit in support of a motion to set aside a judgment of *non pros.* should state either that there is a good cause of action on the merits, or that there is a present cause of action. *Corteseos v. Hume*, 2 Dowl. P.C. 134.

In an action against several defendants, a judgment of *non pros.* cannot be signed until all have appeared. *Palmer v. Feistel*, 2 Dowl. P.C. 507.

Although a defendant is under terms to rejoin gratis, and take short notice of trial, the plaintiff cannot sign judgment of *non pros.* for want of a rejoinder, unless a demand for that purpose has been made. *Seaton v. Skey*, 3 Dowl. P.C. 537.

Where, to a declaration in assumpsit, the defendant pleaded, first, payment of money into court to the whole declaration, according to the 17th rule of H. T. 4 Will. 4; secondly, *non assumpsit* as to the residue; thirdly, payment of a part; fourthly, a set-off as to part; and the plaintiff replied, that he had taken the money out of court according to the form in the 19th rule:—Held, that the defendant was not justified in signing judgment of *non pros.* for want of a replication to the other pleas. *Coates v. Stevens*, 4 Law J. (N.S.) Exch. 167, s.c. 2 C. M. & R. 118.

After a Judge's order for time to enter the issue, the defendant may sign judgment of *non pros.* immediately on the expiration of the time, without giving the plaintiff twenty-four hours more. *Davies v. Cooper*, 4 Doug. 5.

The defendant being entitled to sign judgment of *non pros.* for want of a declaration, the plaintiff's attorney, to prevent the *non pros.*, obtained a rule to discontinue on payment of costs; instead of complying with such rule, as soon as it had expired, he served the defendant with a declaration:—Held, a fraud on the proceedings of the Court; and, the defendant having entered up judgment of *non pros.*, the Court refused to set it aside. *Ariel v. Barrow*, 1 Law J. (N.S.) C.P. 117, s.c. 8 Bing. 375; 1 Mo. & Sc. 581.

#### (D) SIGNING.

[See PRACTICE, Plea.]

Where the declaration and rule to plead were both in vacation, a judgment signed in the next term, without a new rule to plead, held regular. *Mould v. Murphy*, 2 Dowl. P.C. 54.

After a rule to plead in Easter term, in an action on a bill of exchange, defendant paid a portion of the bill, with the costs to that time, and agreed to pay the residue, with the costs of the action, the 1st of October following, if it were not previously paid by another party. No payment having been made, according to the agreement,—Held, that plaintiff might sign judgment in Michaelmas term, without a fresh rule to plead. *Usborne v. Pennell*, 1 Bing. N.C. 320, s.c. 1 Sc. 277.

The plaintiff may open the office on a holiday to sign judgment, for non-delivery of a plea. *Bennett v. Potter*, 1 Law J. (N.S.) Exch. 258, s.c. 2 C. & J. 622.

In general, the Court will not authorize a party to sign judgment for irregularity, but will leave him to take that step at his own peril. *Finn v.*

*Woodman*, 1 Law J. (N.S.) Exch. 132, s. c. 2 C. & J. 464; 2 Tyr. 492.

#### (E) ENTERING UP.

The defendant obtained a verdict in December 1829. In the following term, the plaintiff obtained a rule nisi for a new trial, which rule the Court afterwards directed to be suspended, to await the issue of another cause, which involved the same point. The defendant died in November 1830. The Court, after a lapse of two years and a half from the date of the verdict, allowed the judgment to be entered up *nunc pro tunc*. *Key v. Goodwin*, 1 M. & Sc. 620.

A verdict was taken for the plaintiff in Hilary term 1832, by consent, subject to a reference. The arbitrator made an award in favour of the plaintiff after the expiration of Trinity term, the defendant having died in the meantime. On motion made in the following Michaelmas term, the Court allowed judgment to be entered *nunc pro tunc* as of Trinity term, notwithstanding more than two terms had elapsed since the verdict was taken. *Miller v. Spurr*, 2 M. & Sc. 730.

Where a verdict has been found, subject to a reference, and the award has not been made until some terms afterwards, judgment cannot be entered up as of the term next after the verdict, without a special application to the Court. *Brooke v. Fearn*, 2 Dowl. P.C. 144.

#### (F) DOCKETING.

Where the issue had been docketed, the number of the judgment roll being affixed to the issue, but there had been no docket of the judgment—this was held not a sufficient docket within the statute 4 & 5 W. & M.; and the Court refused an application to docket the judgment *nunc pro tunc*, where the effect would be to give priority over a mortgagee. *Hopwood v. Watts*, 3 Law J. (N.S.) K.B. 109, s. c. 5 B. & Ad. 1056; 3 N. & M. 146.

Docketing the issue is not a sufficient docketing of a judgment, within the provisions of 4 & 5 W. & M. c. 20.—Held, that the committee of a lunatic, who had received and paid over rents to a subsequent mortgagee, was not liable in an action for money had and received to a judgment creditor, to whom the land had been delivered by the sheriff under an elegit sued out upon a judgment prior to the mortgage, of which judgment there was no docket, though the issue had been docketed. *Braithwaite v. Watts*, 1 Law J. (N.S.) Exch. 97, s. c. 2 C. & J. 318; 2 Tyr. 293.

#### (G) ARREST OF.

[See COMMON.]

The record in an action for slander stated, that the writ issued on the 4th June, and that the words were spoken on the 27th:—Held, that this discrepancy on the record was no ground for arresting the judgment. *Steward v. Layton*, 3 Dowl. P.C. 430.

#### (H) SETTING ASIDE.

Where the plaintiff vacated an irregular judgment, and entered a regular one on the same day when the defendant's affidavit for a rule to set aside

the former judgment for irregularity was sworn, the Court set aside the second as well as the first judgment, because the plaintiff's affidavits did not state at what hour the second judgment was entered, and it did not appear that, at the time when the rule was moved for, the defendant knew anything of it. — *v. Sherwin*, 1 Law J. (N.S.) Exch. 95.

Interlocutory judgment cannot be set aside, because the notice of declaration is irregular.

Where a rule is drawn up for setting aside a judgment for irregularity, an objection that it was signed against good faith cannot be entertained (though the rule was moved on that ground), that not being an irregularity. *Smith v. Clarke*, 3 Law J. (N.S.) Exch. 63, s. c. 2 Dowl. P.C. 218.

The Court refused to set aside an interlocutory judgment (which had been irregularly signed three years ago) upon payment of costs, though proceedings of *scire facias* had been only lately commenced. *Lewis v. Brown*, 3 Dowl. P.C. 700.

An application to set aside an interlocutory judgment for irregularity after notice of inquiry on the 4th November, was held to be too late on the 12th. *Scott v. Cogger*, 3 Dowl. P.C. 212.

An affidavit to set aside a regular judgment made by the London agent to the country attorney, and stating, that the deponent believed, from the instructions received from the country attorney, that the defendant had a good defence to the action on the merits:—Held, sufficient. *Schofield v. Huggins*, 3 Dowl. P.C. 427.

#### (I) JUDGMENT RECOVERED.

[See LIMITATIONS, STATUTE OF.]

It is no answer to a plea of set-off on a judgment recovered, that plaintiff has brought a writ of error to reverse the judgment which is still depending.

A judgment recovered after action brought, and before plea is pleaded, is a good set-off. *Reynolds v. Beering*, 4 Doug. 181.

The plaintiff declared in debt for double rent, for use and occupation, with a count for money had and received; and obtained a general verdict for the amount of rent only. Two days before the trial of the action, he delivered a declaration in case, with a count for digging quarries and carrying away stone; and in trover for stone, with a bill of particulars for stone converted, corresponding precisely with the bill of particulars on the count for money had and received in the former action:—Held, that the judgment in the first action was no bar to a recovery on the count in trover on the second. *Hadley v. Green*, 1 Law J. (N.S.) Exch. 137, s. c. 2 C. & J. 374; 2 Tyr. 390.

#### (K) AS IN CASE OF A NONSUIT.

[See EJECTMENT.]

Where a plaintiff has given a peremptory undertaking (but not by rule), the rule for judgment as in case of a nonsuit for not fulfilling that undertaking, is nisi in the first instance. *Vokins v. Snell*, 2 Dowl. P.C. 411.

If it appears that issue is not joined by adding the *similiter*, the rule for judgment as in case of a nonsuit will be discharged. *Gilbert v. Melton*, 2 Dowl. P.C. 632.

The Court will discharge the rule for judgment as in case of a nonsuit, though the defendant swears

the cause is at issue, if the plaintiff swears that the *similiter* has not been added. *Seabrook v. Cave*, 2 Dowl. P.C. 691.

If it appears doubtful whether issue has been joined by adding the *similiter*, the rule for judgment as in case of a nonsuit will be discharged. *Brown v. Kennedy*, 2 Dowl. P.C. 639.

Where issue was joined on the 24th November in a country cause, and the plaintiff did not give notice of trial,—Held, that judgment as in case of a nonsuit might be moved for after one assize had passed. Unless the *similiter* is added, issue cannot be said to be joined for the purpose of such a motion. *Smith v. Rigby*, 3 Dowl. P.C. 705.

A motion for judgment as in case of a nonsuit, on issue joined in the same term, and notice of trial and a countermand for the second sittings, is premature. *Isaacs v. Goodman*, 2 Law J. (N.s.) Exch. 231, s.c. 1 C. & M. 404; 3 Tyr. 559; 2 Dowl. P.C. 34.

Judgment as in case of a nonsuit for not proceeding to trial, pursuant to a notice of trial for the sittings, or before the sheriff, in term, cannot be moved for in the same term in which the notice is given, though issue was joined in the previous term. *Begbie v. Grenville*, 3 Law J. (N.s.) Exch. 21.

Judgment as in case of a nonsuit cannot be moved for in the term in which notice of trial has been given. *Preedy v. Macfarlane*, 3 Law J. (N.s.) Exch. 45, s.c. 2 C. M. & R. 213; 4 Tyr. 93; 2 Dowl. P.C. 216.

Where issue was joined in Easter vacation as of Easter term, and no notice of trial given:—Held, that a rule for judgment as in case of a nonsuit might be moved for in Michaelmas term in a country cause. *Williams v. Edwards*, 4 Law J. (N.s.) Exch. 40, s.c. 1 C. M. & R. 583; 5 Tyr. 177.

Where issue is joined in Trinity term, and notice of trial is given for the sittings in Michaelmas term, which notice is countermanded, it is premature to move for judgment as in case of a nonsuit in that term. *Marshall v. Foster*, 2 C. & M. 213.

Where issue has been joined in one term, and no notice of trial, the defendant cannot move for judgment as in case of a nonsuit in the next term, notwithstanding the rule 70 of H. T. 2 Will. 4. *Gates v. Terry*, 1 Dowl. P.C. 370.

Where issue was joined in a town cause, early in the vacation after Trinity term, and no notice of trial was given,—Held, that the practice was not affected by the Uniformity of Process Act, 2 Will. 4, c. 39; and that it was premature to move for judgment as in case of a nonsuit in Hilary term, or before the third term. *Wingrove v. Hodgson*, 4 Tyr. 323, s.c. 2 Dowl. P.C. 379.

A defendant may obtain judgment as in case of a nonsuit, where notice of trial has been given before the sheriff, pursuant to 3 & 4 Will. 4, c. 42, s. 17. *Walls v. Redmayne*, 2 Dowl. P.C. 508.

The defendant may move for judgment as in case of a nonsuit, as well where the issue is directed to be tried before the sheriff, as where it comes on at the sittings; but it is too soon to move in the same term in which the default is, and where it does not appear that the notice of trial was countermanded. *Begbie v. Grenville*, 2 Dowl. P.C. 238.

If a plaintiff does not proceed within two terms

after issue is joined, which issue is directed to be tried before the sheriff under the 3 & 4 Will. 4, c. 42, s. 17, the defendant is entitled to judgment as in case of a nonsuit as in ordinary cases. *Horwood v. Roberts*, 2 Dowl. P.C. 534.

The issue in a country cause ordered to be tried before the sheriff was joined on the 9th of August, but the plaintiff did not give notice of trial, a motion for judgment as in case of a nonsuit, in the Hilary term following, was held to be premature. *Harle v. Wilson*, 3 Dowl. P.C. 658.

Where a trial is ordered to take place in the sheriff's court, under the Writ of Trial Aet, and the plaintiff does not proceed to try according to the course and practice of the sheriff's court, the defendant may apply for judgment as in case of a nonsuit.

Where issue was joined on the 20th of June, and notice given for trial at the sheriff's court on the 18th of July, which the plaintiff countermanded,—Held, that a motion in the term next following, for judgment as in case of a nonsuit, was not too early. *Maddley v. Batty*, 3 Dowl. P.C. 205.

Notice of trial was given in a cause (ordered to be tried before the sheriff) for a court day in Easter term, the issue having been joined in the previous vacation; but the plaintiff did not proceed to trial according to his notice:—Held, that a motion for a judgment as in case of a nonsuit, made in the same term, was too early. *Lenney v. Poulter*, 3 Dowl. P.C. 650.

Though the rules of Hilary term, 2 Will. 4, did not come into operation until the first day of Easter term, 2 Will. 4, it is irregular to move for judgment as in case of a nonsuit after a motion for costs for the day, for not proceeding to trial, for the same default under the 69th rule of the first division of rules of Hilary term. *Omardson v. Seelling*, 1 Dowl. P.C. 373.

Under rule 69 of the first division of rules of Hilary term, 2 Will. 4, a default in not proceeding to trial pursuant to notice cannot be connected with a default in not giving notice of trial, so as to prevent the defendant from moving for judgment as in case of a nonsuit, after a motion for the costs of the day. *Hyde v. Gardner*, 1 Dowl. P.C. 380.

Rule 69 of 1 Reg. Gen. H. T. 2 Will. 4, s. 60, does not enable the Court, where a rule for judgment as in case of a nonsuit for not proceeding to trial is made absolute, to grant the defendant the costs of the day, on disposing of that motion. *Johansen v. Smith*, 1 Dowl. P.C. 421.

Where a defendant is entitled to judgment as in case of a nonsuit, for not giving notice of trial, he is not deprived of his right by the plaintiff giving notice before motion made. *Smedley v. Christie*, 2 Dowl. P.C. 152.

A separate motion is not necessary for the costs of the day for not proceeding to trial, where a rule for judgment as in case of a nonsuit is discharged. *Piercy v. Owen*, 1 Dowl. P.C. 362.

If a defendant unnecessarily rules a plaintiff to enter the issue, he is not thereby deprived of his right to obtain judgment as in case of a nonsuit. *Sarjeant v. Jones*, 2 Dowl. P.C. 220.

Upon a rule for judgment as in case of a nonsuit, the plaintiff must shew some excuse; and the defendant is not obliged to accept a peremptory



undertaking. *Nicholl v. Collingwood*, 2 Dowl. P.C. 60.

Where a plaintiff has taken a cause down to the Assizes, and it is made a remanet, the defendant is not entitled to judgment as in case of a nonsuit. *Brown v. Bidd*, 1 Dowl. P.C. 371.

Where a plaintiff has once taken his cause down to the Assizes, and it has been made a remanet, the defendant cannot obtain judgment as in a case of a nonsuit, although the plaintiff may have given a subsequent notice of trial, on which he has taken no steps. *Gilbert v. Kirkland*, 2 Dowl. P.C. 153.

If notice of trial be countermanded at the request of the defendant, he cannot obtain judgment as in case of a nonsuit, on the ground of not proceeding to trial pursuant to notice. *Jenkins v. Charity*, 2 Dowl. P.C. 197.

If a plaintiff does not proceed to trial, pursuant to notice, at the defendant's request, he is not entitled to judgment as in case of a nonsuit. *Doe d. Steppins v. Ford*, 2 Dowl. P.C. 419.

If a defendant, by negotiation, prevents a plaintiff proceeding to trial in due time after issue joined, he cannot obtain judgment as in case of a nonsuit, on account of such delay. *Watkins v. Giles*, 4 Dowl. P.C. 14.

In support of a rule to enlarge a peremptory undertaking, where the plaintiff has made only one default, in consequence of the absence of a material witness, the affidavit need not state the name of that witness. *Montfort v. Bond*, 2 Dowl. P.C. 408.

The absence of a material witness on the part of the plaintiff, is not sufficient to prevent the defendant from forcing him to trial, or obtaining judgment as in a case of a nonsuit, unless there is cause to expect that the witness will return within a reasonable time.

Thus, an affidavit in opposition to a rule for judgment as in case of a nonsuit, that a material witness for the plaintiff had gone to New South Wales, and was not expected to return for nine or twelve months—Held, insufficient. *Newton v. Spiers*, 1 Law J. (N.s.) Exch. 229.

Where no notice of trial has been given by reason of an agreement by the defendant's attorney to accept short notice, or no notice at all, the defendant is not entitled to judgment as in case of a nonsuit. *Downes v. Cross*, 1 Law J. (N.s.) Exch. 169, s. c. 2 C. & J. 466.

An affidavit in support of a rule for judgment as in case of a nonsuit for not proceeding to trial after issue joined, need not state that the issue was entered of record.

It is not now the practice of the Court, on discharging such rule on a peremptory undertaking, to allow the costs of the application to the defendant. *Wise v. Fenton*, 1 Law J. (N.s.) Exch. 120.

The non-production of funds by the plaintiff to his attorney, is not a sufficient answer to a rule for judgment as in case of a nonsuit. *Clearby v. Poole*, 4 Law J. (N.s.) Exch. 2, s. c. 1 C. M. & R. 521; 5 Tyr. 146.

Where a default in proceeding to trial has been made by a plaintiff, but the defendant does not move for judgment as in case of a nonsuit, until after fresh notice of trial, he is still entitled to his judgment. *Bainbridge v. Purves*, 1 Dowl. P.C. 444.

An executrix pleaded the general issue, and *plene administravit*, and afterwards moved for judgment as in case of a nonsuit. The Court discharged that rule upon a peremptory undertaking to try the first issue, and allow the plaintiff to withdraw his replication to the second plea, and take judgment of assets *quando, &c.* *Lucas v. Jenner*, 1 C. & M. 597, s. c. 3 Tyr. 564; 2 Dowl. P.C. 64.

An affidavit for judgment as in case of a nonsuit, stating that "a rule to reply was duly given; that the plaintiff accordingly replied; and that the cause was thereby at issue"—is insufficient. *Smith v. Parsloe*, 1 Law J. (N.s.) Exch. 81, s. c. 2 C. & J. 217; 2 Tyr. 284.

Judgment as in case of a nonsuit may be obtained where a term has elapsed after a motion for costs of the day for not proceeding to trial, and the plaintiff has not given a new notice of trial. *Dyke v. Edwards*, 2 Law J. (N.s.) Exch. 237, s. c. 2 Dowl. P.C. 53.

Judgment as in case of a nonsuit, after a peremptory undertaking, set aside on payment of costs, where the plaintiff was prevented from attending to conduct the cause in person, by reason of being arrested. *Pitt v. Evans*, 3 Law J. (N.s.) Exch. 64.

It is no answer to a rule for judgment as in case of a nonsuit, that the action has been brought by an attorney without the knowledge or authority of the plaintiff, and that the attorney cannot be found.—But the Court, in such a case, will enlarge the rule, to give the plaintiff time to find the attorney; and will, at the same time, grant a rule to the plaintiff, calling upon the attorney to shew cause why he should not pay the defendant's costs. *Mudry v. Newman*, 3 Law J. (N.s.) Exch. 356, s. c. 1 C. M. & R. 402; 4 Tyr. 1023; 2 Dowl. P.C. 695.

A defendant is not entitled to judgment as in case of a nonsuit, or to a peremptory undertaking, for the purpose of obtaining his costs, if the plaintiff give a good reason for not proceeding; but he must take the cause to trial by proviso. *Mont v. Bonham*, 3 Law J. (N.s.) Exch. 137, s. c. 4 Tyr. 312; 2 C. & M. 430.

Where a plaintiff was nonsuited, and the nonsuit afterwards was set aside on payment of costs,—Held, that the defendant could not afterwards move for judgment as in case of a nonsuit, but must take the cause down by proviso. *Ashley v. Flaxley*, 3 Law J. (N.s.) Exch. 339, s. c. 2 Dowl. P.C. 697.

Countermanding a notice of trial does not interfere with the defendant's right to obtain judgment as in case of a nonsuit, although issue has been joined in the same term as that in which notice is given. *Denneshy v. Richardson*, 4 Dowl. P.C. 13.

Giving notice that a cause will be taken as undefended at the Sittings in London, and appearing for the purpose of trying the cause as undefended, is not a sufficient taking the cause down to trial, to prevent the defendant from obtaining judgment as in case of a nonsuit. *Edrupp v. Davies*, 1 Dowl. P.C. 552.

Where a defendant took out a summons for putting off a trial at the Assizes, so late before the commission day, that the plaintiff thought he might be put to inconvenience in getting ready for trial, if the order was refused, and therefore countermanded:—Held, the defendant could not move for

judgment as in case of a nonsuit, as upon a default of the plaintiff. *Rendell v. Bailey*, 2 Dowl. P.C. 113.

Where a cause was called on whilst the plaintiff's attorney's clerk was absent from the court, in consequence of an application made to amend, and the record was therefore withdrawn; but the cause was set down again immediately for trial; and afterwards the defendant obtained a rule nisi for judgment as in case of a nonsuit, whilst the cause was still in the paper—the Court discharged the rule, with costs. *Wolsey v. Edwards*, 4 Dowl. P.C. 236.

The defendant caused the plaintiff to be taken before a Magistrate for an alleged assault. The charge being dismissed by the Magistrate, the plaintiff brought an action on the case for the arrest and false imprisonment. The defendant having preferred a bill of indictment at the Sessions, which was afterwards moved by a certiorari to the Court of King's Bench, the plaintiff withdrew the record in this cause, in order to await the decision of the King's Bench upon the indictment. The Court discharged with costs a rule for judgment as in case of a nonsuit, for not proceeding to trial. *Long v. Hutchins*, 1 Sc. 400.

In an action for a malicious arrest, the Court discharged a rule for judgment as in case of a nonsuit, with costs, where the plaintiff shewed that he only forbore proceeding to trial, because the defendant had instituted criminal proceedings against him, on the charge for which the arrest was made. *Grey v. Hutchins*, 3 Dowl. P.C. 414.

The defendant was convicted of felony before issue joined, and the notice of trial was countermanded. The Court discharged a rule for judgment as in case of a nonsuit on a peremptory undertaking, the defendant being permitted to plead the plaintiff's conviction *puis darrein continuance*. *Lee v. Macdonald*, 2 M. & Sc. 140.

The insolvency of the plaintiff, after the commencement of the action, is not an answer to a motion for judgment as in case of a nonsuit. *Frodsham v. Rust*, 4 Dowl. P.C. 90.

After a new trial granted, the defendant took the record down by proviso. On motion by the plaintiff, an order was made by the Judge at the Assizes to put off the trial for the absence of a material witness, on the plaintiff's undertaking to enter the cause for trial at the next assizes. The Court granted judgment, as in case of a nonsuit, for not proceeding to trial at the latter assizes, though the Judge's order had not been made a rule of court. *Jones v. Prichard*, 2 Tyr. 383.

It is sufficient excuse, in shewing cause against a rule for judgment as in case of a nonsuit, for not proceeding to trial pursuant to notice, that the cause was withdrawn in order to obtain a special jury. *Webber v. Roe*, 3 Dowl. P.C. 589.

Costs of the day for not proceeding to trial may be obtained as a separate part of the order for discharging a rule for judgment as in case of a nonsuit, but not as a condition for discharging that rule. *Lenniker v. Barr*, 2 C. & J. 473.

If a plaintiff gives notice of trial a term earlier than, by the rules of the court, he is required to do, still, if he does not try pursuant to such notice, the defendant may move for judgment as in case of a nonsuit, in the following term. *Howell v. Pawlett*,

1 Law J. (n.s.) C.P. 91, s.c. 3 Bing. 274; 1 Mo. & Sc. 355.

Judgment as in case of a nonsuit may be moved for in the Exchequer, on giving four days' notice of the motion, without ruling the plaintiff to enter the issue, as, in that court, there is no rule to enter the issue. *Coaltworth v. Martin*, 1 Law J. (n.s.) Exch. 67, s.c. 2 C. & J. 123; 2 Tyr. 169.

#### (L) JUDGMENT NON OBSTANTE.

[See LANCASTER.]

In an action of trespass for taking weights, &c., the defendants justified under a custom, by which a jury was sworn at the court leet of a manor, to inquire and true presentment make of all persons within the manor, who sold goods, and to see that their weights and measures were lawful and just, and to seize all such as were false and deceitful. They then stated that the plaintiff being resident within the manor, sold goods by weight; that "they, the said defendants, being on such jury," made inquiry and saw the weights, &c. of the plaintiff, that they were false and deceitful—therefore, &c.:—Held, that in order to bring themselves within the custom, all the jury must be present at the inquiry, and that the allegation, not necessarily importing that they were all there, was insufficient—whereupon judgment was entered for the plaintiff, *non obstante veredicto* for the defendants. *Sheppard v. Hall*, 1 Law J. (n.s.) K.B. 152, s.c. 3 B. & Ad. 362.

#### (M) PLEADING.

In debt on a judgment for the plaintiff in an inferior court, the declaration must allege that the cause of action, in the original suit, arose within the jurisdiction of the inferior court. *Read v. Pope*, 3 Law J. (n.s.) Exch. 342, s.c. 1 C. M. & R. 302.

Debt on a judgment. Plea, that defendant had been taken in execution on a writ of *ca. sa.* upon the judgment. Replication, that defendant was discharged from that writ by a Judge's order, for irregularity, which irregularity was stated therein to have been a previous taking in execution on the same judgment. Demurrer thereto:—Held, that as there was no averment of an actual previous writ, and the writ mentioned in the plea had been set aside for irregularity, there was no answer to the action, and the replication was sufficient. *M<sup>c</sup>Corrick v. Melton*, 4 Law J. (n.s.) Exch. 24, s.c. 1 C. M. & R. 525; 5 Tyr. 147.

#### (N) IN COUNTY COURT.

[See EXECUTION.]

### JUDGMENT—VOLUNTARY.

[See INSOLVENT.]

### JURISDICTION.

[See BANKRUPT—BOUNDARY—CHARITY—ECCLIASTICAL COURTS—INJUNCTION—LUNATIC—MARSHAL OF K.B.—SESSIONS—UNIVERSITY.]

The Lord Chancellor, sitting in bankruptcy,

committed the solicitor to a commission, for not obeying an order:—Held, that the Lord Chancellor had jurisdiction so to do; and that no action lay against him for so doing:—Held, also, that the Lord Chancellor, in an action brought against him for so doing, need not plead specially. *Dicas v. Lord Brougham*, 6 C. & P. 249, s.c. 1 M. & R. 309. [Lyndhurst]

The Lord Chancellor sometimes sits in equity, sometimes in bankruptcy, and sometimes lunacy, but still he has the authority of Lord Chancellor, in whichever he is sitting. *Dicas v. Lord Brougham*, 6 C. & P. 249. [Lyndhurst]

The 3 & 4 Will. 4, c. 74, does not authorize the Lord Chancellor, when the tenant in tail in possession is in a state of hopeless lunacy, to consent to the first tenant in tail in remainder barring the subsequent limitations, even for the purpose of preventing the settled estate from going over to collateral relations. *In re Blewitt*, 3 M. & K. 250.

The caption of a party under the warrant of the Lord Chancellor, but executed after he has given up the Great Seal, is not irregular. *Nash v. Yorston*, 4 Law J. (N.S.) Chanc. 86.

A bill had been filed in the Court of Great Sessions, in Wales, and dismissed with costs for want of prosecution, and a demand was made for these costs, two days before the act came into operation, abolishing the Welsh judicature, but they were not paid. On a bill filed in the Court of Chancery, exactly similar, after the act came into operation, the defendants moved, that all proceedings might be stayed in the English suit until the costs were paid of the former bill:—Held, that under the 14th section, the Court of Chancery had no jurisdiction to enforce the payment of the costs. *Williams v. Williams*, 1 Law J. (N.S.) Chanc. 111.

Where the order of the Court of Chancery, or the title of its officers, is disputed, the Court of Chancery alone has jurisdiction, and is bound to enforce its order to the exclusion of any other court; but where any irregularity is committed by an officer in executing the orders of the Court, although the Court in such case has exclusive jurisdiction to punish or protect the officers, yet it may exercise its discretion in leaving the complaint and the redress to the examination of other Courts. *Aston v. Heron*, 3 Law J. (N.S.) Chanc. 194, s.c. 2 M. & K. 390.

The Master of the Rolls has jurisdiction to order the production of proceedings in bankruptcy. *De Tastet v. Smith*, 4 Law J. (N.S.) Chanc. 126.

A report of the Master, that a bond was voluntary, being excepted to, the question came before the House of Lords, on appeal from the Rolls Court; the House of Lords confirmed the Master's report, and the Master of the Rolls held, that he was bound by that decision, and could not admit the question to be further argued; though he permitted a new bill to be filed, in order that a defence, arising out of the decision of the House of Lords, might be set up. *Winchelsea v. Garretty*, 2 Law J. (N.S.) Chanc. 116, s.c. 1 M. & K. 253.

The Vice Chancellor may restrain the prosecution of an order of course obtained at the Rolls. *Leeming v. Sherratt*, 3 Law J. (N.S.) Chanc. 287.

Petition, that plaintiffs might be reimbursed costs, which they had incurred through the alleged negligence of their solicitor, dismissed, because

there was a remedy by action. *Frankland v. Lucas*, 1 Law J. (N.S.) Chanc. 124, s.c. 4 Sim. 586.

Equity has no jurisdiction after a verdict at law, in cases of account, unless some special grounds for the interference of a court of equity be shewn. Thus, where an action at law was brought on matters of account, and the defendant filed a bill for an injunction, which was refused; and the trial at law went on, and the plaintiff at law obtained a verdict for the amount,—Held, that there was no further equity to sustain the bill. *Harrison v. Nettleship*, 3 Law J. (N.S.) Chanc. 26, s.c. 2 M. & K. 423.

The High Court of Admiralty declined, on the application of the claimant, and without letters of request, to interfere to enforce a monition to compel obedience to a decree made many years before by a Vice Admiralty Court, for payment of a small sum as demurrage, against a captain who had ceased to be within the jurisdiction of the latter Court, and was resident in England. *La Madonna della Lettera*, 2 Hag. 289.

Injunction granted to restrain the Lords of the Treasury from paying the compensation awarded, under 11 Geo. 4. & 1 Will. 4, c. 58, for the office of side clerk in the Exchequer, which has been abolished. *Ellis v. Earl Grey*, 6 Sim. 214.

During the pendency of a suit, instituted by a person claiming as an adopted son, against a widow, the widow dies, and a proclamation is made for her heirs to come in, and defend the suit; and the claimant is put in possession of the property in dispute by the collector. The Court of Sudder Dewanny Adawlut decide, that the claimant has not made out his title, and direct the collector to put in possession of the property another person, who had come in under the proclamation, but had produced no evidence of his title:—Held, that the latter part of the decree must be reversed. *Raja Haimun Chull Sing v. Gansheam Sing*, 2 Kn. 203.

The Court of Sudder Dewanny Adawlut of Bengal, ought not to affirm a decree of a provincial court in a case respecting a balance of partnership accounts, without examining the original account-books of the firm, if they are tendered in evidence before it, although they were not produced before the provincial court. *Baboo Benes Suhas v. Baboo Hurkishen Dass*, 2 Kn. 256.

A bill was filed, to which the Lords Commissioners of the Treasury were parties defendants, and it prayed that they might be ordered to pay into court, to the credit of the cause, a sum of 800*l.* a year, granted as a compensation for the abolition of the office of a side clerk in the Exchequer, and praying that the Lords of the Treasury might be restrained by injunction from paying that annuity to any person without the sanction of the Court. A demurrer was put in to the bill by the Lords of the Treasury, on the ground of their not being amenable to the jurisdiction of the Court as public functionaries. Demurrer overruled, on the ground that they were only stakeholders, and, in that capacity, were within the jurisdiction of the Court. *Ellis v. Walsley*, 2 Law J. (N.S.) Chanc. 181.

Bill filed praying a declaration of the title of the Dean and Chapter of Durham to certain tithes of lands situated in the township of South Sherburn within the county palatine, and for an account. Plea to the jurisdiction overruled. *Dean and Chap-*

*ter of Durham v. Christ's Hospital, Durham, 4 Law J. (N.S.) Exch. Eq. 13.*

If a party claims before the Commissioners, appointed under the conventions for indemnifying British subjects for the confiscation of their property by the French revolutionary government, in a character which he really sustains, and an award is made to him in that character, the Court of Chancery has no jurisdiction to interfere, at the suit of a party claiming to have a better title to the compensation. *Lloyd v. Lord Trimlestown, 4 Sim. 296.*

In a plea of foreign attachment it must be stated, that the garnishee resided within the jurisdiction of the Mayor's Court. *Quere*—whether it is necessary to aver that the defendant below had notice, and that the plaintiff above was indebted to the plaintiff below. *Tamm v. Williams, 3 Doug. 281.*

The Royal Court of Jersey has no power to appoint commissioners to repair the pavements of the town of St. Helier, and to raise the costs of such repairs by a tax on the inhabitants. *Le Gros v. Le Breton, 2 Kn. 181.*

Debt on the judgment of the Hundred Court of St. Briavell's. Plea, that the cause of action did not arise within the jurisdiction of the inferior court, on demurrer held good. *Herbert v. Cook, 3 Doug. 101.*

Jurisdiction of commissioners of partition. See *Manners v. Charlesworthy, 1 M. & K. 330.*

### JURY.

#### (A) SPECIAL.

#### (B) COMMON.

##### (a) In general.

##### (b) Disqualification and Exemption from.

##### (c) Discharge of.

Consolidation and amendment of laws relating to juries and jurors—in Ireland. 3 & 4 Will. 4, c. 91; 11 Law J. Stat. 187.

Amendment of that act. 4 Will. 4, c. 8; 12 Law J. Stat. 17.

Amendment of laws relating to grand juries—in Ireland. 3 & 4 Will. 4, c. 78; 11 Law J. Stat. 151.

Grand juries, in Ireland, empowered to raise money by presentment for construction and repair of piers and quays. 5 & 6 Will. 4, c. 84; 13 Law J. Stat. 180.

#### (A) SPECIAL.

#### [See ARBITRATION—AWARD.]

The provisions of 6 Geo. 4, c. 50, to apply to the costs of special jury in case of a nonsuit, as well as to cases of verdicts. 3 & 4 Will. 4, c. 42, s. 35; 11 Law J. Stat. 98.

If a rule be obtained on Saturday to make a cause a special jury, which is marked as a special jury at two o'clock on that day, and notice of it is given to the plaintiff's attorney at seven o'clock on that evening, the cause being in the list for Monday as a common jury cause, the Judge will try it in its order on Monday as a common jury cause, although there be an affidavit of merits. *Johnson v. Blackwell, 6 C. & P. 236.*

*Semble*, that an action for a libel in a newspaper

is a fit cause to be tried by a special jury, if there be special pleas of justification, but not if the general issue only were pleaded. *Roberts v. Brown, 6 C. & P. 757. [Tindal]*

The usual rule having been obtained for a special jury by the defendant, a Judge at chambers, upon the statement of the plaintiff's attorney, without affidavit, ordered a special jury to be struck next day. The Court refused to set aside that order as being irregular. *Joseph v. Perry, 3 Dowl. P.C. 699.*

On the trial at bar of an information, the special jury was summoned from a distant county in which the offence was not charged to have been committed:—Held, that the Court had no power to order their expenses to be paid. The jurors, who tried this information, were only paid one guinea each; and other jurors, who had come from the same county, and had been summoned to try another information, which was not tried, were not paid anything. *Rez v. Pinney, 5 C. & P. 254.*

The Court will not discharge the defendant's rule for a special jury, although he omits to proceed thereon, where it is not sworn that the cause is not a proper one for a special jury, or that the rule was obtained for the purpose of delay. *Andrews v. Thornton, 1 Law J. (N.S.) C.P. 38, s. c. 3 Bing. 64, 481; 1 Mo. & Sc. 139, 670.*

Defendant allowed to retain a special jury on terms fixed by the Court, although the rule for it was not served two days previous to the adjournment day, pursuant to the rule of Trinity term, 52 Geo. 3. *Thorne v. the Marquis of Londonderry, 1 Law J. (N.S.) C.P. 46, s. c. 8 Bing. 26; 1 Mo. & Sc. 62.*

#### (B) COMMON.

##### (a) In general.

#### [See NEW TRIAL.]

Where the jury have returned a verdict, the Judge will not hear the reasons on which they founded their verdict, though the jury may desire to state the reasons. *Horner v. Watson, 6 C. & P. 680. [Gurney]*

The delivery of food to a jurymen, after the jury were shut up to consider of their verdict, is no ground for setting the verdict aside, if it do not appear that such refreshment was supplied by a party to the cause, or that it was delivered to a jurymen whose holding out decided the event. Affidavits of jurymen are admissible as to matters which pass openly in court; but where there is a Judge's report on the same points, that is conclusive. *Everett v. Yowells, 4 B. & Ad. 681, s. c. 1 N. & M. 530.*

A declaration by a juror, before being sworn, that he shall give the verdict only one way, is a ground for a new trial. *Ramadge v. Ryan, 2 Law J. (N.S.) C.P. 7, s. c. 9 Bing. 333.*

It is the privilege of a jury to decline finding any other than a general verdict; and, therefore, if the Judge explains to them, and they clearly understand, that, in the absence of a particular fact, the plaintiff's right to recover will depend on a doubtful legal question, and the Judge requests them to find that fact, if satisfied of its existence; but they nevertheless give a verdict for the plaintiff generally, and on being pressed refuse to find

the particular fact, the Court will not set aside the verdict. *The Mayor and Burgesses of Devises v. Clark*, 3 Ad. & E. 506.

(b) *Disqualification and Exemption from.*

A Quaker is not a good juryman on his affirmation. *Res v. Channess*, 1 M. C. C. 374.

Exemption of persons employed in the Post Office by the Postmaster General from serving on juries—6 Geo. 4, c. 50. *In re Atkinson*, 3 Law J. (n.s.) C.P. 132, s.c. 10 Bing. 399; 4 Mo. & Sc. 160.

(c) *Discharge of.*

If a Judge of his own authority discharges a jury from giving a verdict, on the ground of their not being able to agree, the party ultimately successful will not be entitled to the costs of the first attempt at trial. *Seely v. Powers*, 3 Dowl. P.C. 372.

The Judge, in an undefended cause, where the plaintiff could not get on for want of a written agreement, discharged the jury, and allowed the record to be withdrawn, in order to save expense to the parties. *Bonsor v. Element*, 6 C. & P. 230. [Tindal]

If, after the jury are sworn, it be discovered that to a declaration in trover, the defendant has pleaded *non assumpsit*, the Judge will discharge the jury, unless both parties consent to an amendment. *Bent v. Bengon*, 6 C. & P. 217. [Parke]

### JUS TERTII.

[See AUCTIONEER.]

An auctioneer, employed by a supposed executrix, sold goods of the testator; but, before payment, the real executrix claimed the money from the buyer:—Held, that the auctioneer could not afterwards maintain an action against the buyer, though the latter expressly promised to pay on being allowed to take away the goods, which he did. *Dickenson v. Naul*, 4 B. & Ad. 688, s.c. 1 N. & M. 721.

### JUSTICES IN EYRE.

[See EVIDENCE.]

### JUSTICES OF THE PEACE.

[See MAGISTRATE.]

- (A) POWERS AND DUTIES.
- (B) ORDERS, CONVICTIONS, AND WARRANTS.
- (C) ACTIONS.

(A) POWERS AND DUTIES.

*Quere*—whether a Magistrate, having once issued a legal warrant, can revoke it. *Barons v. Luscombe*, 4 Law J. (n.s.) K.B. 220, s.c. 4 N. & M. 330; 3 Ad. & E. 589.

A Magistrate cannot be required to hear evidence, which ought not to affect his determination. *Res v. Minshull*, 1 N. & M. 277.

A party gave information on oath before a Magistrate, that, from certain language used towards him, he was in bodily fear from another; and the Magistrate, upon hearing the complaint, required

the latter to enter into recognizances to keep the peace. On motion to discharge the recognizances, on the ground that the language was used in a metaphorical sense only, the Court refused to interfere, because it was for the Magistrate to judge in what sense the language was used. *Res v. Tregarthen*, 5 B. & Ad. 678, s.c. 2 N. & M. 379.

Whether a Magistrate has power under the Pawnbroker's Act, 39 & 40 Geo. 3, c. 99, (or any other act which gives him authority to impose a pecuniary penalty,) to adjourn a case for further examination, and in the meantime to commit the party charged—*quere*. *Tate v. Chambers*, 2 Law J. (n.s.) M.C. 88.

By a local act, the rector, vestrymen, &c. were empowered to make rates; and it was provided that if any person should find himself aggrieved, he should first apply to two Justices, &c., and if not relieved, should be obliged to pay, and afterwards appeal to the Sessions:—Held, that this gave the two Justices, by implication, the power to relieve.

And where, upon application by a party aggrieved, Justices had made an order, relieving him, by reducing the estimate of the annual value from 2,943*l.* to 1,650*l.*, the Court refused to quash the order, although it appeared by affidavit that the Justices came to the conclusion, that the estimate was too high, by considering that the principle of rating, which had been pursued by the parish, was erroneous, and by acting upon a distinct principle. *Res v. the Rector, &c. of St. James's, Westminster*, 4 Law J. (n.s.) K.B. 34, s.c. 2 Ad. & E. 241; 4 N. & M. 252.

By a local act for paving, &c. the town of Stafford, certain commissioners were authorized to make rates for the purposes of the act, and if any person thought himself aggrieved by the rate, an appeal was given to the commissioners, and from their determination, to the Sessions; and it was enacted, that in case any person rated should neglect to pay his rate for seven days after demand, it should be lawful for any Justice, upon proof on oath of such demand and non-payment, by warrant to authorize the collector to levy the rate by distress and sale of the goods of the person rated; and in case there should be no distress, to commit the party to gaol:—Held, that the clause was not obligatory on the Justice to issue a warrant, without a previous summons. *Res v. the Justices of Stafford*, 5 N. & M. 94.

*Semble*—That in all cases in which Magistrates are authorized, upon application, to issue a distress warrant for non-payment of any rate, although they have no power to relieve, it is their duty first to call the party before them by summons; unless by act of Parliament it be specially directed that the warrant shall be issued immediately. *Ibid.*

The provisions of 5 Geo. 4, c. 18, apply only to cases of penalties and forfeitures; therefore Magistrates have no power, under that statute, to commit a party to prison for the non-payment of a sum of money adjudged by them, under 20 Geo. 2, c. 19, 31 Geo. 2, c. 11, and 4 Geo. 4, c. 34, to be due as wages.

In an information before Magistrates, under 20 Geo. 2, c. 19, 31 Geo. 2, c. 11, and 4 Geo. 4, c. 34, for non-payment of wages, it should appear that the relation of master and servant in one of the occupations therein specified, existed between the

debtor and the informant. *Wiles v. Cooper*, 5 N. & M. 276; 3 Ad. & E. 524.

Held by the Court of King's Bench (Parke, J. *dubitante*), and the judgment affirmed on error, that under stat. 4 Geo. 4, c. 64, the Justices of a town and county of a town, mentioned in Schedule A. to that act, might rate the inhabitants for rebuilding the gaol of such town and county on a new site—although by a local act, which had been carried into effect, it had been enacted that ground should be purchased and conveyed to the corporation of the said town, and that the Justices for the town and county should cause a new gaol to be built thereon; that a limited sum should be raised by assessment on the town and county, for the purposes of the act respecting such gaol, the surplus to be repaid proportionally to the parties assessed; and that such gaol, when finished, should be a public gaol for the town and county, and should from time to time be maintained, supported, and repaired by the corporation.

The 68th section of 4 Geo. 4, c. 64, enacts, that the Justices in sessions may raise money on the counties, towns, &c., to which the act extends, for defraying the expenses of the matters and things thereinbefore directed to be done respecting gaols, &c., in the same manner as rates applicable to the building, repairing, or maintenance of such prisons respectively are now directed to be raised by law:—Held, by the court of error, that this applies only to the mode of raising such rates, and not to the persons on whom they are to be laid.

Held by both Courts, that the power of the Justices to rate, as above, under stat. 4 Geo. 4, c. 64, is not limited by stat. 5 Geo. 4, c. 85, s. 15.

Held by the Court of King's Bench, on the construction of 4 Geo. 4, c. 64, ss. 45 & 50, that when a presentment has been made as to the propriety of changing the site of a gaol, and the Justices in session have taken such presentment into consideration, giving the notices required by sect. 45, and have resolved that the site ought to be changed, such Justices may at their next session confirm the resolution, and contract for building the new gaol, without having given fresh notices. *Thompson v. Raikes*, 1 Ad. & E. 863.

A Justice called upon to suppress a riot, is required by law to do all he knows to be in his power, that can reasonably be expected from a man of honesty, and of ordinary prudence, firmness, and activity, under the circumstances. Mere honesty of intention is no defence, if he fails in his duty.

Nor is it a defence that he acted upon the best professional advice that could be obtained on legal and military points, if his conduct has been faulty in point of law.

In suppressing a riot, he is not bound to head the special constables, or to arrange and marshal them; this is the duty of the chief constables.

Magistrates are not criminally answerable for not having called out special constables, and compelled them to act pursuant to 1 & 2 Will. 4, c. 41, unless it be proved that information was laid before them on oath, of a riot, &c. having occurred or being expected.

A Magistrate is not chargeable with neglect of duty for not having called out the *posse comitatus*, in case of a riot, if he has given the king's subjects

reasonable and timely warning to come to his assistance.

Applying personally to some of the inhabitants of a city, calling at the houses of others, employing others to do the same, sending notices to the churchwardens, &c. (on a Sunday), to be published at the places of worship, requiring the people to meet the Magistrates at a stated time and place, in aid of the civil power, and for the protection of the city, and posting and distributing other notices to the like effect, is reasonable warning, the riot having recently broken out.

A Magistrate who calls upon soldiers to suppress a riot, is not bound to go with them in person; it is enough if he gives them authority. *Rees v. Pissay*, 3 B. & Ad. 947, a. c. 5 C. & P. 254.

#### (B) ORDERS, CONVICTIONS, AND WARRANTS.

##### [See CONVICTION.]

By the 3 & 4 Will. 4, c. 53, s. 90, magistrates are enabled to amend convictions, warrants of commitment, &c. for offences against acts relating to smuggling. If an amendment be made by drawing up a new warrant, and of substituting that for the former, on the return to a *habeas corpus*, it must appear that at the time the new warrant was drawn up, the Justices had the former one before them, or that substituted by the authority of the same Justices who signed and sealed the former one; and it is not sufficient that the second warrant left in lieu of the first, purports upon the face of it to be signed and sealed by the same Justices. *In re Elmy and Sawyer*, 3 Law J. (n.s.) K.B. 199, a. c. 1 Ad. & E. 845; 3 N. & M. 733.

#### (C) ACTIONS.

[See ABOUSE—INFORMATION, Criminal—Rate, Distress for Poor Rate.]

A Magistrate who means to act in the execution of his office is entitled to notice under the stat. 24 Geo. 2, c. 44, s. 1. *Bird v. Gunston*, 4 Doug. 274.

In a notice of action against a Justice of the Peace, an indorsement on the notice of action "Given under my hand at Durham," is not a sufficient indorsement of the attorney's place of abode within the stat. 24 Geo. 2, c. 44, s. 1. *Taylor v. Fenwick*, 3 Doug. 178.

It is unnecessary to demand perusal and copy of a warrant in a case where there is no remedy against the Magistrates. *Cotton v. Keadwell*, 2 N. & M. 399.

Where, in an action of trespass against a Magistrate, he pleads tender of amends to the amount of 25*l.*, as sufficient amends, and the plaintiff joins issue upon the sufficiency of amends, and the jury finds the sum tendered to be sufficient, the defendant cannot afterwards go into the inquiry, whether it was a case within the stat. 24 Geo. 2, c. 44. *Doddsworth v. Blanchard*, 3 Law J. (n.s.) M.C. 9, a. c. 2 N. & M. 549.

A notice to a Magistrate of intention to move for a rule nisi for a certiorari on the day on which the notice is served "or as soon afterwards as I can be heard," will not be taken to be a notice of an intention to move as soon as by law the party might be heard, i. e. in six days after notice. *Rees v. Floenders*, 1 N. & M. 592.

In an action against Magistrates for an act done in the performance of their duty as such, the

plaintiff obtained a rule of court to remove the action to a county different from that in which it was brought; he undertaking, by the rule, to pay the defendants' costs of the removal. The defendants obtained a verdict:—Held, that the defendants' costs of the removal were not to be doubled, under stat. 7 Jac. 1, c. 5, and 21 Jac. 1, c. 12. *Thomas v. Saunders*, 1 Ad. & E. 552, a.c. 3 N. & M. 572.

A disturbance took place in C, upon the liberation of a prisoner. Defendant, a Magistrate, seized plaintiff, because he was going towards the prison: plaintiff was not concerned in the disturbance, which was going on out of sight of the place where he was seized by defendant:—Held, that defendant was not entitled to notice of an action of trespass brought against him by plaintiff for the assault. *James v. Saunders*, 3 Law J. (n.s.) M.C. 105, a.c. 10 Bing. 428; 4 Mo. & Sc. 316.

### LABOURERS

In agricultural parishes. Provisions for the better employment of. 2 & 3 Will. 4, c. 96; 10 Law J. Stat. 251.

### LACHES.

[See ARBITRATION, Setting aside Award—ATTORNEY, Summary Jurisdiction of the Court over—COSTS, Security for—EXECUTOR, Power and Duties of—BAIL, Cancelling of Bail Bond—INTERPLEADER—ISSUE, Practice—PRISONER, Discharge of—PRACTICE, Irregularity of Process; Time to declare; Setting aside Proceedings.]

After the lapse of seven years, it is too late to take the objection that a rule for a *sci. fa.*, on a judgment more than ten years old, has not been obtained. *Wilson v. Bacon*, 1 Dowl. P.C. 118.

After nine terms have elapsed, it is too late to object that a party in custody for non-payment of poor-rates, has been charged and detained on an attachment of privilege, without leave of the Court or a Judge. *Goodman v. —*, 1 Dowl. P.C. 128.

After a lapse of eight years, the Court will not interfere to compel an arbitrator to refund a sum of money alleged to have been overpaid, particularly where the party who could explain the transaction is dead. *Brazier v. Bryant*, 2 Dowl. P.C. 757.

After a lapse of ten years, it is too late to object that a *hab. corp. ad satisfac.*, on which the defendant is charged in execution, was not indorsed with the number roll. *Wilson v. Bacon*, 2 Dowl. P.C. 450.

It is too late to rescind a Judge's order, allowing to the plaintiff's attorney the costs of taxing the costs on the back of a writ for which more than a sixth was taken off after the order has been made a rule of court, and an attachment obtained upon it. *Thompson v. Carter*, 3 Dowl. P.C. 657.

Judgment signed in November, 1833, plaintiff took no further step till January 1835, when he gave a term's notice of executing a writ of inquiry. In April, notice of executing it for the 28th of May was served on the defendant in person. On the 27th of May the defendant took out a summons to set aside the judgment for having been irregularly signed after plea delivered, returnable the next day

at three o'clock, but it was not attended by plaintiff's attorney. At four o'clock the writ of inquiry was executed. On the same day a second summons was taken out, returnable the next day, which was attended and discussed; and an application was then made to the Court to set aside the judgment and subsequent proceedings for irregularity:—Held, that the defendant was too late, and that the summons to set aside the judgment was not, under the circumstances, sufficient to stay the trial of the writ of inquiry. *Roberts v. Cuttill*, 4 Dowl. P.C. 204.

### LANCASTER.

[See EXECUTION.]

Provisions for improving the practice and proceedings in the Court of Common Pleas of. 4 & 5 Will. 4, c. 62; 12 Law J. Stat. 25.

Motions for new trials or nonsuits in actions tried in the Court of Common Pleas at Lancaster, should be made in the court in which the Judge who presided at the trial sits. *Foster v. Jolly*, 4 Law J. (n.s.) Exch. 65, a.c. 1 C.M. & R. 703; 5 Tyr. 239.

All the Judges are now Judges of the Court of Common Pleas at Lancaster, under the 4 & 5 Will. 4, c. 62. An award is not within section 26 of that act. *Terns v. Fitzhugh*, 3 Dowl. P.C. 278.

The 26th section of the 4 & 5 Will. 4, c. 62, does not authorize the Court to entertain a motion, in a cause in the Common Pleas at Lancaster, to set aside an award made under an order of *Nisi Prius*, though a verdict was taken subject to the award. *Byrne v. Fitzhugh*, 2 C.M. & R. 597, a.c. 5 Tyr. 221.

Though, by the 4 & 5 Will. 4, c. 62, s. 26, where a cause is tried in the Common Pleas at Lancaster, the motion for a new trial, &c. is directed to be made in any one of the courts at Westminster, yet the Courts require it to be made in the court of which the Judge who presided at the trial is a member. *Forster v. Jolliffe*, 1 Sc. 54.

The Court of Exchequer has no power to order judgment to be entered up, *non obstante veredicto*, in an action in the Common Pleas at Lancaster, under 4 & 5 Will. 4, c. 126. *Potter v. Moss*, 1 C.M. & R. 848, a.c. 5 Tyr. 512.

### LANDLORD AND TENANT.

[See DISTRESS—EJECTMENT—LEASE—WASTE—SURRENDER.]

- (A) RIGHTS AND LIABILITIES OF LANDLORD AND TENANT.
- (B) CONTRACTS BETWEEN.
- (C) OF ASSIGNEES.
- (D) OF EXECUTORS.
- (E) OF UNDER-LESSEES.
- (F) RENT.
- (G) REPAIRS.
- (H) GOOD CULTIVATION.
- (I) FRAUDULENT REMOVAL.
- (K) NOTICE TO QUIT.
- (L) EVICTION.
- (M) DISCLAIMER.
- (N) ESTOPPEL.

## (A) RIGHTS AND LIABILITIES OF LANDLORD AND TENANT.

[See ARBITRATION, Effect of Award—BANKRUPT, Rights of Assignees—TENANTS IN COMMON.]

To an action of debt for rent, a plea admitted the demise by the plaintiff, and stated, that afterwards the plaintiff petitioned the Court of Insolvent Debtors, and that an assignee was appointed, to whom the premises were assigned; and that the plaintiff, having been permitted to remain in possession, and authorized by the assignee to demise, afterwards the assignee gave notice to the defendant to pay the rent to him, by reason whereof he became liable to pay to the assignee:—Held bad on special demurrer; for, as upon the plea it was admitted that the demise by the plaintiff still existed, and as there was no direct allegation that the demise was made by the plaintiff as agent to the assignee, the defendant was not at liberty to set up the title of the assignee against the claim of the plaintiff under the demise.

Where a mortgagor is in possession, and, after the mortgage, makes a lease, notice by the mortgagee to the tenant to pay the rent to him will not of itself make him tenant to the mortgagee, but the old tenancy created by the mortgagor must be put an end to, and a new tenancy created by the mortgagee's receiving rent from the tenant. *Partington v. Woodcock*, 4 Law J. (N.S.) K.B. 239.

Where an out-going tenant does the necessary ploughing, and sows the land in the ordinary and proper course of husbandry, and leaves manure for the benefit of the landlord, which is accepted and taken by him,—the law, without an allegation or proof of a custom of the country, will imply an assumpsit on the part of the landlord to pay the tenant the value; and the Court held, that the plaintiff was not deprived of that right, by reason of his having held over after the expiration of the term. *Martin v. Coulman*, 4 Law J. (N.S.) K.B. 37.

By a clause in the agreement, it was stipulated, that, in case the tenant should duly observe and perform the covenants thereinbefore contained, he should be entitled to a 'way-going crop, which 'way-going crop should be left to the landlord or the on-coming tenant, at a valuation to be made by arbitrators or an umpire:—Held, that, at all events, after the expiration of the tenancy, this gave the tenant only a right to enter the field on which the crop was growing in order to cultivate it and improve the condition thereof, but not to exclude the landlord.

*Quere*—whether, under this clause, the performance of covenants by the tenant constituted a condition precedent to his right to the 'way-going crop. *Strickland v. Maxwell*, 3 Law J. (N.S.) Exch. 161, s.c. 4 Tyr. 346; 2 Cr. & M. 639.

The acts of occupiers during their occupation are, even after their occupation has ceased, evidence against the parties under whom such occupiers came into possession. *Doe d. Manton v. Austin*, 1 Law J. (N.S.) C.P. 162, s.c. 9 Bing. 41; 2 Mo. & Sc. 107.

The property in trees is in the landlord; the property in bushes is in the tenant; consequently, where a stranger lopped a fence adjoining his (the stranger's) land, and carried the cuttings to the

tenant, in the occupation of the land to which the fence belonged:—Held, that an action of trespass, with a count *de bonis asportatis*, brought by the landlord against such stranger, could not be supported. *Berriman v. Peacock*, 2 Law J. (N.S.) C.P. 23, s.c. 9 Bing. 384; 2 Mo. & Sc. 515.

A subsisting tenancy is not determined by an agreement, whereby the landlord lets to his tenant at a valuation, to be made by two persons, and stipulating that the tenant is to give sureties to answer for the rent, if no valuation be made, and no sureties given.

A plea of *riens in arriere*, except a sum specified, and a tender thereof, is not supported by proof of tender of the whole of the rent due, if the sum tendered be less than that specified. *John v. Jenkins*, 2 Law J. (N.S.) Exch. 83, s.c. 1 C. & M. 227; 3 Tyr. 170.

Where the tenant received an inventory of the plate, furniture, &c., of the house which he occupied, and engaged, by a memorandum attached to the inventory, to return the articles at the expiration of the lease; upon their destruction by a fire, for the consequences of which the tenant was not liable,—Held, that by the law of Scotland, such memorandum did not impose a greater responsibility upon the party than the law of the country of itself required; and that it did not amount to a special contract for the delivery of the articles at all events. *Mackenzie v. Macleod*, 3 Law J. (N.S.) C.P. 79, s.c. 10 Bing. 385; 4 Mo. & Sc. 249.

If a landlord be lawfully on his tenant's premises for the purpose of making a distress, he may put up a bill in the window for the purpose of letting them, without thereby making himself liable as a trespasser. *Skidmore v. Booth*, 6 C. & P. 777. [Tindal]

If a tenant makes an encroachment adjoining to the farm he rents, this encroachment will be for the benefit of his landlord, unless it appear clearly from some act done at the time that the tenant intended to make the encroachment for his own benefit, and not to hold it as he held the farm. *Doe d. Lewis v. Rees*, 6 C. & P. 610. [Parke]

A tenant (not a gardener by trade) cannot remove a border of box, planted on the demised premises by himself, unless by special agreement with the landlord. *Empton v. Soden*, 4 B. & Ad. 655, s.c. 1 N. & M. 720.

A tender after distress, by tenant to landlord, of a sum sufficient to cover the rent and the expenses, under the 57 Geo. 3, c. 93, is a good tender.

After such a tender, the landlord withdrew, and subsequently entered again for the same cause of distress:—Held, that although the second entry was a trespass, the tenant might waive the trespass, and maintain an action on the case or trover. *Smith v. Goodwin*, 2 Law J. (N.S.) K.B. 192, s.c. 1 Nev. & M. 371; 4 B. & Ad. 413; 2 N. & M. 114.

*Quere*—Whether a barn of wood erected on blocks of stone, some of which stand on the surface of the soil, some a few inches in the ground, and others standing on foundations of brick and mortar, is a fixture which cannot be removed by a tenant. *Wansborough v. Maton*, 4 Law J. (N.S.) K.B. 154.

The landlord is entitled to a year's full rent from a creditor on a *f. fa.* against his tenant, although he has himself on former occasions made an abatement



to the tenant. *Williams v. Leowery*, 1 Law J. (N.S.) C.P. 13, s. c. 8 Bing. 28; 1 Mo. & Sc. 92.

In an action of trover against a landlord, for the value of growing crops seized and sold by him, as a distress for rent, and afterwards cut down and carried away by the purchaser, he is entitled to deduct the amount of rent from the damages; and, therefore, if the crops have been sold at their full value, and the amount is less than the rent, the plaintiff can have a verdict for nominal damages only. *Proudlove v. Twemlow*, 2 Law J. (N.S.) Exch. 111, s. c. 1 C. & M. 326; 3 Tyr. 260.

Where a farm was taken for fourteen years, and the tenant was to pay a given sum for tillages and improvements done before he entered, and to receive the value of the tillages and improvements which he should leave on the farm, according to a valuation to be made at his quitting; and the tenant in the first year of the tenancy said, that he would leave, and his landlord said he might; but no new bargain was made as to his tillages and improvements:—Held, that he was not entitled to the value of the tillages and improvements which he left on so quitting. *Whittaker v. Barker*, 1 C. & M. 113, s. c. 3 Tyr. 135.

A tenant from year to year is not bound to do substantial repairs: he is only bound to keep the premises wind and water-tight. An outgoing tenant may remove an ornamental chimney-piece, put up by himself during his tenancy, but not a chimney-piece which is not ornamental.

An outgoing tenant has no right to remove pillars of brick and mortar, built on a dairy floor to hold pans, although such pillars are not let into the ground. *Leach v. Thomas*, 7 C. & P. 327. [Patteson]

Under a lease, commencing at Whitsuntide, as to the natural grass lands, and as to the arable lands at the severing of the crops, the tenant being bound to consume the straw upon the land, and sufficiently to cultivate and manure them, the tenant is entitled to the value of the dung made between Whitsuntide and harvest, and left upon the land; and the landlord having at Whitsuntide taken the straw upon the farm, which was no more than was requisite for foddering the cattle between that time and the severance of the crops, is bound to pay the value of it to the tenant. *Allen v. Berry*, 4 Bligh, N.S. 520.

A tenant holding over after notice to quit given by the landlord, is not liable to a distress, without some evidence of a renewal of the tenancy. *Jenner v. Clegg*, 1 M. & Ro. 213. [Parke]

The 1 Geo. 4, c. 87, requiring tenants holding over to give security and enter into recognizance, only applies to cases where the tenancy is under lease, and has expired by efflux of time, or under an agreement from year to year, if the tenancy has been determined by a regular notice to quit. *Doe d. Tindal v. Roe*, 1 Law J. (N.S.) K.B. 8, s. c. 2 B. & Ad. 922.

A record of proceedings taken by Justices, under the 11 Geo. 2, c. 19, s. 16, between persons filling the relation of landlord and tenant, is a defence to an action of trespass by the tenant; although the premises, in point of fact, were not "deserted" when the Justices came to view; and although their proceedings have been set aside by the Judges of assize, in pursuance of the power of appeal, given by that section.

Such record is a defence in such a form of action, not only to the Justices, but to the landlord, and all persons acting *bona fide* under the authority of their jurisdiction.

*Semble*—that under such circumstances, the tenant may maintain an action on the case against the landlord, for causing the Justices to take the proceedings. *Ashcroft v. Boume*, 1 Law J. (N.S.) K.B. 209, s. c. 3 B. & Ad. 684.

If a tenancy of a house be determined, and the tenant has promised to leave on a particular day, but afterwards refuses to do so, the landlord is not justified in putting the tenant's wife by force out of the house, and putting the tenant's furniture into the street; but if the tenancy be determined, and the tenant and his family be gone away, and the house locked up, no one being in possession, the landlord would be justified in breaking into the house, and obtaining possession. *Hellry v. Gay*, 6 C. & P. 284.

If a person take lodgings on the first and second floors of a house, he has a right to the use of the door-bell, the knocker, the skylight of the staircase, and the water-closet, unless it be otherwise stipulated at the time of the taking of the lodgings; therefore, if the landlord deprived the lodger of the use of either, an action lies. If the defendant in such a case merely pleads the general issue, he cannot shew, that the water-closet was useless before he removed it; but, in mitigation of damages, he may go into evidence to shew, that the plaintiff and his family were bad lodgers, and that he did the acts complained of to cause them to quit the house. *Underwood v. Burrows*, 7 C. & P. 26. [Abinger]

#### (B) CONTRACTS BETWEEN.

Use and occupation. Defendant, who had occupied under a lease, which expired at Lady-day, 1829, paid a quarter's rent at Midsummer-day, 1829, deducting something for repairs; he was not afterwards seen on the premises, but the rent was paid at irregular intervals by L, who was in occupation for the ensuing two years:—Held, that it was correctly left to a jury to find, whether the lessor had accepted L as a tenant, and the jury having found for defendant, the Court refused to set aside the verdict. *Woodcock v. Nuth*, 8 Bing. 170, s. c. 1 Mo. & Sc. 317.

A, having agreed with B for the lease of a farm, before the execution of the lease became insolvent; the assignees of A thereupon entered into the possession of the farm:—it was held, by the Lord Chancellor, (reversing the decision of the Vice Chancellor, the effect of which was, that by the insolvency of A, B was absolved from his obligation to grant such lease,) that if the assignee were solvent, and able to enter into the covenants of the lease, he was deprived by the insolvency of A of the benefit of the agreement. *Crosby v. Tooke*, 2 Law J. (N.S.) Chanc. 88, s. c. 1 M. & K. 481.

An instrument of demise was produced in evidence, by which the plaintiff agreed to let, &c. for the term of one year, fully to be complete and ended. Most of the subsequent stipulations in the lease were wholly inapplicable to the tenancy for a year, and many of them appeared applicable only to a tenancy determinable by a notice to quit. The document appeared, on the face of it, to have origi-

nally contained words creating a tenancy from year to year, which were struck out, and the above words as to the term for one year only remained:—Held, that the words struck out might be looked at, to shew what the intention of the parties was; that the tenancy was for a single year only; and that the terms inapplicable to such a tenancy must be considered as expunged, or as only applicable in case the tenancy should continue.

By a clause in a lease, it was agreed, that, in case the tenant should duly observe and perform the several covenants and agreements, &c. (one being for the payment of rent,) and should peaceably quit, &c. on notice, &c., he should be entitled to a 'way-going crop, to be taken from the lands specified, &c., and the crop was to be left for the landlord or his in-coming tenant at a valuation to be made, &c.:—Held, that this clause did not give the tenant the right of possession as against the landlord, after the determination of the tenancy, but that the tenant at most could only go on the land for the purposes of a 'way-going crop, and could not exclude the landlord.

*Quere*—whether the payment of the rent, and the performance of the other covenants, were a condition precedent to the having the right to the 'way-going crop. *Strickland v. Maxwell*, 2 C. & M. 539, s. c. 3 Law J. (n.s.) Exch. 161.

In a conversation between a person who subsequently became the tenant, and the steward of the landlord, the former said, "I have no objection to take the farm, if the game is destroyed. I don't care so much about the birds as the hares and rabbits." To which the latter said, "Why, you are a man who keep no dog, and use no gun, and you ought not to be annoyed with rabbits and hares: you must let the keepers know, and they must kill them;" upon which the tenant said, "then upon these terms I will take the farm:"—Held, sufficient evidence for the jury to infer a contract on the part of the landlord to kill the hares and rabbits; and that the landlord was liable to damages committed by the hares and rabbits on the tenant's farm. *Barrow v. Lord Ashburnham*, 4 Law J. (n.s.) K.B. 146.

A tenant, being in arrear with his landlord, was distrained upon, having previously executed a bill of sale of all his effects to a creditor, which included a crop of growing grass not in the distress. An arrangement was made by the landlord's agent and the creditor under the bill of sale, that a sale should take place, and the arrears of rent should be paid out of the proceeds. Amongst the rest, this growing crop was sold as eatage. The whole proceeds of the sale were paid over to the landlord, but did not satisfy the arrears:—Held, (Parke, B. *dissentiente*), that from these facts a contract might be implied, on the part of the landlord, not to distrain the cattle of the purchaser; and therefore that a distress, by the landlord, of his cattle while eating the grass so purchased, was unlawful. *Horsford v. Webster*, 4 Law J. (n.s.) Exch. 100, s. c. 1 C. M. & R. 696; 5 Tyr. 409.

#### (C) OF ASSIGNEES.

[See, *post*, Repairs; and see LEASE, Assignment.]

Covenant lies against an assignee after he has assigned over, for a breach of a covenant to repair,

which occurred during his possession, and before he had assigned. *Harley v. King*, 4 Law J. (n.s.) Exch. 144, s. c. 2 C. M. & R. 18.

In an action of debt for rent against defendant, as assignee of *all* right, interest, &c. in the premises originally demised, upon proof that the defendant was assignee but of part, and issue found accordingly:—Held, that the defendant was entitled to have the verdict entered for him.

*Quere*—Does a privity of estate exist in respect of the *whole* land by an assignment of part only? *Curtis v. Spitty*, 4 Law J. (n.s.) C.P. 236, s. c. 1 Bing. N.C. 756; 1 Sc. 737.

An assignee of leasehold premises, assigned by indorsement on the lease, "to hold" during the remainder of the term granted by the lease, subject nevertheless to the payment of the existing rent, and to the performance of the covenants and agreements reserved and contained in the said indenture of lease, is not liable to the lessee, in covenant for rent which has become due after he has assigned over, though the lessee has been obliged to pay such rent to the lessor under the covenant in the lease. *Wolveridge v. Steward*, 2 Law J. (n.s.) Exch. 303, s. c. 1 C. & M. 644; 3 Tyr. 637; s. c. in error, 3 Law J. (n.s.) Exch. 360.

If an assignee of a lease commit waste, the landlord may sue him in covenant, or in a special action on the case, but not in assumpsit. *Torrans v. Young*, 6 C. & P. 8.

The surrenderee of a copyhold is an assignee of a reversion within the statute of 52 Hen. 8, c. 34, and may maintain an action of covenant upon a lease made by his surrenderor, and the defendant in such an action cannot protect himself by alleging the invalidity of the lease. *Whitton v. Peacock*, 3 M. & K. 325.

The assignee of a lease for years, who has assigned over, is discharged from the covenant to pay rent before the entry of his assignee. *Walker v. Ross*, 3 Doug. 19.

A common assignment by a lessee, without an acceptance of rent from the assignee by the lessor, or some other evidence of his assent, is not sufficient (though the lessor have notice) to discharge the lessee from an action of debt.

An assignment under a commission of bankruptcy, being by act of law and under the statutes of bankruptcy, is a good plea in discharge of the bankrupt lessee in an action of debt for rent. *Wedham v. Marlow*, 4 Doug. 54.

#### (D) OF EXECUTORS.

Executors of lessor may distrain for arrears of rent due in the lifetime of the deceased. 3 & 4 Will. 4, c. 42, s. 37; 11 Law J. Stat. 98.

In covenant against an executor, sued as an assignee for breaches of covenants to pay rent and to repair, incurred in his time, it was pleaded, first, that the defendant was executor of the lessee; that the premises vested in him as such executor only, and not otherwise; that the profits of the demised premises at the time he became executor, and since that, hitherto, were less than the rent reserved; and that the defendant had paid the plaintiff before commencing the suit 255*l.*, being all that remained in his hands of the said profits by him at any time received therefrom, and that he had never since

received any such profit:—Held, to be sufficient, on special demurrer for not stating that the defendant had no other assets of the deceased, which had come to his hands as executor to be administered.

In two other pleas, the defendant added to the above statement, that the sum of 255*l.* so paid before the commencement of the suit, was all the money which remained in his hands, not only on account of the profits of the premises received by him, but of all the goods and chattels which were of the deceased, which had come to his hands to be administered; and that he had not at any time before the commencement of the suit, or at any time since, any profits or goods and chattels of the deceased in his hands to be administered:—Held, on special demurrer, to be insufficient, for not stating, that during the interval between the payment of the 255*l.* and the commencement of the suit, defendant had no assets.

*Semble*—an offer by an executor to a lessor to surrender to him a lease granted to his testator, is an answer to an action of covenant against him as assignee for breaches of a covenant to repair, as to all breaches accruing after that offer. *Read v. Lord Tenterden*, 4 Tyr. 111.

A demise was created for one year certain, and then from year to year, so long as the parties should think proper, with power to determine it on giving notice to quit; and contained various other terms and conditions. The lessee died, and his executors continued to occupy, and paid rent:—Held, that they were chargeable in their personal character upon the terms contained in the original demise; their continuing to occupy, and the landlord's abstaining from giving notice to quit, raising an implied promise on their part to act on the terms in the original contract. *Buckworth v. Simpson*, 4 Law J. (N.S.) Exch. 104, s.c. 1 C. M. & R. 834; 5 Tyr. 344.

#### (E) OF UNDER-LESSEES.

If any person has held under the terms of a lease, and holds over after the lease is at an end, he is bound by the terms of it, although no new bargain to that effect is entered into between the parties; but if he comes in as an under-tenant, before any lease was granted to the person of whom he took the premises, and that person afterwards takes a lease, if there is no evidence that he knew of the lease, it will be for the jury to say, whether he is not an under-tenant, and not an assignee of the lease. *Torriano v. Young*, 6 C. & P. 8. [Taunton]

Where tenant for years had "demised and leased" for a longer term than he held, at a yearly rent or sum:—Held, that his executor might sue in covenant for non-payment of rent, although the testator reserved no reversion in the premises demised, as the plaintiff sued, not as assignee of the reversion, but as representative of the testator, and the sum reserved was not a sum in gross, but in the nature of rent. *Baker v. Gosling*, 3 Law J. (N.S.) C.P. 292, s.c. 1 Bing. N.C. 19; 4 Mo. & Sc. 539.

A tenant from year to year may make a lease for twenty-one years. *Mackay v. Mackreth*, 4 Doug. 213.

#### (F) RENT.

Arrears may be distrained for within six months

after the determination of the term. 3 & 4 Will. 4, c. 42, s. 38; 11 Law J. Stat. 98.

The defendant occupied premises from the 1st of December 1830, under an agreement, dated February 1831, for the term of one year, the rent to be paid on the usual quarter days, "the first day of payment to be on the 25th of December last." He paid four quarters' rent, the last payment being on the 29th of September 1831; and, on the 4th of December, sent the key of the premises to the landlord, who, on the 20th, gave possession to a new tenant:—Held, that the agreement was for payment of rent in advance, and, therefore, that the defendant was entitled to costs, under 43 Geo. 3, c. 46, on an arrest and holding to bail for a whole quarter's rent. *Allen v. Bates*, 3 Law J. (N.S.) Exch. 39.

A tenant in fee of certain premises let to tenants from year to year, died in the middle of a quarter, and devised to his widow for life. She died within the year after the deviser, having received rent from the under-tenants:—Held, that the deviser not having given notice to determine their tenancy, it continued after his death, and a new tenancy was not created under the tenant for life. Therefore her administratrix was not entitled to an apportionment of the rent under the 11 Geo. 2, c. 19, s. 15, she having died in the middle of a quarter. *Botheroyd v. Woolley*, 4 Law J. (N.S.) Exch. 155, s.c. 5 Tyr. 522.

A, the landlord of premises, sued B as an assignee of a lease, for rent due, with a count for use and occupation. At the trial, A put in the lease, which was a lease to W, who had taken the benefit of the Insolvent Debtors Act; it was proved, that B had occupied the premises, and had treated A as landlord, and had paid rent to him; but that the lease had never been assigned:—Held, that A could not recover against B, either for the rent, or for the use and occupation. *Hyde v. Moakes*, 5 C. & P. 42. [Parke]

Corn purchased in open market may, by the law of Scotland, be recovered from the buyer to satisfy rent in arrear for the current year—the corn being part of the produce of that year of the land rented. *Dunlop v. Dalhousie*, 7 Bligh, N.S. 422.

#### (G) REPAIRS.

An action for a breach of an implied contract to keep premises in repair, may be laid in any county. *Buckworth v. Simpson*, 4 Law J. (N.S.) Exch. 104, s.c. 1 C. M. & R. 834; 5 Tyr. 344.

Where a lease contains a general covenant to repair, with a proviso for re-entry in case the premises should not be repaired in manner aforesaid, within three months after notice, or in case of breach or default in all or any of the other covenants, clauses, and agreements therein contained—*Semble*, that no right of entry accrued until notice had been given, and three months expired. *Doe d. Rankin v. Brindley*, 2 Law J. (N.S.) K.B. 7, s.c. 1 N. & M. 1; 4 B. & Ad. 84.

The turning a dwelling-house into a shop does not amount to a breach of covenant to repair. *Doe d. Dalton v. Jones*, 2 Law J. (N.S.) K.B. 11, s.c. 1 Nev. & M. 6; 4 B. & Ad. 126.

A lessee of a mill covenanted to leave, at the end of his term, such water-mill, with all fixtures,

fastenings, and improvements, during the demise fixed, fastened, or set up in or upon the premises, in good plight and condition, reasonable use and wear only excepted. During the term, he substituted a new pair of French mill-stones, for a pair of old Peak stones:—and held, that under the term "improvements," such new stones were included; although, by the custom of the country, he was justified in removing such stones, replacing the old ones. *Martyn v. Bradley*, 1 Law J. (N.S.) C.P. 147, a.c. 8 Bing. 24; 2 Mo. & Sc. 25.

In covenant against an administrator as assignee, who has entered upon premises demised to his intestate, for non-repair, a plea that the premises were of no value, and produced no profit to the administrator, is bad; *secus* where the breach is for non-payment of rent. *Tremore v. Morrison*, 3 Law J. (N.S.) C.P. 260, a.c. 1 Bing. N.C. 89; 4 Mo. & Sc. 603, 609.

A general covenant to repair is satisfied by the lessee keeping the premises in *substantial repair*; a literal performance of the covenant is not to be required. *Harris v. Jones*, 1 M. & Ro. 173. [Tindal]

A tenant from year to year is not liable for permissive waste, and is not liable to make good wear and tear of the premises. *Torrance v. Young*, 6 C. & P. 8.

A tenant from year to year of a house is only bound to keep it wind and water tight. A tenant who covenants to repair is to sustain and uphold the premises; but that is not so with a tenant from year to year. *Answorth v. Johnson*, 5 C. & P. 239. [Tenterden]

If a tenant, who is bound to repair, leave, and at the end of the tenancy the premises be out of repair, the jury may give the landlord, in an action against the tenant, not only the amount of the actual expense of the repairs, but also a compensation for the loss of the use of the premises while they were undergoing repair. *Woods v. Pops*, 6 C. & P. 782. [Gaselee]

Where a very old house is demised, with the usual covenants to repair and yield up in repair, it is not meant that the house should be restored in an improved state, or that the consequences of the elements should be averted; but the tenant has the duty of keeping the house in the state in which it was at the time of the demise, by the timely expenditure of money and care.

In construing a covenant not to carry on any offensive trade or business on the premises demised, much will depend on the situation of the premises; and in construing such a covenant, it is particularly worthy of consideration whether such trade as that complained of was carried on there at the time of the demise; and *analog*, that a trade carried on there at the time of the demise would not be within the covenant. *Gutteridge v. Munyard*, 7 C. & P. 129, a.c. 1 M. & Ro. 173. [Tindal]

#### (H) GOOD CULTIVATION.

*Quære*—whether it is sufficient to assign a breach of an agreement to manage a farm in a husbandlike manner, and according to the custom of the country, in the words of the agreement. *Earl of Falmouth v. Thomas*, 2 Law J. (N.S.) Exch. 57, a.c. 1 C. & M. 89; 3 Tyr. 26.

The plaintiff, in an action against his tenant for

the mismanagement of a farm, set forth a precise custom as to the mode of cultivation, and alleged, that the defendant had not cultivated according thereto, which custom the defendant traversed. The jury found that the custom was not as the plaintiff had alleged, but that the defendant had not cultivated his farm according to the course of good husbandry in the neighbourhood:—Held, that the plaintiff was bound by the precise custom, as he had stated it; and having failed to prove it, could not recover. *Angerstein v. Handson*, 4 Law J. (N.S.) Exch. 118, a.c. 1 C. M. & R. 789; 5 Tyr. 383.

#### (I) FRAUDULENT REMOVAL.

[See ARREST, Where allowed. And see DISTRESS, Fraudulent Removal.]

An admission by the tenant, on an issue of fraudulent removal, that the goods were removed to prevent a distress by the landlord, is, it seems, not conclusive; but it is for the jury still to decide whether such removal was fraudulent, or under a *bona fide* belief of a right to remove. *John v. Jenkins*, 2 Law J. (N.S.) Exch. 83, a.c. 1 C. & M. 227; 3 Tyr. 170.

#### (K) NOTICE TO QUIT.

A tenant of apartments is not justified in quitting without notice, merely from a fear, however reasonable, that his goods may be seized for his landlord's rent. *Richett v. Tullick*, 6 C. & P. 66. [Vaughan]

If, by agreement, the relation of landlord and tenant subsist between two parties for one year, e.g. from Lady-day to Lady-day; and if, before the ensuing Michaelmas-day, the landlord give a regular notice to his tenant to quit possession upon the next Lady-day, a waiver of such notice and a continuance of the tenancy may be presumed, from the subsequent conduct and demeanour of the parties. *Flecknoe v. Purcell*, 2 Law J. (N.S.) C.P. 177.

In January, notice to repair was given. At the Spring Assizes following, upon the trial of an ejectment on the clause of re-entry for not repairing according to covenant, by order of Nisi Prius, by consent of parties, a juror was withdrawn, and it was agreed that the premises should be put in repair by the 24th of June to the satisfaction of two persons mentioned:—Held, that this was no waiver of the notice, but merely an enlargement of the time within which the defendants were to repair; and that the lessor was therefore, after the 24th of June, entitled to recover without giving a fresh notice. *Dee d. Rankin v. Brindley*, 2 Law J. (N.S.) K.B. 7, a.c. 1 N. & M. 1; 4 B. & Ad. 84.

If a tenant from year to year give notice to quit, not expiring with the year, the landlord, if the notice be in writing, and signed by the tenant, may, if he pleases, treat this irregular notice as a surrender of the tenancy. *Aldinburgh v. People*, 6 C. & P. 212. [Parke]

In an ordinary weekly tenancy, a week's notice is not necessary as an implied part of the contract, unless there be a usage to that effect; but the tenant is bound to finish the week, or pay a week's rent. *Hagell v. Armstrong*, 7 C. & P. 54. [Parke]

#### (L) EVICTION.

Defendant, having only a defeasible title, demised to plaintiff for years. Before the first quarter's

rent was due, plaintiff was evicted by title paramount to defendant's, and remained out of possession for some weeks. He then entered again, under a new agreement with the person who had evicted him by title paramount:—Held, that defendant was not entitled to distrain, and that the eviction might be given in evidence on the issue of *assumpsit*. *Hopcroft v. Keys*, 9 Bing. 613, s. c. 2 Mo. & Sc. 760.

A lessor demised, by parol, certain premises for a year; the lessee accepted the lease, and entered upon them. He found another person in possession of a part of the demised premises, under a previous lease from his lessor. That person continued to occupy that part, in exclusion of the lessee, until the expiration of the first half year, but the lessee occupied the remainder:—Held, that this was not a case of eviction by the landlord, but that the rent was apportionable; and that, as the lessee must be taken to have held under the lease, the landlord was entitled to distrain for the apportioned rent. *Neale v. Mackenzie*, 4 Law J. (n.s.) Exch. 185, s. c. 2 C. M. & R. 84.

(M) DISCLAIMER.

[See EJECTMENT, Between Landlord and Tenant.]

"I have no rent for you, because A B has ordered me to pay none." This is evidence of a disclaimer of tenancy. *Doe d. Whitehead v. Pittman*, 2 N. & M. 673.

(N) ESTOPPEL.

If a lessor, who has only an equitable title, grants a lease, he has, as against his lessee, a good title by estoppel; but if, after the lease, the lessor, by a mortgage deed, grants all his interest in law and in equity to a mortgagee, the lessee may give in evidence this deed, and thus prevent the lessor from recovering in ejectment on a forfeiture of the lease. *Doe d. Marriott v. Edwards*, 6 C. & P. 208.

The defendant entered into a written agreement for certain premises with two parties, who described themselves as agents of the five trustees of a certain joint estate. In an action for use and occupation, —Held, that the five trustees might bring the action, though not named in the agreement.—Held, also, that proof given by the plaintiffs themselves of their being, at some time before the agreement, trustees, not of a joint, but of separate estates, could not be taken advantage of by the defendant, as, by the execution of the agreement, he must be supposed to have admitted the character of the plaintiffs as trustees of a joint estate. *Fleming v. Gooding*, 3 Law J. (n.s.) C.P. 214, s. c. 10 Bing. 549; 4 Mo. & Sc. 455.

The plaintiff was admitted into possession of premises by the then occupier, who, as well as his predecessor, paid rent to the defendant under a distress. In replevin—Held, that, under such circumstances, it was not competent for the plaintiff to dispute the defendant's title, though the plaintiff's predecessor held under a lease for a certain term, to which the plaintiff was a stranger; and the defendant did not shew that he was the assignee of the reversion, but, on the contrary, gave evidence tending to impeach the validity of the title. *Cooper v. Blandy*, 3 Law J. (n.s.) C.P. 274, s. c. 1 Bing. N.C. 45; 4 Mo. & Sc. 562.

Where a party who originally got possession of land, either as a trespasser or by the permission of a stranger, afterwards took a lease of the same land of the lessor of the plaintiff, and the defendant gave him 20<sup>l</sup> on condition that he gave up the possession to him:—Held, that the defendant must be considered as assignee of the lease, and that he could not dispute the title of the lessor of the plaintiff. *Doe d. Bullen v. Mills*, 4 Law J. (n.s.) K.B. 10, s. c. 2 Ad. & E. 17; 4 N. & M. 25.

LAND TAX.

[See RATE—REVENUE.]

Appointment of additional commissioners. 2 & 3 Will. 4, c. 127; 10 Law J. Stat. 329. And 3 & 4 Will. 4, c. 95; 11 Law J. Stat. 198.

A being under a settlement, tenant for life in remainder, after prior estates for life and in tail, with remainder to his own first and other sons in tail, with an ultimate remainder in fee, which afterwards became vested in the first tenant for life, redeemed the land tax upon the settled estates during the life of the first tenant for life, and took an assignment to himself under the Land Tax Act. The prior tenant for life afterwards died without issue, having devised to A the ultimate fee; and A, being in a dying state, and having no issue, made his will, and devised the fee of the settled estate, without declaring any intention with respect to the land tax redeemed. The land tax, at his death, continues to be part of his personal estate. *Trevor v. Trevor*, 2 M. & K. 675.

By the statute 33 Geo. 3, c. 5, s. 36, all places, constablewicks, divisions, allotments, shall be assessed in such county, hundred, rape, &c. as they have been usually assessed in, and not elsewhere. By the 53rd section, every person who shall be assessed in respect of any lands, &c. shall be assessed for the same in the places where they lie. In an action of trespass against the land-tax collector, on a dispute, as to whether the plaintiff's lands were in that parish for which the defendant was collector,—it was held to have been rightly left to the jury "whether the whole or any part of the lands were in that parish,"—the 36th section applying to cases where there is any doubt as to the locality of particular places, and the 53rd to the rating of persons for farms within those places. *Margetts v. Morley*, 1 Law J. (n.s.) K.B. 112.

Where it appeared that the land-tax assessments were irregularly kept; that when the estate remained in the same family the assessments were usually continued in the name of the ancestor, and it was not changed until the estate was sold or went to another family:—Held, that the land-tax assessments were not evidence of seisin of the party assessed. *Doe d. Stansbury v. Arkwright*, 2 Law J. (n.s.) K.B. 102, s. c. 1 N. & M. 731; 2 Ad. & E. 182.

The 42 Geo. 3, c. 116, s. 69, authorizes bodies corporate, for the purpose of redeeming land tax charged on their lands, to sell and convey any lands whereof they shall be in actual possession, or entitled beneficially to the rents or profits, or the fee simple and inheritance of any land belonging to them which shall have been or shall be granted or demised for any beneficial lease for life or lives, or

years; and also the rents and services and other profits reserved or payable in respect of such leasehold tenements.

Section 76 enacts, that no sale shall be valid unless two of the commissioners appointed under section 72 of the act shall certify their assent by signing and sealing the deed of sale as parties thereto.

A prebendary agreed by writing, in consideration of a sum in 3l. per cent. stock (of the amount necessary for redeeming the land tax) to convey to a lessee then in possession a part of the reversion in the prebendal estate, such part to be set out and valued by A B, and approved by the king's commissioners. The lessee furnished the sum required for purchasing the stock, and the prebendary concluded the necessary contract with the land-tax commissioners, transferred the stock into the names of the Commissioners for Reducing the National Debt, and had the contract duly registered; the land was also set out and valued; but the lessee then refused to sign the necessary memorial for the purpose of obtaining the approbation of the king's commissioners, pursuant to section 88:—Held, that there had been no valid sale of the land, for the want of the assent of the commissioners; and because, in order to comply with the provisions of section 69, the prebendary ought to have sold, not only the fee simple of the land demised, but also the rents, services, and other profits.—Held, also, that he had no right, by section 88, to distrain until the precise quantity of land, and the portion of reserved rent to be sold, were ascertained by the commissioners. *Warner v. Potchett*, 3 B. & Ad. 921.

### LARCENY.

[See HOUSEBREAKING — INDICTMENT — POST OFFICE—PRINCIPAL AND ACCESSARY—ROBERT.]

Amendment of clerical errors in 9 Geo. 4, c. 55, relating to, in Ireland. 5 & 5 Will. 4, c. 34; 13 Law J. Stat. 64.

If a pawnbroker's servant, who has a general authority from his master to act in his business, delivers up a pledge to the pawnor, on receiving a parcel from the pawnor, which he supposes contains valuables he has just seen in the pawnor's possession in a similar parcel, the receipt of the pledges by the pawnor is not larceny. *Rex v. Jackson*, 1 R. & M. C.C. 119.

If a man takes a letter, supposing it to belong to himself, and on finding it does not, appropriates to himself any property it contains, this appropriation does not make him answerable for larceny, there being no *animus furandi* when he first received the letter. *Rex v. Mucklow*, 1 R. & M. C.C. 160.

Prevailing upon a tradesman to bring goods, proposed to be bought, to a given place, under pretence that the price shall then be paid for them; and further prevailing upon him to leave them there, in the care of a third person, and then getting them from that person, without paying the price, is a

felonious taking, if, *ab initio*, the intention was to get the goods from the tradesman, and not to pay for them. *Rex v. Campbell*, 1 R. & M. C.C. 179.

If A ask B, who is not his servant, to put a letter in the post, telling him that it contains money, and B breaks the seal, and abstracts the money before he puts the letter in the post, he is guilty of larceny. *Rex v. Jones*, 7 C. & P. 151. [Mirehouse, Common Serjeant.]

Getting goods delivered into a hired cart, on the express condition that the price shall be paid for them before they are taken from the cart, and then getting them from the cart without paying the price, will be larceny, if the prisoner never had the intention to pay, but had, *ab initio*, the intention to defraud. *Rex v. Pratt*, 1 R. & M. C.C. 250.

Getting a parcel from a carrier's servant, by falsely pretending to be the person to whom it is directed, if it be taken *animus furandi*, is a larceny; for the servant has no authority to part with it, but to the right person. *Rex v. Longstreath*, 1 R. & M. C.C. 137.

A went to a shop, and asked a boy there to give him change for half-a-crown: the boy gave him two shillings, and six pennyworth of copper. The prisoner held out a half-a-crown, which the boy touched, but never got hold of, and the prisoner ran away with the two shillings and the copper:—Held, a larceny of the two shillings and copper. *Rex v. Williams*, 6 C. & P. 390. [Park]

Taking goods the prisoner has bargained to buy, is felonious, if, by the usage, the seller ought to be paid before they are taken, and the prisoner, when he bargained for them, did not intend to pay for them, but meant to get them into his possession, and dispose of them for his own benefit, without paying for them. *Rex v. Gilbert*, 1 R. & M. C.C. 185.

A, in consequence of seeing an advertisement, applied to B to raise money for him. B said he would procure him 5,000*l.*, and produced from his pocket-book ten blank 6*s.* bill stamps, across each of which A wrote, "Accepted payable at Messrs. P & Co., 189, Fleet Street, London," and signed his name. B, who was present, took up the stamps, and nothing was said as to what was to be done with them. Afterwards, bills of exchange for 500*l.* each were drawn on these stamps, and B put them in circulation:—Held, that these stamps, with the acceptance thus written upon them, were neither "bills of exchange," "orders for the payment of money," nor "securities for money." And held, also, that a charge of larceny against B for stealing the stamps, and for stealing the paper on which the stamps were, could not be sustained, as this was no larceny. *Rex v. Hart*, 6 C. & P. 106.

Re-issuable notes, if they cannot be properly called valuable securities whilst in the hands of the maker, may be called goods and chattels. *Rex v. Fyfe*, 1 R. & M. C.C. 213.

Stealing rolls of parchment will be larceny, according to the value of the parchment, though they are the records of a court of justice, unless they concern the realty. *Rex v. Walker*, 1 R. & M. C.C. 155.

In an indictment on the statute 7 & 8 Geo. 4, c. 29, s. 23, for stealing writings relating to real estate, the jury must be satisfied that the defen-

dant took them under such circumstances as would have amounted to larceny, if the writings in question had been the subject of larceny. *Rez v. John*, 7 C. & P. 324. [Patteson]

If an animal has the same appellation, whether it be alive or dead, and it makes no difference as to the charge, whether it were alive or dead, it may be called when dead by the appellation applicable to it when alive. *Rez v. Puckering*, 1 R. & M. C.C. 242.

If a man and the owner's wife jointly take away the husband's goods, it may be larceny in the man, though he was acting jointly with the wife. *Rez v. Tolfree*, 1 R. & M. C.C. 243.

Stealing by a wife of a member of a friendly society, money of the society, deposited in the box in the husband's custody, kept locked by the steward, is not larceny. *Rez v. Willis*, 1 M. C.C. 375.

If a man, who is hired to drive cattle, sell them, it is larceny; for he has the custody only, not the right to possession. His possession is the owner's possession, though he is a general drover—at least if he is paid by the day. *Rez v. M'Namee*, 1 M. C.C. 368.

The luggage of a passenger going by a steam-boat is within the words "goods or merchandizes" in the 17th section of the statute 7 & 8 Geo. 4, c. 29, which relates to property stolen from any vessel in any navigable river. *Rez v. Wright*, 7 C. & P. 159. [Parke]

If a larceny be committed out of the kingdom, though within the king's dominions, bringing the thing stolen into the kingdom will not make it larceny here. *Rez v. Prosser*, 1 M. C.C. 349.

If a person picks up a thing, when he knows that he can immediately find the owner, and, instead of restoring it to the owner, converts it to his own use, this is a larceny. *Rez v. Pope*, 6 C. & P. 346. [Park]

An indictment charged, in the first count, that A and B killed a sheep, with intent to steal one of its hind legs; and, in the second count, that C received nine pounds weight of mutton so stolen as aforesaid; and, in the third count, that C received the mutton "of a certain evil-disposed person," *scilicet*, &c.:—Held, that, on this form of indictment, all the three prisoners might be properly convicted. *Rez v. Wheeler*, 7 C. & P. 170. [Coleridge]

In an indictment for stealing several articles, it is no ground for confining the prosecutor's proof to some of the articles, that they might have been, and probably were, stolen at different times, if they might have been stolen all at once. But on an indictment against a receiver for receiving several articles, if it appeared that they were received at different times, the prosecutor may be put to his election. But evidence may be given of all the receipts, for the purpose of proving guilty knowledge in the receiving, at least of all prior to that on which the prosecutor elects to proceed. *Rez v. Dunn*, 1 R. & M. C.C. 146.

Stealing in a bed-room over a stable in a yard, not under the same roof, nor having any direct communication with the house in which the prosecutor resides, cannot be properly charged as a stealing in his dwelling-house. *Rez v. Turner*, 6 C. & P. 407. [Vaughan]

A Bible had been given to a society of Wesleyans, and it had been bound at the expense of the society. B stated that he was one of the trustees of the chapel, and also a member of the society. No trust-deed was produced:—Held, that in an indictment for stealing the Bible, the property was rightly laid in B and others. *Rez v. Boulton*, 5 C. & P. 537. [Parke]

In an indictment for stealing property which had belonged to a deceased person, who appointed executors, who would not prove the will, it was held, that the property must be laid in the ordinary, and not in a person who, after the commission of the offence, but before the indictment, had taken out letters of administration with the will annexed; because, the rights of an administrator only commence from the date of the letters, as distinguished from those of an executor, which commence, not from the granting of the probate, but from the death of the testator. *Rez v. Smith*, 7 C. & P. 147. [Bolland]

If a poacher take a gun by force from a game-keeper, under the impression that it may be used against him, it is not felony, though he state afterwards that he will sell the gun, and it be not subsequently heard of. *Rez v. Holloway*, 5 C. & P. 524. [Vaughan]

A had consigned three trusses of hay to B, and had sent them by the prisoner's cart. The prisoner took away one of the trusses, which was found in his stable, but not broken up:—Held, no larceny, as the prisoner did not break up the truss. *Rez v. Pratley*, 5 C. & P. 533. [Parke]

A, the owner of a boat, was employed by B, the captain of a ship, to carry a number of wooden staves ashore in his boat. B's men were put into the boat, but were under the controul of A, who did not deliver all the staves, but took one of them away to the house of his mother:—Held, that this was a bailment of the staves to A, and not a charge only; and that a mere non-delivery of the staves would not have been a larceny in A; but that if A separated one of the staves from the rest, and carried it to a place different from that of its destination, with intent to appropriate it to his own use, that was equivalent to a breaking of bulk, and therefore would be sufficient to constitute a larceny. *Rez v. Howell*, 7 C. & P. 325. [Patteson]

#### LAW AMENDMENT ACT.

3 & 4 Will. 4, c. 42; 11 Law J. Stat. 98.]

#### LEASE.

[See DISTRESS—EJECTMENT—LANDLORD AND TENANT.]

- (A) WHAT AMOUNTS TO.
- (B) VALID OR VOID.
- (C) CONSTRUCTION OF, IN GENERAL.
- (D) COVENANTS.
- (E) ASSIGNMENT.
- (F) RENEWAL.
- (G) SURRENDER.
- (H) FORFEITURE.

- (I) DETERMINATION OF.  
(K) STAMP.  
(L) ACTIONS.

(A) WHAT AMOUNTS TO.

J B being wrongfully dispossessed of certain premises, executed the following deed:—"Be it remembered, that J B hath let, and by these presents doth demise to R F (the premises), as now held by W F, for the full space or term of twenty-one years, to commence the first day of May, or the first day of November, whichever first happens after the said J B recovers the said lands from the heirs, &c., the said R F covenanting and agreeing, on the foregoing conditions, to pay to the said J B, &c. the sum of, &c. Leases, with power of distress, and clauses of re-entry, and all other clauses usual between landlord and tenant, to be drawn and signed at the request of either party as soon as the said J B recovers the land," &c.:—Held, that this instrument operated as a present demise. *Barry v. Nugent*, 3 Doug. 179.

September 21, 1829—K agrees to let, and P to take, a house in its unfinished state, for the term of sixty years, being the whole term that K has the same leased to him, at the rent of 525*l.*, payable quarterly, the first payment to be made for the half quarter at Christmas next; P to insure the premises, and to have the benefit of an insurance lately paid: a lease and counterpart to be prepared at the expense of P, and to contain all the clauses, covenants, and agreements K entered into in the lease granted to him:—Held, an actual demise, and not a mere agreement for a lease. *Doe d. Pearson v. Ries and Knapp*, 1 Law J. (N.S.) C.P. 78, s.c. 8 Bing. 178; 1 Mo. & Sc. 259.

Memorandum of agreement, in which everything intended to be provided for in a lease, was provided for in the agreement; the lessee to pay all expenses of preparing a lease for either of the terms before mentioned,—Held, to amount to a demise. *Warman v. Faithful*, 3 Law J. (N.S.) K.B. 114, s.c. 5 B. & Ad. 1042; 3 N. & M. 137.

(B) VALID OR VOID.

Lease under power to lease in possession, was dated in March, to hold from Michaelmas, but not delivered till Michaelmas—semble, the lease is good. *Doe, lessee of Mount, v. Roberts*, 4 Doug. 306.

Tenant in fee demises to A for twenty-one years; during that time he demises, not by deed, to B for ninety-nine years. The second lease, though not by deed, shall take effect at the expiration of the first, for as many years as remain of the ninety-nine. *Doe d. Thomas v. Jenkins*, 1 Law J. (N.S.) K.B. 190.

(C) CONSTRUCTION OF, IN GENERAL.

Where A demises to B for the term of his natural life, the demise is *prima facie* for the life of B. But where A demised to B, his executors and administrators, for the term of his natural life; and the lease contained a covenant by A for quiet enjoyment of the premises by B, his executors, and during the natural life of A:—Held, that the word

"his," in the demising clause, must be referred to A, the grantor, and not to B, though his name was the last antecedent. *Pritchard v. Dodd*, 5 B. & Ad. 689, s.c. 2 N. & M. 839.

A, the owner of certain freehold houses and land, with a yard adjoining thereto, demised, by parol, several of the houses. The tenants were in the habit of passing over the yard, and using a common pump and privy there. There was no evidence whether the yard formed part of the demise or not. In trespass by one of the tenants against the landlord for excluding him from the yard, the Judge left it to the jury to say whether the landlord at the time of the demise had reserved the yard:—Held, that this was a misdirection, the question being whether he had demised, and not whether he had reserved it. *Hobbert v. Thomas*, 1 C. M. & R. 861, s.c. 5 Tyr. 503.

(D) COVENANTS.

[See COVENANT, Valid or Void—POWER.]

A party who enters into an agreement for an underlease, without inquiring into the covenants of the original lease, has constructive notice of all usual covenants in the original lease. *Quære*—whether he has such notice of unusual covenants; but where a party entered into an agreement with a lessee for an underlease, and informed him of the nature of the business, which he meant to carry on in the premises, and the lessee did not apprise him that there was a covenant in the original lease prohibiting such business, the silence of the lessee was equivalent to a representation that there was no such prohibiting covenant. *Flight v. Barmen*, 3 M. & K. 282.

It is the duty of a person, contracting for an underlease, to inform himself of the covenants contained in the original lease; and, if he enters and takes possession of the property, he will be bound by those covenants.

Where the original lease contained unusual covenants, and the defendant entered into an agreement with the plaintiff for an underlease, and took possession of the premises, no reference to covenants being made in the agreement; but the defendant's solicitor having had an opportunity of inspecting the original lease,—it was held, that the defendant was bound to accept a lease with the unusual covenants contained in the original lease. *Cosser v. Collings*, 3 M. & K. 283.

Where, in an agreement for the lease of a house to be granted by defendant to the plaintiff, it was stipulated, that the lease should contain the usual covenants between landlord and tenant, and that the house should not be converted into a school, it is immaterial whether the plaintiff had or had not notice that the defendants derived their title under a lease from another person, because the agreement amounts to a representation on the part of the defendants, that they were at liberty to grant a lease conformably to the terms of the agreement.

The usual covenants between landlord and tenant will not extend to covenants in restraint of trade; and the stipulation that the premises should not be converted into a school does not imply, and cannot be extended to, a restriction against the carrying on of other trades. *Van v. Corps*, 6 Law J. (N.S.) Chanc. 208, s.c. 3 M. & K. 269.



If an agreement for a lease contain no stipulation as to covenants, the party agreeing to take the lease has a right to a lease containing only usual covenants; and a restriction against particular trades, not being a usual covenant, cannot be introduced into the lease. *Proper v. Parker*, 3 M. & K. 280.

The Court will not relieve a tenant against the breach of a covenant to insure. *Green v. Bridges*, 4 Sim. 96.

A covenant for a landlord to be allowed to come into a house to see the state of its repair at "convenient times," is not broken by his not being allowed to go into some of the rooms, if he has given no notice of his coming.

A covenant by a lessee, that he will, during the term, repair, uphold, support, sustain, and maintain the brick walls to the demised premises belonging, is broken, if the lessee, during the term, pull down a brick wall which divides the courtyard at the front of the house from another yard at the side of the house.

A covenant not to remove or grub up trees, is broken by removing trees from one part of the premises to another; and so it is by taking away trees, even if the lessee plant a greater quantity than he takes away, unless those taken away were dead. *Doe d. Wetherell v. Bird*, 6 C. & P. 195. [Denman]

The custom of the country is excluded where there is an express stipulation on a subject-matter, to which it would otherwise apply, though such stipulation provides only for a part of the custom; as where the custom is that the tenant shall leave the manure and be paid for it, and it is stipulated that he shall leave the manure, he is not entitled to be paid the value of it. *Roberts v. Barker*, 2 Law J. (N.S.) Exch. 268, a.c. 1 C. & M. 808; 3 Tyr. 945.

Permitting persons to use small portions of land, for the purpose of raising a crop of potatoes, is a breach of a stipulation in a lease of a farm, for the tenant not to "suffer to be occupied by any other person, without the consent of the landlord in writing;" notwithstanding the lease also contains a covenant to "use, occupy, dress, and manure the land according to the custom of the country," and it is proved to be the custom of the country for tenants to let out small portions of land for such a purpose. *Greenlade v. Tapscot*, 3 Law J. (N.S.) Exch. 328, a.c. 1 C. M. & B. 55; 4 Tyr. 868.

Covenant by the lessees of a farm, that they would use all the hay and straw which should arise or be gathered from the premises, upon the premises; nor should the same, nor any part thereof, be at any time removed from off the premises, on pain to forfeit, as and for liquidated damages, the sum of 5*l.* for every ton of hay, &c. or cart-load of dung sold or carried off:—true construction held to be, that he should not remove any of the hay without paying 5*l.* per load. *Doe d. Antrobus v. Jopeen*, 1 Law J. (N.S.) K.B. 154, a.c. 3 B. & Ad. 402.

#### (E) ASSIGNMENT.

[See LANDLORD AND TENANT, Assignee.]

The depository of a lease to secure advances to the extent of 200*l.* during a period of two years, after the expiration of that period held to be liable  
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to the rent reserved upon it, and not allowed to abandon. *Flight v. Bentley*, 4 Law J. (N.S.) Chanc. 262.

A lessee, by indenture indorsed on the lease, assigned the demised premises to B, "subject to the rent reserved in the lease."—Held, that such assignee was liable in covenant to the lessee for rent which he had been called on by the lessor to pay, after the assignee had assigned over. *Steward v. Wolveridge*, 1 Law J. (N.S.) C.P. 159, a.c. 9 Bing. 60; 2 Mo. & Sc. 75.

#### (F) RENEWAL.

A lease made in 1663 of land in Ireland, together with all mines thereon in the disposal of the lessor, and all timber growing thereon, to be disposed of by the lessee, he planting trees in the room of them, to hold the premises, without impeachment of waste, to him, his executors, administrators, and assigns, for ninety-eight years, at a rent therein mentioned, contained a covenant, that the lessor, his heirs, and assigns, should, upon the request of the lessee, his executors, administrators, and assigns, from time to time renew the said lease, and perfect such other assurances as the lessee, his executors, administrators, and assigns should reasonably require for strengthening, confirming, and suremaking the demised premises, at such rents, and under such covenants and conditions, as in the said lease were contained. Another covenant provided that, in case of eviction, or waste by rebellion, the rent should cease and be abated. A renewal of the lease, with all the covenants, was executed in 1739:—Held, by the Lords, affirming the judgment of the Court of Exchequer, in Ireland, that the covenant was not for perpetual renewal, but for confirming and further assuring the original lease. *Brown v. Tighe*, 2 C. & F. 396, a.c. 3 Bligh, N.S. 272.

Testator bequeathed a church lease for twenty-one years to A for life, remainder to his first and other sons; and directed the lease to be continually renewed by the persons in possession for the time being. A neglected to renew, and the lease expired in 1798. His eldest son attained twenty-one in 1800. In 1830 A died. In 1831, the eldest son filed his bill, praying to be compensated for the loss of the lease out of A's assets:—Held, that he was entitled to the relief, notwithstanding the lapse of time. *Bennett v. Colley*, 5 Sim. 181, a.c. 2 M. & K. 225.

Where the first trust of leasehold property, held for lives and years, is to pay the fines on renewals out of the rents and profits, and the next trust is for the benefit of those who, in strict settlement, take freehold and copyhold property under the same will, the expenses of renewal are incidental to the leasehold property, and fall upon those who from time to time are entitled to the possession of it under the will. *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 111.

In a correspondence respecting the granting of a new lease, the lessee speaks of the renewal of the old lease, which expression the lessor does not object to in his answer, but proceeds to discuss other points connected with the subject. A bill is filed for the specific performance of an agreement for a renewal of the former lease, alleged to be contained in the letters:—Held, that the letters were sufficient

evidence of such agreement, to warrant the continuance of an injunction to restrain the lessor from proceeding in his action of ejectment commenced against the lessee.

Discharge of the plaintiff seven years before, as an insolvent debtor, and former breaches of covenant by neglect and delay in payment of rent, no ground for dissolving such an injunction.

*Seemle*, that in an agreement to renew a lease without specifying the duration of it, it will be implied that the new shall be co-extensive in duration with the old lease. *Price v. Ashton*, 4 Law J. (n.s.) Exch. Eq. 3, s. c. 1 Y. & C. 82.

R B devised leaseholds held for lives to his widow for life, with remainder to J B (who was one of the *cestuis que vie*) for life, with remainder over. There was no direction as to renewal; but, the second husband of the widow having surrendered the old lease, and obtained a renewal—it was held, that he was a trustee for those in remainder:—that the tenant for life, and those in remainder, are bound to contribute to the expenses of renewal in proportion to their enjoyment:—that the proper mode of making this calculation is to allow compound interest on the sums advanced for renewal, and to charge the parties in proportion to the value of their respective enjoyment; but the enjoyment of the tenant for life under such renewed lease, must, for the purposes of the calculation, be considered as commencing at the time at which the old lease, if unsurrendered, would have expired by effluxion of time. *Cridland v. Lurton*, 4 Law J. (n.s.) Chanc. 65.

A devise of renewable leasehold estates for lives and for years, upon trust, from time to time to renew the leases, and out of the rents, issues, and profits, to pay the fines, fees, and other expenses of renewal, and subject thereto, upon trusts corresponding with the trusts of freehold property devised by the same will to the testator's eldest son for life, with remainders to his issue in tail, with remainder to his second son for life, with remainders over in strict settlement.

As to leaseholds for lives,—Held, that, under this devise, the persons successively entitled to the leasehold estates for lives, under the will, are bound to sustain the expenses of all renewals occurring during the period of their respective enjoyment.

As to leaseholds for years,—Held, on the authority of the decided cases, the fines on renewals are to be provided by an annual reservation out of the rents and profits of an aliquot part of the accruing fine. *Earl of Shaftesbury v. Duke of Marlborough*, 3 Law J. (n.s.) Chanc. 30.

#### (G) SURRENDER.

[See SURRENDER.]

The tenant of a house, stable-yard, and cottages for a term at an entire rent, in the middle of a quarter, and when the stable and yard were in his own possession, and the house and cottages respectively in the occupation of under-tenants, assigned the residue of the term to another person, who took possession thereupon of the stable and yard. The agent of the landlord received a sum of money from the tenant equal to the amount of rent due up to the date of the assignment. Afterwards, during the

term, he received the rents from the under-tenants, let the cottages to new tenants, and likewise advertised the whole of the premises to be let or sold:—Held, that these circumstances were sufficient to warrant a presumption of the acceptance of other tenants, and to amount to a surrender by operation of law.—Held also, that the plaintiff was not entitled to a new trial, the Judge having said, that there was no case for the jury, and unsolicited, the plaintiff's counsel not having required the Judge to put the question of the acceptance of other tenants to the jury as a fact. *Reeve v. Bird*, 3 Law J. (n.s.) Exch. 282, s. c. 1 C. M. & R. 31; 4 Tyr. 612.

The defendants, W & H, having entered into an agreement with the plaintiff for a lease of premises for the purpose of carrying on a partnership business, for the term of three years, to be extended by notice to seven, after they had dissolved partnership with the knowledge of the plaintiff, gave him a joint notice to extend the term; subsequent to that notice H applied to him to grant a new lease to himself and a new partner, S, when the plaintiff gave H a letter to his attorney, expressing his readiness to grant the proposed lease, and directing his attorney to prepare one accordingly. This letter was never delivered to the attorney, or communicated to W, but the plaintiff afterwards gave a receipt for rent to the new firm of H & S.—Held, that these circumstances did not amount to a surrender of the extended term, or the substitution of a new tenant, but that the defendants were jointly liable for rent in arrear in an action on the agreement for a lease. *Graham v. Wickels*, 2 Law J. (n.s.) Exch. 70, s. c. 1 C. & M. 188; 3 Tyr. 201.

#### (H) FORFEITURE.

[See ATTAINDER.]

In an ejectment under the 4 Geo. 2, c. 28, on a right of re-entry, for non-payment of rent, the taking of an insufficient distress, after the forfeiture, for rent accruing before, is not a waiver of the right to re-enter. *Brewer d. Lord Onslow v. Eaton*, 3 Doug. 230.

Indenture of lease, with a proviso for re-entry if the rent should be in arrear for the space of fourteen days after the day of payment, or if the lessee should assign, or if the lessee, his executors, &c., or any of them, should do, or cause to be done, any act, matter or thing whatsoever, contrary to, or in breach of, one or more of the covenants or agreements thereafter mentioned:—Held, that the latter words of this proviso extended only to acts of commission, and not to those of omission: that, therefore, the not repairing according to a covenant to that effect, was not a cause of forfeiture on which to found an action of ejectment. *Doe d. Abdy v. Jeapes*, 1 Law J. (n.s.) K.B. 101, s. c. 3 B. & Ad. 299.

The delivering up of the lease and possession of premises by a tenant for years in fraud of his landlord to a party claiming adversely to the landlord, in order to enable such party to set up his hostile title, and not with the intention that he should hold under the lease, is a forfeiture of the term. *Doe d. Ellerbrock v. Flynn*, 3 Law J. (n.s.) Exch. 221, s. c. 1 C. M. & R. 137; 4 Tyr. 619.

A lease contained a proviso, that if the lessee,

his executor, administrator, or assign, should become bankrupt or insolvent, it should determine. The lessee having died, his executor became a bankrupt in his own business:—Held, that the forfeiture accrued, and the proviso was not to be limited to the case where the executor should carry on the business of the lessee and become bankrupt in that character. *Doe d. Williams v. Davies*, 4 Law J. (n.s.) Exch. 10, s. c. 6 C. & P. 614. [Parke]

Where a grant of a licence to enter upon lands, for the purposes of mining, contained a condition that if the party, to whom it was granted, should neglect to work the premises for six calendar months, the indenture should be absolutely void:—Held, that such licence was voidable only, at the election of the grantor, on breach of the condition; and that he, or a person claiming under him, must do some act to shew his intention of taking advantage of a forfeiture, accruing by reason of the non-performance of the condition, before trespass could be maintained, against the licence for working the premises. *Roberts v. Davy*, 2 Law J. (n.s.) K.B. 141, s. c. 1 N. & M. 443; 4 B. & Ad. 664.

(I) DETERMINATION OF.

A lease to A B, his executors, &c. for a year, and so on year to year, for so long time as it shall please the lessor and A B, his executors, &c., does not expire on the death of A B, but vests in his executors. *Mackay v. Mackreth*, 4 Doug. 213.

"Unless you pay what you owe me, I shall take immediate measures to recover possession of the property," addressed to a tenant at will by the party entitled in fee:—Held, a sufficient determination of the will. *Doe d. Price v. Price*, 9 Bing. 355, s. c. 2 Mo. & Sc. 464.

(K) STAMP.

[See STAMP.]

(L) ACTIONS.

A lease at common law vests no estate in the lessee before entry.

Neither can a deed which may take effect either at common law, or, as a bargain and sale under the Statute of Uses, operate under the statute before election by the grantee.

A party, therefore, who pleads a demise which may operate either way, in order to defeat a subsequent grant for a valuable consideration, must allege either entry or election by the grantee under such demise, or shew privity with such grantee.

Accordingly, in replevin, the defendant made cognizance for arrears of annuity under a power of distress in an annuity deed:—the plaintiff pleaded in bar a prior grant of annuity, containing, for a money consideration, a grant, bargain, sale, and demise of the premises for a term unexpired, for securing the payment of the annuity, but did not allege entry or election by the grantee, or that he was in under the grantee:—Held, therefore, that the term of years so set up in the plea, was no answer to the cognizance under the subsequent annuity deed.

Growing crops cannot be taken under a power in an annuity deed "to enter and distrain, and the distress then and there to detain, manage, sell, and dispose of, in the same manner and in all respects

as distresses for rents reserved upon leases for years, might, were, and ought to be detained, managed, sold, and disposed of, and as if the said annuity or yearly sum thereby granted was a rent reserved upon a lease for years;" but the powers given by these words are limited to those given to landlords by stat. 2 Wm. & Mary, c. 5. *Miller v. Green*, 1 Law J. (n.s.) Exch. 51, s. c. 2 C. & J. 142; 2 Tyr. 1.

LECTURES.

Prohibition of publication of, without consent of authors. 5 & 6 Will. 4, c. 65; 13 Law J. Stat. 149.

LEGACY.

[See BOND, Satisfaction of—EXECUTOR—SETTLEMENT. And see DEVISE—WILL, Construction of—throughout.]

- (A) WHAT CONSTITUTES A LEGACY.
- (B) CONSTRUCTION OF, IN GENERAL.
- (C) WHO TAKE AS LEGATEES.
- (D) WHAT PROPERTY PASSES.
- (E) WHAT INTEREST VESTS.

- (a) *Absolute.*
- (b) *For Life.*
- (c) *Tenancy in Common.*

- (F) SURVIVORSHIP.
- (G) SPECIFIC.
- (H) OF CHATTELS TO GO WITH A TITLE.
- (I) CUMULATIVE.
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- (M) ON WHAT PROPERTY CHARGEABLE.
- (N) INVESTMENT OF.
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- (P) PAYMENT AND SATISFACTION OF.
- (Q) INTEREST UPON.
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- (T) FORFEITED.
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- (W) REVOKED.
- (X) VOID.
- (Y) RESIDUE OR SURPLUS.
- (Z) ELECTION.
- (AA) LEGACY DUTY.
- (BB) RIGHTS OF LEGATEES.

(A) WHAT CONSTITUTES A LEGACY.

[See Legacy Duty—post, AA.]

The Court will not raise an implication to bequeath property, unless there are words of gift, or a manifest intention. *Davis v. Davis*, 1 Law J. (n.s.) Chanc. 151.

(B) CONSTRUCTION OF, IN GENERAL.

[See HEIRS.]

A testator directs, that, on the death of A, the legacy left to her shall devolve upon her children, should she have any, in equal proportions. A has two children, one of whom dies in her lifetime; the other survives her. The child, who survives, takes the whole fund by force of the word "devolve." *Parr v. Parr*, 2 Law J. (n.s.) Chanc. 167, s. c. 1 M. & K. 647.

A testatrix bequeathed the interest of the residue to her grand-daughter, for and under her sole controul, and that her mother should have no controul over it. The grand-daughter was unmarried at the death of the testatrix:—Held, that these words were not sufficient to create a separate estate.

A bequest to the separate use of an unmarried female passes to her husband on a subsequent marriage. *Massey v. Parker*, 4 Law J. (n.s.) Chanc. 47, s. c. 2 M. & K. 174.

A wife, by will, gives her separate property to her husband, and directs him to pay a legacy of 100*l.* to M, a married woman, for her separate use, and leaves it in the discretion of the husband to pay the legacy in his life or to direct his executors to pay it. The husband, by his will, gives to M a legacy of 100*l.*, but does not direct it to be to her separate use:—Held, that this was no performance of the direction in the wife's will, and, therefore, M was entitled to a legacy of 100*l.* to her own use, besides the legacy given by the husband's will. *Fourdrin v. Goudney*, 3 Law J. (n.s.) Chanc. 172.

A testatrix gave to J B, and his wife, and the survivor of them, an annuity of 100*l.* during their respective lives, in case J B should become incapable to collect, or be discharged from collecting the rents of a particular estate; the annuity to commence and become payable from the first quarter-day after her decease, or after he should cease to collect the rents. The husband survived the testatrix, but died soon afterwards, having continued to receive the rents till his death. The wife is entitled to the annuity of 100*l.* for her life. *Brittain v. Fleming*, 2 M. & K. 147.

If separate legacies are given to two or more persons, with a limitation over to the survivor or survivors in case of death of either without issue, the presumption *prima facie* is, that the testator had not in his contemplation an indefinite failure of issue. *Ranelagh v. Ranelagh*, 2 M. & K. 441.

A testator bequeathed his stock in trade to his wife and son, whom he authorized to carry on his business for their own benefit on his leasehold premises; but, in case of disputes arising between them, and the business being discontinued, he gave such lease and stock in trade to trustees for sale, and directed the produce to be held upon certain trusts in the will mentioned: the wife and son became bankrupts:—Held, that the leasehold property did not vest in the assignees, but went to the trustees for sale, under the trusts of the will. *Thompson v. Andrews*, 2 Law J. (n.s.) Chanc. 46, s. c. 1 M. & K. 116.

A testator gave annuities "out of any money arising from whatever dividends he might die possessed of in the Bank; the remainder to A B, in order to enable him to assist such of the children of C D, as he might find deserving of encouragement," and then a gift of the portions of the annuitants in the dividends after their respective deceases to A B, but the capital to remain in the Bank. And he gave to E and F equally all his money, bills, notes, &c.—Held, that A B was entitled to the capital of the stock, out of the dividends of which the annuities were payable, subject to the payment of the annuities: that there was no constructive trust for the benefit of the children of C D; and that the gift to E and F was not a resi-

duary, but a specific bequest. *Homming v. Whitlam*, 1 Law J. (n.s.) Chanc. 94, s. c. 5 Sim. 22.

A testator, having three sons and three daughters, mentioned in his will, that he had given to his daughter A, 20,000*l.* and to B, C, D, and E the several smaller sums mentioned; and desired his executors to make up to the *five last* inheritors equal to the 20,000*l.* given to A. Then he apportioned the residue, giving to his eldest son B three-tenths, to his son C two-tenths, to his son F two-tenths, and to each of his daughters one-tenth. F had not received anything during his father's life:—Held, that the name of F must be considered to have been inadvertently omitted, as one of the five last inheritors, there being otherwise but four named; and that the 20,000*l.* must be made up to him accordingly.

The testator directed "that such of my sons and daughters as may die without lawful issue, are not to be entitled to bequeath more of the fortunes they inherit from me than 10,000*l.* to others than their surviving brothers and sisters, or the immediate successors of them":—Held, not too remote, —for that it meant 'dying without issue living at his or her death'; therefore, that, as to all beyond 10,000*l.*, the party so dying without issue had a power of appointment by will to surviving brothers and sisters, or any of them, or the issue of any of them then dead, who might be living at the death of the party making the appointment; in default of appointment, to all surviving brothers and sisters, and issue of those dead (per stirpes) equally. —Held also, that this clause did not extend to sums advanced by the testator in his lifetime.

One of the sons being dead without issue, and intestate, the sum of 10,000*l.* was ordered to be paid to his representative:—and held, that the surplus of his fortune had devolved absolutely to his surviving brothers and sisters: and that such beneficial interest accruing by survivorship came not within the scope of the executory bequest like an original share. *Gould v. Gould*, 1 Law J. (n.s.) Chanc. 60.

#### (C) WHO TAKE AS LEGATEES.

Gift to the relations of A, "in any degree, but not to include or go further than second cousins:—Held, to include second cousins. *Percival v. Remish*, 3 Law J. (n.s.) Chanc. 23.

A testator, domiciled in Jamaica, became, during a temporary residence at Frankfort, engaged and betrothed to a lady; and by a codicil to his will, after mentioning her by name, and alluding to his intended marriage with her, he gave 3,000*l.* to his wife. During the engagement, but before the marriage, the testator died:—Held, that the lady was entitled to the legacy. *Schloss v. Stiebel*, 6 Sim. 1.

Bequest in trust for A for life; and, at her death, the principal to be paid "to such children or representatives of children as she might leave; and if she should leave no children or representatives of children," then over:—Held, that "representatives of children" meant descendants. *Herbert v. Forbes*, 1 Law J. (n.s.) Chanc. 118.

Bequest of specific legacies of stock, and a declaration, that, in case of the death of any of the legatees in the testator's lifetime, his legacy shall go and be paid to his executors or administrators.

One of the legatees dies, having by her will appointed executors, and having made a residuary bequest of her personal estate:—Held, that the residuary legatee under the will takes, and not the executors, beneficially, nor the next-of-kin under the Statute of Distribution. *Pain v. Hills*, 2 Law J. (n.s.) Chanc. 142, s.c. 1 M. & K. 470.

Bequest of 5,000*l.* to Lady K for life, and after her death to transfer it to or amongst such person or persons as would be her personal representatives. Lady K made a will and appointed executors, but did not execute the power:—Held, that the personal representatives of Lady K took as her next-of-kin, amongst whom it was directed to be divided. *Baines v. Otley*, 1 Law J. (n.s.) Chanc. 210, s.c. 1 M. & K. 466.

In a suit of subtraction of legacy, a coachman, a married man, originally hired by, and who had lived five years with, the testatrix, residing over her stables in town, occasionally accompanying her into the country, where he lived in the house, though, like all her servants, on board wages; waiting sometimes at table, and remaining with her, though she changed her job-man:—Held (although the several job-masters paid him his wages and board-wages, except 2*s.* per week extra in the country, and found him in livery,) entitled, under a bequest, "to each of my servants living with me at the time of my death 10*l.*," and the executrix condemned in full costs. *Howard v. Wilson*, 4 Hagg. 107.

#### (D) WHAT PROPERTY PASSES.

By the word "money," stock will not be held to pass in a will, unless the context shews an intention to extend the accepted signification of the word. *Gooden v. Dotterell*, 2 Law J. (n.s.) Chanc. 16, s.c. 1 M. & K. 56.

Bequest of stock in the public funds, will not of itself pass bank stock. *Mills v. Mills*, 1 Law J. (n.s.) Chanc. 286.

Testator bequeathed to his wife, furniture, &c. in his house, A B; the lease of the house expired before his death, and some of the furniture was sold, and some removed to C D:—Held, that the widow was not entitled to what remained. *Colleton v. Garth*, 2 Law J. (n.s.) Chanc. 75.

Cash at banker's, money in funds, arrears of pension, &c. will pass under a bequest of "1,000*l.* to A M, also my wines and property in England." The word "property" is not, in such a bequest, limited to things *ejusdem generis*. *Arnold v. Arnold*, 4 Law J. (n.s.) Chanc. 123, s.c. 2 M. & K. 365.

The testator by will gave to a son a legacy of 20,000*l.* in the joint stock of the 4*l.* per cent. bank annuities, transferable at the Bank of England, commonly called 4*l.* per cent. bank annuities: the only 4*l.* per cent. bank annuities existing at the date of his will, were reduced to 3*l.* 10*s.* per cent.; afterwards, and before his death, a new stock of 4*l.* per cent. bank annuities was created:—the will speaks at the testator's death, and the son is entitled to a sum of 20,000*l.* in the then existing 4*l.* per cent. bank annuities. *Sheffield v. Earl of Coventry*, 2 Russ. & M. 317.

Where in a will the testator bequeathed a leasehold messuage, with the grates, stoves, coppers,

locks, bolts, keys, bells, and other fixtures and fixed furniture therein, and also the household goods, furniture, plate, &c. to trustees upon trust to permit E S V to have the enjoyment of them during her life, and as to the said household goods, plate, &c. and other properties not comprehended under the preceding terms "fixtures and fixed furniture," for E S V absolutely as her own property:—Held, that looking-glasses fixed over the chimney-piece, and fastened in the wall by a nail on each side, and a book-case in a recess in the wall, to which it was affixed by screw, must be considered as included under the terms "fixtures and fixed furniture," and did not pass absolutely to E S V. *Birch v. Dawson*, 4 Law J. (n.s.) K.B. 49, s.c. 2 Ad. & E. 37; 4 N. & M. 22.

#### (E) WHAT INTEREST VESTS.

[*Pearson v. Stephen*, 2 D. & Cl. A.C. 328; 2 Law J. Dig. 176, s.c. 5 Bligh, n.s. 203.]

##### (a) Absolute.

A testator bequeathed 20,000*l.* to C H, his natural daughter; but in case of her death without lawful issue, he willed the money so left to be equally divided betwixt his nephews and nieces, "who may be living at the time." He also left to C A H, his niece, 8,000*l.*; but in case of her death, without issue, to revert back, and to be divided betwixt his nephews and nieces, who might be then living. The residue of property he directed to be divided into fifteen shares, to be for his other fifteen nephews and nieces, after the deaths of their parents respectively. C H, and all the nephews and nieces, survived the testator, and C H died some time after, under age and unmarried, having made a will bequeathing the 20,000*l.*:—Held, that C H took an absolute interest in the 20,000*l.*, and that the limitation over was void for remoteness. *Candy v. Campbell*, 2 C. & F. 421, s.c. 8 Bligh, n.s. 469.

Residuary bequest to James, John, David, and Frances, equally, to be paid, assigned, &c. at their respective ages of twenty-one; and if Frances should marry, the executors should settle at least three-fourths of her income on her for life, with remainder to her children. Frances attained twenty-one unmarried:—Held, that she took a vested interest in the whole share absolutely at twenty-one, she not having married before that time. *Lumsden v. Shaw*, 1 Law J. (n.s.) Chanc. 115.

Bequest to A and her children, to be paid at a specified time. If there are no children at the time, A takes absolutely. *Pyne v. Franklyn*, 2 Law J. (n.s.) Chanc. 41, s.c. 5 Sim. 458.

Bequest to C H and M H, when and if they shall attain twenty-one; and in case of the death of the said C H and M H, or either of them, leaving children, the share of the legatee so dying to go to their or her respective children or child:—Held, to give an absolute interest on attaining twenty-one. *Horne v. Pillans*, 4 Law J. (n.s.) Chanc. 2, s.c. 2 M. & K. 15.

A bequest to certain persons, during their lives, and in case of the death of any without legitimate issue, their proportion to be divided equally amongst the survivors:—Held, not to give an absolute interest; the words construed to mean, failure of issue

living at the death of the legatees. *Ranslagh v. Ranslagh*, 1 Law J. (N.S.) Chanc. 183, s. c. 2 M. & K. 441.

(b) *For Life.*

Bequest for the joint lives of A and B, and after their decease to C, is a gift for the joint lives and the life of the survivor. *Townley v. Bolton*, 2 Law J. (N.S.) Chanc. 25, s. c. 1 M. & K. 148.

A bequest of personalty to A and B, equally, and in case of the death of either, to the survivor; and in the event of their marrying and having children, to the children of them, or the survivor of them, if they should attain twenty-one, but if not, then among the children of P G:—Held, to give only a life-interest to B on A's death unmarried; and that on her death, without children, the children of P G would take. *Child v. Gillett*, 3 Law J. (N.S.) Chanc. 124, s. c. 3 M. & K. 71.

A testator gave to J H, for and during his life, an annuity of 30*l.*, charged on his real and personal estate, and provided, that if J H should intermarry and leave issue of his body lawfully begotten at the time of his decease, then the annuity should, after his decease, be paid to his issue lawfully begotten, and their heirs and assigns for ever; and in default of such issue, to the right heirs of J H for ever.

J H, by lease and release, and by fine sur grant, &c. conveyed the annuity absolutely to a purchaser:—Held, that J H took an estate for life, with remainder to his issue (if any) living at his death, and that such conveyance and fine were inoperative as against his issue living at his death. *Saunders v. Howell*, 4 Law J. (N.S.) Chanc. 219.

(c) *Tenancy in Common.*

Bequest to A for life, and after her decease, to her children, when they arrived at twenty-one. A had two children, both of whom attained twenty-one:—Held, that they were tenants in common. *Woodgate v. Unwin*, 4 Sim. 129.

(F) *SURVIVORSHIP.*

A bequest of residue "to my executors herein-after named, to enable them to pay debts, legacies, funeral and testamentary charges, and also to recompense them for their trouble, equally between them;" followed by the appointment of three persons as executors, is a gift to those persons as a class in their official character; and therefore, one having died in the lifetime of the testator, the whole residue vests in the two survivors. *Knight v. Gould*, 2 M. & K. 295.

(G) *SPECIFIC.*

A testatrix, by her will, bequeathed funded property sufficient to pay an annuity of 50*l.* to A for life, and after A's death, she bequeathed the fund to other persons. And, after giving various pecuniary legacies, she bequeathed to B the whole of the remainder of her (the testatrix's) dividends, during her life; and after B's decease, she bequeathed 1,000*l.* stock to C, and other sums of stock to other persons. The testatrix died shortly after the date of her will, entitled to 606*l.* long annuities, but to no other stock:—Held, that the bequest to B during her life, of the whole of the dividends of the testa-

trix, was specific, and that C and the other legatees in remainder after B's death, were not entitled to have the long annuities converted into bank annuities; though, being a decreasing fund, the legacies might altogether fail. *Vincent v. Newcombe*, 1 You. 599.

A legacy of 1,000*l.*, "being part of the monies received by J from my debtor, A G, but not remitted to me;" is specific. *Nelson v. Carter*, 5 Sim. 530.

A testator by his will gave 5,000*l.* bank stock to A and her children, and directed that if the amount of stock standing in his name at his decease should be insufficient, his executors should purchase sufficient to make up that sum. At the testator's death he had only 2,000*l.* bank stock in his name:—Held, that the bequest of that sum was specific. *Hobson v. Blackburn*, 2 Law J. (N.S.) Chanc. 168, s. c. 1 M. & K. 571.

Where a specific legacy is given by will, and the subject of the bequest is mortgaged by the testator, the right of redemption which the testator has under the mortgage must be exercised by the executors in favour of the specific legatee; or, if the legacy be not redeemed, the legatee is entitled to compensation in respect of it. *Knight v. Davis*, 3 Law J. (N.S.) Chanc. 81, s. c. 3 M. & K. 358.

A testator gave annuities "out of any money arising from whatever dividends he might die possessed of in the Bank; the remainder to A B, in order to enable him to assist such of the children of C D, as he might find deserving of encouragement," and then a gift of the portions of the annuitants in the dividends after their respective deceases to A B, but the capital to remain in the Bank. And he gave to E and F equally all his money, bills, notes, &c.:—Held, that A B was entitled to the capital of the stock, out of the dividends of which the annuities were payable, subject to the payment of the annuities: that there was no constructive trust for the benefit of the children of C D; and that the gift to E and F was not a residuary, but a specific bequest. *Hemming v. Whittam*, 1 Law J. (N.S.) Chanc. 94, s. c. 5 Sim. 22.

(H) *OF CHATTELS TO GO WITH A TITLE.*

Lord Vere bequeathed certain chattels to trustees, in trust for his wife for life, and after her decease to his son for life, and after the decease of the survivor of them, in trust for such person as should from time to time be Lord Vere; it being his will and intention, that the same should, after the decease of his wife, go and be held with the title of the family, as far as the rules of law and equity would permit. The testator left his wife and son surviving him, and also two sons of his son. After the death of the wife and son, the eldest grandson succeeded to the title, and to the enjoyment of the chattels, and died, leaving an only son, who then succeeded to the title, and died an infant, and unmarried, leaving the second grandson of the testator surviving him:—Held, by the Lords, reversing a decree of the Court below, that the chattels vested absolutely in the eldest grandson, on succeeding to the title. *Tollmachers v. Coventry*, 2 C. & F. 611, s. c. 8 Bligh, N.S. 547.

## (I) CUMULATIVE.

A testatrix bequeathed to C T, "after her husband's decease, and in default or failure of issue of their marriage, 100*l*." She afterwards bequeathed "to her brother C T 100*l*;" and she directed that the legacies, wherein no time was fixed for payment, were to be paid within three months after her husband's decease, in default of issue:—Held, that such bequests were not cumulative, and that the legatee was entitled to one sum of 100*l* only. *Manning v. Thesiger*, 4 Law J. (N.S.) Chanc. 285, s. c. 3 M. & K. 29.

Testator, by a will duly attested, gave legacies to various persons, charged upon his real and personal estates, and payable at the end of two years after his death, and he directed that, if his property should be more than sufficient to pay the legacies, they should be increased proportionably. By an unattested paper, purporting to be instructions for a will, but admitted to probate, the testator gave legacies to many of the legatees in the will, either individually, or as members of a family; but the directions as to the time of payment, and the increase of the legacies, were omitted:—Held, that the legacies in the unattested paper were not substitutional for the legacies in the will, but cumulative. *Strong v. Ingram*, 6 Sim. 197.

Upon the question, whether a legacy is cumulative or substitutional, the object of the Court will be to ascertain the testator's intention, which can only be done by a close and critical examination of the language used in the testamentary instruments:—Held, upon the language of the codicil in this case, that a bequest contained in the codicil was in addition to one given by the will.

Under what particular circumstances, and to what extent parol evidence may be resorted to, upon the question of cumulation or substitution, *quare*. *Guy v. Sharp*, 1 M. & Ro. 589.

## (K) VESTED, AND VESTING.

Bequest in trust of residue for C E C, and M A C, equally for their lives, and after the decease of C E C and M A C, upon trust, to divide the residue amongst the lawful issue of C E C and M A C, or such of them as shall have issue, in equal parts; and, in default of such issue, over. M A C had seven children; two died in the lifetime of M A C, five survived her:—The five survivors held to have acquired a vested interest in their mother's share. *Cross v. Cross*, 4 Law J. (N.S.) Chanc. 38.

A testator bequeaths legacies of 500*l* a piece "to each child that may be born to either of the children of either of my brothers" at twenty-one years of age. Children born after the testator's death are not entitled, the words "may be born" applying to the interval between the making of the will and the death of the testator. *Storrs v. Bendow*, 2 Law J. (N.S.) Chanc. 201, s. c. 2 M. & K. 46.

A testator bequeaths his residuary personal estate, in trust, to pay the interest and income to his daughter for life; after her decease, to pay the same or a sufficient part for maintenance of the children of the daughter, till they attain twenty-four, and when they attain that age, to pay the residue and unapplied income to all the children; and in case

of the death of any of them under that age, without leaving lawful issue, to pay the residue and unapplied income to such of the children as attain that age; if but one, the whole to that one. But in case all the children die under that age, and without leaving lawful issue, then upon trust to pay the income to W B:—Held, that the effect of these words was, to give vested interests to the children, in consequence of the gift over being only in case of the deaths of the children under twenty-four, without leaving lawful issue. *Bland v. Williams*, 3 Law J. (N.S.) Chanc. 218, s. c. 2 M. & K. 411.

A testator gives one-third of his personal property to his daughter, and, in case of his decease, to have the interest therein and principal at twenty-five:—Held, that this gave a vested interest to the daughter, though she died under twenty-five. *Breedon v. Tugman*, 3 Law J. (N.S.) Chanc. 169, s. c. 3 M. & K. 289.

A testator, by his will, bequeathed legacies of 50*l* each to his six grandchildren when the youngest should come of age, with interest in the meantime; and he directed an estate to be sold at that time for payment of the legacies:—Held, that the legacies vested immediately, the payment being postponed for the convenience of the estate. *Murkin v. Phillipson*, 3 Law J. (N.S.) Chanc. 148, s. c. 3 M. & K. 257.

Testator bequeathed 5,000*l* to A, if he attained twenty-one, but if he should not attain that age, or die without leaving issue male, then over:—Held, that the 5,000*l* vested absolutely in A, on his attaining twenty-one. *Mytton v. Boodle*, 6 Sim. 457.

## (L) CONDITIONAL.

[*Tollner v. Marriott*, 2 Law J. Dig. 177, s. c. 4 Sim. 19.]

Testator directed his trustees to pay to his daughters, their portions on their marrying with the consent, in writing, of his trustees first had and obtained; and, on their marrying without such consent, that the trustees should stand possessed of their fortunes, in trust for their separate use for life, with remainder to their children. A proposed to the trustees to marry one of the daughters, who was an infant. The terms, as communicated to her by one of the trustees, were, that 500*l* should be paid to A, on his marriage, out of her portion, and that the remainder should be invested, in the names of the trustees, for her sole use and benefit, the interest to be paid to her only. The daughter accepted the proposals, and asked the consent of the trustees. The same trustee then wrote a letter to the daughter saying, that he and his co-trustees had not then signed the consent, but were ready to do so as soon as requisite; and a draft was prepared, by which (subject to the payment of the 500*l* to the husband,) the portion was settled on the intended husband during his solvency, then on the intended wife, for her separate use, for life, with remainder to the children, with remainder to the survivor of the intended husband and wife. A having made certain arrangements for the disposal of the 500*l*, which the trustees disapproved of, the trustee who had written the letter, refused to look at the draft of the settlement, saying, he should expect A to make some other proposals respecting the disposal of the 500*l*. Another arrange-

ment was accordingly made, and communicated to the trustee, but he took no notice of it, and his name was struck out of the settlement; and the marriage (to which his co-trustee had duly consented,) was had, without further communication with him:—Held, that the letter was a sufficient consent on his part to the marriage. *Le Jeune v. Budd*, 6 Sim. 441.

#### (M) ON WHAT PROPERTY CHARGEABLE.

Two estates were devised charged with legacies; the devisee mortgaged both, became bankrupt, and both were sold; the proceeds of one were sufficient to pay legacies and mortgage money; *secus*, the other:—Held, the legacies should be paid out of the former alone. *Ex parte Hartley*, 2 M. & A. 406.

A testator gave to his executors, in separate clauses of his will, all his real and personal estate upon the trusts after mentioned; he then gave a life estate in both species of property, and directed that, after the death of the tenants for life, his executors should invest 1,000*l.* for the benefit of his nieces. The personal estate proving deficient, the 1,000*l.* was held to be charged on the real estate. *Scoley v. Cartledge*, 4 Law J. (N.S.) Chanc. 85.

A testator gave a legacy of 2,000*l.*, and he charged it, and his debts, and funeral and testamentary expenses, on the D estate. He subsequently gave all his personal estate to one for life, and directed an inventory to be taken thereof:—Held, that the D estate was primarily liable for the legacy and debts, &c. *Price v. Price*, 4 Law J. (N.S.) Chanc. 243.

#### (N) INVESTMENT OF.

A testator directed his executors and trustees to sell all his real and personal property with all convenient speed after his decease; and, after certain specific bequests, he directed his trustees to stand possessed of the rents, issues, and profits of all his estates and effects whatsoever until investment; and, upon investment thereof, he directed that the whole of his residuary estate, property, and effects should be considered as divided into two equal moieties or half parts, and the interest of one moiety he directed should be paid into the proper hands of his daughter P V, for her separate use:—Held, that this was no gift till investment, but that the daughter was entitled to the interest from one year after the testator's death, though the whole was not then invested. *Vickers v. Scott*, 3 Law J. (N.S.) Chanc. 223.

#### (O) ABATEMENT.

A testator bequeathed 800*l.* to be enjoyed by A B for life, the principal to devolve eventually to his residuary legatees. The estate proved insufficient, and the legatees were directed to abate proportionably:—Held, that, on the death of A B, the residuary legatees did not become entitled to the 800*l.*; but that the same was applicable, in the first instance, to making up the other abated legacies. *Arnold v. Arnold*, 4 Law J. (N.S.) Chanc. 79.

A testator gave several life annuities charged upon a particular fund, the income of which he considered to be equal to them in value; and he gave the fund itself over to another person for life, upon the respective deaths of the annuitants; the fund having proved deficient, and the annuitants

having suffered a proportional abatement, it was held on the death of one of them, that the income from the fund released by the falling in of her annuity, went over to the tenant for life, and was not applicable to make good the deficiency of the continuing annuities. *Scott v. Salmon*, 1 M. & K. 368.

#### (P) PAYMENT AND SATISFACTION.

##### [See DOUBLE PROVISION.]

A legacy of 1,000*l.* to be paid to a child at twenty-one, in the meantime to be applied in education, or placing out in business.

The infant being seventeen, and the father not of sufficient ability, a portion of the legacy directed to be sold in order to apprentice him to a surgeon, on reference to the Master. *Wilson v. Thomas*, 4 Law J. (N.S.) Chanc. 25.

Where legacies out of property in the colonies, of a specific amount, are directed to be paid in England, the specific sums must be paid, without any allowance for the expense of transmission. *Martin v. Fear*, 2 Law J. (N.S.) Chanc. 21.

A testator, living in Jamaica, gave, by his will, legacies of 1,000*l.* and 1,000*l.* to A, and 500*l.* each to B and C, who also resided there, and directed that they should be paid out of the money due to him upon bonds given by the said A. The testator afterwards went to Scotland, where he died in 1790. The legatees left Jamaica in the same year. Probate of the will was granted there in 1791, and the bonds due from A were put in suit by the executor. In 1818, the legacies given to B and C were purchased by A, their near relative, for 25*l.* each. In 1821, administration, with the will of the testator annexed, was, for the first time, taken out in this country, and in that year A filed his bill, claiming payment of these legacies:—Held, that the Court of Equity might, after such lapse of time, consider all the circumstances of the case, and presume the legacies to be satisfied. *Campbell v. Sandford*, 2 C. & F. 429, s.c. 8 Bligh, N.S. 622.

#### (Q) INTEREST UPON.

A testator bequeaths a legacy to his daughter, and devises to his son after the death of his wife certain real property charged with the payment of the legacy:—The legacy held to carry interest from the end of one year after the death of the testator. *Freeman v. Simpson*, 2 Law J. (N.S.) Chanc. 141, s.c. 6 Sim. 75.

#### (R) ASSIGNMENT.

"We hereby authorize the executors of the late Captain A to pay you any legacy or monies that he may have bequeathed to us, or either of us, in part payment of the various loans you have so kindly lent us, and your receipt shall be to them a sufficient discharge for the same; there appears to be about 150*l.* due to you." *Quære*, whether the above instrument given by husband and wife (the latter being entitled to a legacy of 100*l.*) to a party to whom the husband is indebted, the executor, on the claim of that party being made known to him, stating that he would pay the legacy to the wife, operates as an equitable assignment of the legacy, as against the assignee of the husband, under the Insolvent Debtors Act?



Held, at law, that where the wife received the legacy after the petition and assignment of her husband under the Insolvent Debtors Act, and immediately paid it over under the above authority, the legacy passed to the assignee of the insolvent, and that he could recover the amount in an action for money had and received. *Best v. Argles*, 3 Law J. (n.s.) Exch. 117, s. c. 2 C. & M. 394; 4 Tyr. 256.

## (S) ADEMPMENT.

Testator bequeathed 7,000*l.* secured on mortgage of an estate at W, belonging to R T. The 7,000*l.* and interest were received after the date of the will, by the testator's agent, on his account, and, immediately afterwards, 6,000*l.*, part of it, was invested on another mortgage, and the remainder was paid into a bank in which the testator had no other monies, but was afterwards drawn out by a person to whom the testator had given a cheque for the amount:—Held, that the legacy was specific, and notwithstanding the 6,000*l.* remained due on the second mortgage at the testator's death, that the legacy was wholly adeemed. *Gardner v. Hatton*, 6 Sim. 98.

A legacy adeemed by a post-nuptial settlement. *Morton v. Harsley*, 2 Law J. (n.s.) Chanc. 192.

Where a specific legacy of stock is given, the legacy is adeemed by a change of the stock for any purpose. *Pattison v. Pattison*, 2 Law J. (n.s.) Chanc. 15, s. c. 1 M. & K. 12.

Where a legacy is given to a child simply, and afterwards, upon marriage, the portion is settled, the legacy is adeemed;—*secus*, where a legacy is given to a child, remainder to children, and afterwards, on marriage, the portion is settled in a different manner; as, in the present case, on the children of that marriage. *Wharton v. Lord Durham*, 2 Law J. (n.s.) Chanc. 25, s. c. 5 Sim. 297; affirmed, 3 M. & K. 472.

## (T) FORFEITED.

A testator gave to E B a life interest in some property, and directed, that if he should mortgage, assign, sell, charge, or incur, or in any manner anticipate the receipt of a provision given him by his will, or should do any deed, &c., whereby his will and interest might be frustrated, then that the interest should go over:—Held, that E B's interest ceased on his taking the benefit of the Insolvent Debtors Act. *Tyser v. Jones*, 3 Law J. (n.s.) Chanc. 240.

A testator directed his trustees to pay certain rents to his son, from year to year, without power of assigning or anticipating, and declared, that if he should impede or frustrate the trusts, then the rents to go over. The son conveyed the property to trustees for his creditors:—Held, by the Lord Chancellor, on appeal, that the son's interest had thereby become forfeited. *Lewis v. Lewis*, 4 Law J. (n.s.) Chanc. 77, s. c. 12 Law J. Chanc. 55; 6 Sim. 304.

## (U) LAPSED.

A legacy given to A, and, in case of his death before his legacy should become payable, upon trust for his issue:—Held, not to lapse by A's death in

the testator's life, but to belong to his children. *Collins v. Johnson*, 4 Law J. (n.s.) Chanc. 226.

Testator devised real estates to A for life, remainder to B in fee, and he gave a legacy to C, to be paid to her by B within twelve months after A's death: and he charged his estate with the legacy; and appointed A his executrix; C died in A's lifetime:—Held, that the legacy did not lapse. *Poole v. Terry*, 4 Sim. 294.

Where a testator directed his real and personal estate to be sold, and his debts and legacies to be thereout paid, including certain charitable legacies, and gave the residue of the mixed fund to A and B:—the failure of the charitable legacies was held to enure to the benefit of A and B. Affirmed on appeal. *Green v. Jackson*, 2 Russ. & M. 238.

## (W) REVOKED.

Legacy to executors revoked under circumstances. *Perry v. Meddowcroft*, 2 Law J. (n.s.) Chanc. 40.

## (X) VOID.

[See *Candy v. Campbell*, ante, What Interest vests.]

[*Attorney General v. Mill*, 3 Russ. 328, 1 Dig. Law J. 320; affirmed, 5 Bligh, n.s. 593, 2 D. & Cl. 393.]

A testator made a bequest in the following words:—"I give to my executors the sum of 1,000*l.*, upon trust to be invested in the funds of the Bank of England, during the lives of the survivors or survivor, for the widows of J S and T D, to be divided between them, share and share alike." The testator appointed two executors of his will. One of the widows died in the testator's lifetime, the other widow survived the testator, and received the interest of the 1,000*l.* during her life:—Held, upon the death of the surviving widow, that the bequest was void for uncertainty, and belonged therefore to the residuary legatee. *Hoffman v. Hankey*, 3 M. & K. 376.

Gift over, on the happening of a certain contingency, "to such persons as shall then be entitled to my personal estate." When the event happened, the personal estate had been all distributed. Gift over void for uncertainty. *Turner v. Fiedrick*, 2 Law J. (n.s.) Chanc. 2, s. c. 5 Sim. 466.

A bequest to priests and chapels, that the testatrix might have the benefit of their prayers and masses for the repose of her soul, is void as a superstitious use, and the next-of-kin are entitled.

A residuary bequest to executors, to be appropriated in such way as they may judge best calculated to promote the knowledge of the Catholic Christian religion among the poor inhabitants of S, is a valid bequest. *West v. Shuttleworth*, 4 Law J. (n.s.) Chanc. 115, s. c. 2 M. & K. 684.

A testator gave four sixth shares of the interest of a sum in the funds to four ladies, to each a share, and in reversion to their lawful heirs in perpetuity in the female line; and the will then afterwards continued, "and as the four last-mentioned legatees are at this date all unmarried, and consequently without lawful heirs, and as in the course of Providence they may die without being married, and consequently without lawful heirs, in this event I direct the share of the interest of my property, which would thus revert on the death of any one or

all of the above-named legatees, shall be disposed of in the following manner; the first share that may thus become disposable by the death of any one of the legatees, I bequeath in perpetuity to the Bible Society." One of the persons died unmarried:—Held, that she took the share in the funds absolutely, and that the gift over was void. *Warren v. Coley*, 4 Law J. (N.S.) Chanc. 92.

#### (Y) RESIDUE OR SURPLUS.

Testator gave 1,000*l.* to his natural son, and if he died under twenty-one, then that sum and the residue to go to the testator's family; and he gave the residue to his natural son, to be applied as above directed. The son died under twenty-one:—Held, that the 1,000*l.* was part of the residue, and did not pass to the testator's next-of-kin as a legacy. *Breashur v. Dor*, 4 Sim. 21.

A testator gave the interest of 2,000*l.*, to be paid to his daughter for life; and in case her husband should survive her, and have children then living by her, he was to enjoy the interest during his widowhood; but on his marrying again, it was to devolve to the children then living, in equal portions. The husband died before the wife—the wife died leaving several children:—Held, that the children were not entitled, and that the money fell into the residue. *Carew v. Robinson*, 4 Law J. (N.S.) Chanc. 56.

A bequest of "the rest of my property to be divided among my son, to whom I give 5,000*l.*, and the residue to be equally shared by my brothers and sisters":—Held, to give the son 5,000*l.* only. *Stewart v. Stewart*, 4 Law J. (N.S.) Exch. 230.

Bequest of a particular fund "for payment of debts and legacies given by my will and former codicil," is no exoneration of the rest of the testator's estate from its liabilities; nor does it create any exemption of other parts of the assets not specifically bequeathed. General bequest of the residue is a legacy. *Duke of Sussex v. Moore*, 2 Law J. (N.S.) Chanc. 2.

A testatrix, after bequeathing to trustees "funded property sufficient to pay A 50*l.* for her life," and at her decease giving and bequeathing "the said funded property to B and her heirs," and, after also giving various legacies, gave and bequeathed to C "the whole of the remainder of her dividends for her life;" and at her decease gave several considerable legacies, viz. to D 1,000*l.* stock, B 1,000*l.* stock, &c.—At the making of her will, and at her death, the testatrix was possessed only of bank long annuities: and, held, that by such a bequest to C, C was entitled to the whole residue of such long annuities for her life, after sufficient being raised thereout in aid of her other personal estate, to realize the said funded property, and pay the previous legacies; and that the Court could not enter into the consideration whether there might or might not be a sufficient fund to answer the legacies given after her decease. *Vincent v. Newcombe*, 2 Law J. (N.S.) Exch. 15.

"I think there will be something left after funeral expenses, &c. paid, to give W B for equipping him for a profession:"—Held, sufficient to shew an intention to constitute W B residuary legatee. *Leigh-ton v. Baillie*, 3 Law J. (N.S.) Chanc. 133, s. c. 3 M. & K. 267.

A testator by will directs the residue of his property to be divided among his two daughters, in certain given proportions; and by codicil, he directs that in case these proportions shall exceed certain specific sums, all beyond that shall be equally divided between his son and his two daughters. The codicil does not alter the nature of the bequest, but leaves the gift to the daughters still in the character of part of the residue. *Duke v. Hinzman*, 2 Law J. (N.S.) Chanc. 185.

Residuary bequest in trust, to purchase stock and pay the dividends to C D for life, and after her decease, to pay principal and interest to C L D, if she shall survive her mother C D, and attain twenty-one; and if C L D shall not survive her mother and live to attain twenty-one, to pay to such other child or children of C D, as she shall appoint; in default of appointment, to such other child or children of C D as shall be living at her death, equally to be divided between them share and share alike, to be paid as each shall attain twenty-one, &c.; and if all such other children shall happen to die before twenty-one, then in trust for L M, her heirs, &c. C D survived testatrix, but made no appointment, and C L D and another child of C D who attained twenty-one, died during the life of their mother:—Held, that on the death of C D, the heir of L M was entitled to the residue. *Mackinnon v. Sewell*, 3 Law J. (N.S.) Chanc. 161, s. c. 2 M. & K. 202; 5 Sim. 78.

#### (Z) ELECTION.

[See ELECTION.]

#### (AA) LEGACY DUTY.

[See DEVISE, Domicile.]

A proportionate part of stock in the funds ordered to be transferred to the comptroller in lieu of legacy duty thereon. *Kilpin v. Kilpin*, 4 Law J. (N.S.) Chanc. 17.

Legacy duty is not payable on legacies bequeathed by a foreign testator, and paid in this country by English executors to English legatees. *In re Bruce*, 1 Law J. (N.S.) Exch. 153, s. c. 2 Tyr. 475; 2 C. & J. 436.

A "testamentary instrument" defined to be a writing, in whatever form, which remains dormant during the life of the grantor, is revocable by him, and only comes into operation at his death.

Terms of such a testamentary instrument, which were held to imply a direction to sell the testator's real estate; and the proceeds of the real estate sold under it,—Held, liable to duty. *The Advocate General v. Ramsay's Trustees*, 4 Law J. (N.S.) Exch. 211, s. c. 2 C. M. & R. 224.

An instrument vesting property in trustees for the benefit of the grantor for his life, and after his decease, for other persons, with a power of revocation, is not testamentary, and, consequently, not liable to the payment of legacy duty. *Tompson v. Browne*, 3 M. & K. 32.

Lands were devised, to the use, among others, that M A F should take from and out of the same premises, an annuity or yearly rent-charge of 500*l.* a year, to be paid clear of all taxes and deductions, remainder to S for life, subject to the annuity:—Held, that the annuity was to be paid clear of legacy duty, and was a charge upon the land; and conse-

quently that S, who had entered into possession under the devise to him, and been compelled to pay the legacy duty on the annuity, pursuant to 45 Geo. 3, c. 28, s. 5, could not recover it again from the annuitant. *Stow v. Davenport*, 5 B. & Ad. 359, s. c. 2 N. & M. 805.

Annuity, payable out of real estate, clear of all taxes and outgoings:—Held, that the annuitant takes it clear of the legacy duty. *Louch v. Peters*, 3 Law J. (n.s.) Chanc. 167, s. c. 1 M. & K. 489.

A testator, by his will, gave certain legacies to charitable institutions, to be paid prior to the payment of his debts and other legacies; and he directed all his legacies to be paid within two years after his decease, free from any tax or duty. By a codicil, he bequeathed legacies payable and raiseable immediately:—Held, that the charitable legacies, and the legacy given by codicil raiseable immediately, were exempt from legacy duty. *Byne v. Curry*, 3 Law J. (n.s.) Exch. 177, s. c. 2 C. & J. 603; 4 Tyr. 478.

The proceeds of real estate, devised to trustees, with a power to sell as shall appear to them most expedient towards effecting the arrangement of the testator's property, a portion of which estate has been sold shortly after the testator's death, by reason of its being land suitable for building, and the residue ten years afterwards, under an order in equity founded upon a Master's report that it would be most beneficial for the parties interested that a sale should take place, held not liable to legacy duty, under 55 Geo. 3, c. 184, sch. 3. *In re Evans*, 4 Law J. (n.s.) Exch. 201, s. c. 2 C. M. & R. 206.

Testator gave the residue of his freehold and copyhold messuages, lands, and tenements, (not being rent-charges for life or lives,) to R J and W J, to the use of C T, the wife of J T, for life; and, from and after her decease, "to the use and intent, that J T should, during his life, receive by and out of the said hereditaments, and the rents thereof, one annuity or clear yearly rent-charge of 500*l.*, clear of taxes and without any deduction or abatement whatsoever, to be payable quarterly, &c.—with such powers and remedies of distress and entry, and perception of rents, in case the said annuity of 500*l.* should be in arrear, as are reserved to lessors for the recovery of rents on leases for years;" and, subject to the said annuity or yearly rent-charge, to certain other uses; and on failure thereof, as to one moiety, to the use of R J, his heirs and assigns for ever; and, as to the other moiety, to W J, and his assigns for life:—Held, that the interest or benefit passing to J T was subject to the legacy duty, being "a gift by way of annuity, out of or charged upon the testator's real estate," within the statute 55 Geo. 3, c. 184, schedule part 3, 2.—Held, also, that R J and W J were jointly bound to pay such duty, but were entitled, on payment of the annuity, to retain the amount thereof. *The Attorney General v. Randle Jackson*, 1 Law J. (n.s.) Exch. 21, s. c. 2 C. & J. 101; 2 Tyr. 50.

A testator born in Scotland, but having for many years resided in India, died there, leaving real and personal property situated in India, but not assets in England. By his will and testamentary papers, all executed in India, he left the whole of his property in equal divisions, to his four natural children, or the survivors of them, and their heirs, subject to

some small legacies and annuities. His executors, who were in India, before and at the time of his death, having obtained an Indian probate, paid the debts and bequests, and got in the testator's estate, and converted the principal part thereof into money, which they sent to their bankers in England, and afterwards invested in the funds in their own names. A suit was afterwards instituted in the Court of Chancery, in England, to ascertain the claims of the residuary legatees under the will; whereupon the stock was transferred into the name of the Accountant General of the Court of Chancery; and that Court made a decree declaring the shares of the several claimants. In that suit a claim was made on behalf of the Crown, for the legacy duty on the residuary fund:—Held, by the House of Lords, affirming the judgments of the Court below; that legacy duty was not payable on the legacies, annuities, or shares of the residue bequeathed. *The Attorney General v. Forbes*, 2 C. & F. 48, s. c. *Jackson v. Forbes*, 1 Law J. (n.s.) Exch. 159; 8 Bligh, n.s. 16; 2 C. & J. 382; 2 Tyr. 354; 3 Tyr. 982.

Bequest of 12,000*l.* stock to trustees, upon trust for son for life, his wife for life; after decease of son, (subject to life interest of his wife), upon trust, to transfer fund to and amongst his wife (if then living) and any children he should have, in such shares and for such interests as he should appoint.

Bequest of residue, as to one third, to be paid to the same trustees, upon the same trusts, and with the same restrictions, limitations, and conditions, as declared of the 12,000*l.*; but testator declared expressly, that the wife of his son should have no interest in this third of the residue.

The son made a will, reciting that of his father, and appointed 11,800*l.*, part of the 12,000*l.*, to his wife, and 200*l.*, the remainder, to any children he might have; and bequeathed the residue of his estate and effects to his wife.

The son died, never having had a child; the wife and the executors of the son's will filed the bill against executors of original testator's will for the 11,800*l.*, and the third share of residue, bequeathed by the father's will:—Held, that the wife was entitled to the 11,800*l.*, under the appointment; but that she could take no interest, by the bequest of her husband's will, in the one-third of the residue of the original testator's estate.

And, the testator having directed the legacy duty to be paid out of his estate, the Court directed a reference, to compute the amount of that duty, in respect to the life-interests, and ultimate interests; and ordered sufficient of the fund to be retained, to answer the duty when due; the dividends, in the meantime, to be paid to the persons entitled to the income for the time being. *Houstoun v. Houstoun*, 1 Law J. (n.s.) Chanc. 50, s. c. 4 Sim. 611.

The power of the Court, under 42 Geo. 3, c. 99, s. 2, is discretionary, and, it seems, will not be exercised where an unreasonable time has elapsed without any application to account, unless the delay is explained.

Where the original testator had been dead upwards of twenty years, the Court refused to compel the surviving executor of his executrix, to account, he never having acted except in signing documents, and knowing nothing of the estate of his testatrix,

and not having received assets of hers or of the original testator. *In re Pigott*, 2 Law J. (N.S.) Exch. 298, s. c. 1 C. & M. 827; 3 Tyr. 859.

A sum of money, appointed by will under a power, though not the personal estate of the donee of the power, is liable to legacy duty.

Thus, where by a marriage settlement 20,000*l.* was vested in trustees, to pay the dividends to the wife's father for life, and after his death to the husband, with remainder to the wife for her life, with a power of appointment amongst children, and in default of issue, as she should by will appoint, in case she died in her husband's lifetime, or in case she should survive him, by deed or will; and in default of her appointment, amongst her next-of-kin; and the wife, after appointing this sum by will, died in her husband's lifetime:—It was held, that legacy duty was payable thereon. *In re Catherine Cholmondeley*, 2 Law J. (N.S.) Exch. 66, s. c. 1 C. & M. 149; 3 Tyr. 10.

Where a residue is bequeathed to executors in trust to divide the interest among poor pious persons in 10*l.* or 15*l.*, as they shall see fit, the individuals of the class answering that description are alone beneficially interested, and liable to legacy duty, where the sum received by each in consequence of being selected more than once to receive the bounty amounts to more than 20*l.* In such cases only, are the executors accountable for legacy duty, according to the relationship of the individual to the testator. *In re Wilkinson*, 3 Law J. (N.S.) Exch. 236, s. c. 1 C. M. & R. 142; 4 Tyr. 416.

Where a testator dies in this country, possessed of personal property, here, and also in foreign funds, and the executor takes out probate here, and pays probate duty on the amount of the property in this country, he is not chargeable with the duty in respect of the property in the foreign funds, although he afterwards obtain such property, and administer it. *The Attorney General v. Hope*, 2 C. & J. 84, s. c. 8 Bligh, N.S. 44.

#### (BB) RIGHTS OF LEGATEES.

*Semble*, that, in a cause of subtraction of legacy, the legatee, on giving security to refund, would be entitled to recover his legacy. *Higgins v. Higgins*, 4 Hag. Ec. 242.

A testator, in the first place, directed, that his debts should be paid out of his personal estate. He then gave to E F L a leasehold, subject to an annuity of 100*l.* to be paid thereout, and also subject to any mortgage thereon:—Held, that the legatee was entitled to have the mortgage paid out of the general personal estate of the testator. *Kent v. Leake*, 4 Law J. (N.S.) Chanc. 111.

A testator bequeathed to A, "the legal interest of 600*l.*" charged upon a real estate; the estate was afterwards sold with the consent of the annuitant:—Held, that he was entitled to have such part of the purchase money invested as would secure him an annuity of 30*l.* a year. *Peacock v. Burt*, 4 Law J. (N.S.) Chanc. 49.

Where a legacy is given to a natural child, with direction to apply the interest for his maintenance, the interest is payable from the death of the testator. *Dowling v. Tyrell*, 2 Russ. & M. 343.

The legatee of a house, held by the testator on a lease at a reserved rent higher than it could be let

for after his death, cannot reject the gift of the lease, and retain an annuity under the will, but must take the benefit *cum onere*. *Talbot v. Earl of Radnor*, 3 M. & K. 252.

A testator directs his trustees, of whom his wife was one, to permit his wife to receive the rents and profits of his real estates, and thereout in the first place to retain to herself an annuity of 400*l.* a year, and to pay annuities of 100*l.* a year to each of his daughters:—Held, that these words do not give a priority to the wife in respect of her annuity over the daughters. *Jenkins v. Briant*, 3 Law J. (N.S.) Chanc. 169.

#### LEGITIMACY.

[See BASTARD.]

#### LEX LOCI.

[See ARREST.]

#### LIBEL.

[See SLANDER. And see COSTS—PRACTICE, Mode of Conducting Trial—NEWSPAPER—VENUE.]

- (A) ACTIONS FOR.
- (B) PLEADINGS.
- (C) EVIDENCE.
- (D) INFORMATIONS AND INDICTMENTS.

#### (A) ACTIONS FOR.

A writing which imputes to the party fraudulent and dishonourable conduct, is a libel, and the subject-matter of an action, whether the innuendos in the declaration are supported by the words used or not. *Digby v. Thompson*, 2 Law J. (N.S.) K.B. 140, s. c. 1 N. & M. 485; 4 B. & Ad. 321.

Action for libel, consisting of the following sentence in a newspaper: "Mr. Richards (the plaintiff) is an old man, being, as we hear, upwards of sixty years of age. He also exercises great power, necessarily delegated to him by Lord Gage, and ought therefore, both on account of his years and of his influential station, to be the man to protect the wives and daughters of his neighbours from the ruffian's insult, rather than to violate in their persons, not only the decencies of society, but the modesty of nature. We should be sorry to hear, that any man, who had lived to Mr. Richards's years, had been pronounced guilty of such an offence as is alleged against him; yet the respect we bear our neighbours, and the feeble protection which it is our duty to throw over the modest and virtuous of the gentler sex, compel us to express a hope that Lord Gage will see the propriety of instituting some inquiry." After verdict for the plaintiff,—held, on motion in arrest of judgment, that the sentence was libellous on the plaintiff. *Richards v. Cohen*, 1 Law J. (N.S.) K.B. 210.

The plaintiff gave evidence before commissioners *de lunatico inquirendo*. Defendant published an account of the proceedings, in which he did not give the evidence or the speech of counsel at length. He merely stated the result of such evidence and the object with which it was given, and that counsel commented with cutting severity upon the testimony

thus given. In an action for libel, the defendant justified that part which alleged the cutting severity of counsel; upon special demurrer,—held, that such part referring to, and connected with, the former parts of the publication, was libellous, and that a plea justifying it was bad. *Roberts v. Brown*, 3 Law J. (n.s.) C.P. 168, s.c. 10 Bing. 519; 4 Mo. & Sc. 407.

The defendant wrote a letter to the manager of some property, in which he and the plaintiff were jointly interested, principally with reference to the property, but also charging the plaintiff with misconduct towards his mother and aunt:—Held, that the latter part could not be considered as a privileged communication. *Warren v. Warren*, 3 Law J. (n.s.) Exch. 294, s.c. 1 C. M. & R. 250; 4 Tyr. 850.

The plaintiff, who had filled the situation of engineer in superintending the works of a railway company of which the defendant and one L were commissioners, became a candidate for the appointment of engineer to another undertaking, in which L was also a commissioner. The defendant, who did not know L was a commissioner, wrote to him recommending one B as a candidate, in reply to which, he received a letter stating that another person had been elected. He then wrote another letter to L upon the subject of the railway, containing libellous matter in respect of the plaintiff's conduct when in the situation of engineer to the company; and in consequence of that letter being shewn, the plaintiff was unsuccessful at a subsequent election:—Held, that the letter so written, after the first and before the second election, was not a privileged communication. *Brooks v. Blanshard*, 2 Law J. (n.s.) Exch. 275, s.c. 1 C. & M. 779; 3 Tyr. 844.

Describing a person as "Man Friday," not libellous without a special averment, touching the character and condition of "Man Friday."

A paragraph in a newspaper, headed "Gambling fracas," and stating, that a dispute at play arose between the plaintiff and another person, that a meeting was decided on by the friends of the parties, but that the plaintiff did not appear on the ground:—Held, not libellous, without an introductory averment, that the play intended was illegal play. *Forbes v. King*, 2 Law J. (n.s.) Exch. 109, s.c. 1 C. & M. 435; 3 Tyr. 385; 1 Dowl. P.C. 672.

A letter, written by a private individual to a public officer, complaining of the misconduct of a person under him, is not privileged from disclosure as an official communication; but, if made *bond fide* and without malice, such communication is not actionable as libellous, though some of the charges may not be true. *Blake v. Pitfold*, 1 M. & R. 198. [Taunton]

Every wilful unauthorized publication, injurious to the character of another, is a libel; but where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interest of that person, that which he writes under such circumstances is a privileged communication, and no action will lie for what is thus written, unless the writer be actuated by malice.

A, being a tenant of B, was desired by B to inform him if he saw or heard anything respecting the game. A wrote a letter to B, informing B that

his gamekeeper sold game:—Held, that, if A had been so informed, and believed the fact to be so, this was a privileged communication, and that the gamekeeper could not maintain any action for a libel. In such a case the defendant may give in evidence representations made to him as to the conduct of the gamekeeper, but cannot go into evidence of acts done by the gamekeeper. *Cochayne v. Hodgkinson*, 5 C. & P. 543. [Parke]

A letter to the Postmaster General, or to the secretary to the General Post-office, complaining of misconduct in a postmaster, is not a libel, if it was written as a *bond fide* complaint to obtain redress for a grievance that the party really believed he had suffered; and particular expressions are not to be too strictly scrutinized, if the intention of the defendant was good. *Woodward v. Lander*, 6 C. & P. 548. [Alderson]

Where one newspaper copied a libellous paragraph from another, adding the word "fudge" at the close:—Held, in an action by the party libelled against the publisher of the paper in which the word "fudge" was added, that it was for the jury to say whether the object was to vindicate the character of the party by the addition of the word, or whether it was only introduced for the purpose of creating an argument in case proceedings should be afterwards taken. *Hunt v. Algar*, 6 C. & P. 245. [Lyndhurst]

A libel contained in an advertisement by two tradesmen in partnership, stated, that they deemed it necessary to caution their friends against a fraudulent representation, that any part of their business had been removed, it being obvious that their concern was still carried on solely at No. 9, Mansion House Street; and that they had no connexion with a shop recently opened in another place under circumstances grossly misrepresented, and highly discreditable, with a view of defrauding them of a part of their business, is not justified by proof, that the person alluded to (who had been for several years in partnership with them) had issued a bill, in which, after thanking his friends for their favours during his residence at No. 9, opposite the Mansion House, he stated, that he had removed his establishment to another place, where the business would be carried on under the firm of R, R, C, & Co.; and, in addition to this, had put over his shop-door 'R, R, C, & Co.,' removed from opposite the Mansion House. *Chubb v. Flannagan*, 6 C. & P. 431. [Park]

The words "Threatening letters.—The Middlesex Grand Jury have returned a true bill against a gentleman, of some property, named French," published of a person in a newspaper, are libellous, as the words 'threatening letters' are to be taken in connexion with the matter following, and import unlawful threatening letters. *Harvey v. French*, 1 Law J. (n.s.) Exch. 231, s.c. 2 Tyr. 585; 1 C. & M. 11; 2 Mo. & Sc. 591.

#### (B) PLEADINGS.

Defendant stated in a letter, "He (the plaintiff) has become so inflated with self-importance by the few hundred pounds made in my service, (God only knows whether honestly or otherwise)." Upon action for libel, and verdict for the plaintiff, it was held, on motion in arrest of judgment, that the in-

nuendo, that the defendant by such words meant to insinuate, that the plaintiff conducted himself in a dishonest manner in the defendant's service, was good; inasmuch as such innuendo served only to explain, not to add to, the sense or meaning of the words imputed to the defendant. *Clegg v. Laffer*, 3 Law J. (N.S.) C.P. 66, s. c. 10 Bing. 253; 3 Mo. & Sc. 727.

An innuendo, without any introductory averment, that the defendant thereby "meant to insinuate and have it understood, that the plaintiff had been suspected to have been, and had been guilty of the offence of sending a letter without any name or signature thereto subscribed, directed to one — Trotter, threatening to kill and murder the said — Trotter, with a view of extorting money," is bad, but may be rejected as surplusage. *Harvey v. French*, 1 Law J. (N.S.) Exch. 231; 2 Mo. & Sc. 591; 1 C. & M. 11; 2 Tyr. 585.

#### (C) EVIDENCE.

[See, ante, *Cockayne v. Hodgkisson*.]

A declaration for a libel imputing "mismanagement or ignorance," is not sustained by evidence that the expressions used were "ignorance and inattention." *Brooks v. Blanshard*, 2 Law J. (N.S.) Exch. 275, s. c. 1 C. & M. 779; 3 Tyr. 844.

The production of a letter in the defendant's handwriting, containing a libel, with the seal broken, and proof that it has passed regularly through the Post-office, is sufficient *prima facie* evidence that it was received by the party to whom it was addressed, and of publication to him. *Warren v. Warren*, 3 Law J. (N.S.) Exch. 294, s. c. 1 C. M. & R. 260; 4 Tyr. 850.

Truth being pleaded in justification of a libel, part of which alleged that a physician in refusing to act with the plaintiff, also a physician, *had honourably and faithfully discharged his duty to his medical brethren*:—Held, that the defendant could not give in evidence the opinion of a medical witness on that point, it being one on which the jury were as capable of forming an opinion as the witness himself. *Ramadge v. Ryan*, 2 Law J. (N.S.) C.P. 7, s. c. 9 Bing. 333; 2 Mo. & Sc. 421.

A declaration for a libel averring that the plaintiff is "on the rolls of attorneys of the Courts of our Lord the King at Westminster," and alleging a colloquium of and concerning the plaintiff in his said profession, is good; and the inducement is sufficiently proved by evidence that he is on the roll of attorneys of one of the courts. *Dicas v. Gregorie*, 2 Law J. (N.S.) Exch. 189.

If the declaration in case for libel state, *inter alia*, that at a certain place certain meetings for the promotion of sedition and blasphemy had been held, and that the defendant published of and concerning the plaintiff, and of and concerning the other matters, and of and concerning the said meetings, a libel charging him among other things with having taken the chair at the said place, but not saying anything of the character of the meetings there, it will not be ground of nonsuit, should the plaintiff, at the trial, fail to prove, that the meetings were such as he described in his inducement. *Chalmers v. Shackell*, 6 C. & P. 475. [Tindal and Gaselee]

Libel imputing that the plaintiff had received rosewood, knowing it to have been stolen. Pleas

of justification, stating that B had stolen the rosewood from A, and that the plaintiff had received it, knowing it to be stolen:—Held, that the defendant's counsel might ask what B said, with a view of proving that B committed the larceny; and held also, that the plaintiff's counsel might ask the defendant's witnesses what was the plaintiff's general character for honesty. *Powel v. Harper*, 5 C. & P. 590. [Parke]

Where an information for libel states, that certain transactions took place, and that the libel was published of and concerning them; and then sets out the libel as referring to them; and the prosecutor, at the trial, gives general proof of such transactions, to support the introductory part of his pleading;—the defendant is not thereby authorized to give evidence of the particular history of those transactions, so as to bring into issue the truth or falsehood of the libel.

But if such evidence be adduced, *bond fide*, to shew that the transactions, referred to in the alleged libel, are not the same with those which the information supposes it to have had in view; and the Judge is informed, that the evidence is offered for that purpose,—it is admissible. *Rex v. Grant*, 5 K. & Ad. 1081.

If a plea justifying a libel state that an information was laid before the Magistrate, an examined copy of the Magistrate's conviction, reciting the information, is sufficient proof of the information. *Scarth v. Gardener*, 5 C. & P. 38. [Tenterden]

In an action for libel, to support a plea of justification, stating, that the plaintiff had forged and uttered, knowing it to be forged, a certain bill of exchange, to justify a verdict for the defendant, the same evidence must be given as would be necessary to convict the plaintiff, if he were on trial for those offences; but if the evidence fall short of satisfying the jury that the strict legal offence was committed, they may take the facts proved into their consideration in estimating the damages. *Chalmers v. Shackell*, 6 C. & P. 475. [Tindal and Gaselee]

A libel stated, that there was a riot at C, and that a person fired a pistol at an assemblage of persons; and upon this, imputed neglect of duty to the Magistrates:—Held, that, on the trial of a criminal information for this libel on the Magistrates, the defendant's counsel, with a view of shewing that the libel did not exceed the bounds of free discussion, could not go into evidence to prove that there was, in fact, a riot, and that a pistol was, in fact, fired at the people. *Rex v. Brigstock*, 6 C. & P. 184. [Patteson]

A libel purported to be a report of what occurred before one of his Majesty's Commissioners of Inquiry, respecting corporations:—Held, that the defendant could not give evidence of the accuracy of the report as a matter of justification, but that he might give such evidence, in mitigation of damages;—held, also, that, if he did so, the plaintiff might give evidence in reply, to shew the inaccuracy of the report. *Charlton v. Watton*, 6 C. & P. 385. [Patteson]

On the trial of an action against a publisher of a monthly periodical for a libel contained in it, articles published from month to month alluding to the action, and attacking the plaintiff, are receiv-

able as evidence *quo animo* the libel was published, and as shewing that the publisher of the work considered it as applying to the plaintiff. *Chubb v. Westley*, 6 C. & P. 436. [Park]

If the publication of a libel consists in merely selling a few copies of a periodical, in which, *inter alia*, it is contained, one question for the jury is, did the parties know that they were selling? *Chubb v. Flannagan*, 6 C. & P. 431. [Park]

If, in an action for libel, the defendant, by his pleading, admits the publication, the plaintiff is still at liberty to shew the manner of the publication, with a view to the amount of damages. *Vines v. Serell*, 7 C. & P. [Parke]

In an action for libel in a newspaper, the defendant cannot go into evidence, in mitigation of damages, that the libel had appeared in other papers, and that plaintiff had already recovered damages from them; but he may shew that, in copying the libel, he omitted several offensive passages. *Creevy v. Carr*, 7 C. & P. 64. [Gurney]

#### (D) INFORMATIONS AND INDICTMENTS.

An information for a libel stated, that the prosecutor had received certain anonymous letters; and that of and concerning those letters, the defendant published a libellous placard. The defendant was proved to have caused the placard to be published. In the placard it was asked if the prosecutor had not received certain warning. The prosecutor stated, that he understood that to refer to the letters, and that he should not have understood the meaning of the placard, if he had not received the letters:—Held, that the letters might be read in evidence as explanatory of the placard, without proof of the handwriting of them. *Rex v. Slaney*, 5 C. & P. 213. [Tenterden]

Formerly, on the trial of an indictment for libel, the only questions for the jury were the fact of publication, and the truth of the innuendos. The question of libel or no libel was for the sole consideration of the Court, out of which the record came, and on which the Judge, at the trial, was not called upon to give his opinion to a jury. [*Diss. Willes.*]

It is no answer to a charge of criminal publication of a libel to shew that the defendant had been told it was libellous, and not fit to be generally disseminated in the neighbourhood; and that he printed it with a view to disprove the imputation of having intended to promulgate a libel. *Rex v. Shipley*, 4 Doug. 73.

#### LICENCE.

The Sessions have no power to entertain an appeal, under the 9 Geo. 4, c. 61, s. 27, against the granting of a licence by Magistrates. *Rex v. the Justices of Middlesex*, 1 Law J. (N.S.) M.C. 68, s. c. 3 B. & Ad. 938.

A having a house, in which he was making alterations, adjoining the grounds of B, his wife wrote to B as follows:—"Before the last coat of paint is put on the side wall, we wish to place a window in it, and it can be finished more neatly with your permission to place the necessary ladder, &c.; the motive for doing this is, that I should gain a more cheerful view." B answered (by letter), "You are welcome to place a ladder in my grounds near your

house, and I should be obliged if you will caution the workmen not to injure the shrubs." A placed a ladder, and made a window in the part of his house to which the ladder applied, overlooking the premises of B, who was absent from home at the time. B afterwards objected to the window, and wrote as follows:—"When you applied to me for permission to place a ladder in my grounds, being without a friend to advise with, and even without knowing exactly the situation in which your window would be placed, I unfortunately complied with your request, without consulting my own comfort:—Held, that the first two letters did not shew a consent by B, that A should open a window overlooking B's ground; that the third letter, being written after the whole transaction, could not be resorted to in proof of such consent, and, even if available, did not prove the consent relied upon, and, consequently, that A could not justify throwing down a wall, which B had built on her own soil after the completion of the window, obstructing the access of light and air to it.

*Quære*, whether a licence to the owner of a house, to enjoy unobstructed access of light and air to his new window from over his neighbour's premises, may be given by parol, or is an easement, to be granted under seal.

Supposing such licence may be given by parol, *quære*, whether it is countermandable. *Bridges v. Blanchard*, 1 Ad. & E. 536, s. c. 3 N. & M. 691.

#### LIEN.

[See BANKRUPT, Possession, Order and Disposition—SHIP AND SHIPPING, Charter-party—INN-KEEPER—INSURANCE—STOPPAGE IN TRANSITU—TROVER.]

- (A) AT LAW.
- (B) IN EQUIT.
- (C) WAIVER OR DISCHARGE.

#### (A) AT LAW.

Dyers have not a general lien independent of the usage of trade. *Bennet v. Johnson*, 3 Doug. 587.

The landlord of an inn has a lien on the goods of his guest for board, lodging, and wine, to any amount, supplied to him, and even for money advanced, if it was agreed that the goods should be a security; and therefore a sheriff under a *f. fa.* can only take the goods subject to this lien, and not merely to a lien for a reasonable quantity of wines, &c. *Proctor v. Nicholson*, 7 C. & P. 67. [Abinger]

A delivered to B a pawnbroker's duplicate, for B to take some goods of A's out of pledge, B did so; but on A sending to B for the goods, B said he had not got them, and refused to tell who had:—Held, that if, after this, trover was brought against B, he could not insist on a lien on the goods for the money he had advanced to get them out of pledge. *Jones v. Chiff*, 5 C. & P. 560. [Taunton]

A lien on the lading of a ship having been expressly reserved to the owner by a charter-party,—held, that goods which the charterer purchased, and put on board, and then transferred, with a stipulation to convey them to their destination for a certain amount of freight, were, even as against an

indorsee of the bill of lading, subject not only to that freight, but to the shipowner's lien for a balance due to him under the charter-party, whether possession of the ship was by the charter-party completely out of the shipowner, and vested in the charterer, or not. *Small v. Moates*, 9 Bing. 574, s. c. 2 Mo. & Sc. 674.

*Semble*—that where a party claims to hold goods for his general balance, he cannot object that a smaller sum, for which he really has a lien, has not been tendered to him. *Ayling v. Williams*, 5 C. & P. 399. [Vaughan]

Whether, by the custom of trade, in London, whoever the person may be who houses goods with an up-town warehouse-keeper, the warehouse-keeper has a right to detain them for all that is due from such person in respect of charges for goods previously deposited by such person, *quære*—but it seems that such a custom would not be unreasonable.

The general law as to a custom is, that, if you shew its existence at a distant time, and there is no evidence that, at any certain time, it did not exist, a jury may infer that it went back as far as the reign of Richard the First, which is the time of legal memory. *Leuckart v. Cooper*, 7 C. & P. 119. [Tindal]

A put a phaeton into the possession of M, for him to paint it, and paid him beforehand for the painting. M never painted it, but placed it on the premises of B, where it stood three months:—Held, that B had no lien on the phaeton for his charge for the standing of it, unless the jury were satisfied that M placed it there by the authority of A. *Buzton v. Baughan*, 6 C. & P. 674. [Alderson]

A person has no right to keep the property of another, and charge for the standing of it, unless there was a previous bargain between him and the owner of the property, or between him and some agent authorized by the owner. *Ibid.*

A party who receives a mortgage deed for the purpose of obtaining payment of principal and interest due thereon, has no lien in respect of applications made for that purpose. *Sanderson v. Bell*, 3 Law J. (n.s.) Exch. 66, s. c. 2 C. & M. 304; 4 Tyr. 244.

A livery-stable keeper has no lien on a horse delivered to him to keep; therefore, a plea *in detinere* for a horse, that the horse was delivered to the defendant to be stabled and taken care of, and fed and kept by him for the plaintiff for reward, and that 10*l.* became due to him from the plaintiff as a reasonable reward, for which he detained the horse:—Held bad, on general demurrer. *Judson v. Etheridge*, 2 Law J. (n.s.) Exch. 360, s. c. 1 C. & M. 743; 3 Tyr. 295.

A bill-broker who receives bills from a customer, merely for the purpose of procuring them to be discounted, has no right to mix them with the bills of other customers, and to pledge the whole mass as a security for an advance of money; still less to deposit such bills as a security, or part security, for money previously due from him.

A party who advances money on a deposit of bills by a bill-broker, must exercise due caution; and if he knows, or has reason to believe, that the bills were delivered by the customer for the purpose of discount only, he has no lien as against that

customer. *Haynes v. Foster*, 3 Law J. (n.s.) Exch. 153, s. c. 2 C. & M. 237; 4 Tyr. 65.

A person who has a lien on property, accompanied by the guarantee of a third person, does not lose his lien by taking the bills of that third person for the amount, concurrently with, and in order to a sale of the property to satisfy the debt. *Solarte v. Maes Hilbers*, 1 Law J. (n.s.) K.B. 196.

### (B) IN EQUITY.

Covenant in marriage articles to settle lands to the amount of 200*l.* per annum, or to settle 4,000*l.* to the same uses,—held, not to constitute a specific lien on lands of which the covenantor was then seised. *Ravenshaw v. Hollier*, 4 Law J. (n.s.) Chanc. 119.

A bankrupt conveys his real estate to two trustees upon certain trusts for the payment of his debts, and subsequently enters into an agreement with them as to the sale of the property; after which he takes forcible possession of part of it, and the trustees bring an action of ejectment against him, which, with another action, is referred to the decision of an arbitrator. The award finds, that the creditors were entitled to recover in the action of ejectment, and directs that a sum of money, which was due to the trustees, for expenses incurred by them in the execution of the trusts, shall be paid by instalments, and in default of payment, that the property shall be sold, and the proceeds applied in discharge of the debt due to the trustees:—Held, that the award was no charge upon the land; but that it did not destroy the lien thereon, which the deed had expressly given to the trustees for the expenses incurred by them in the execution of the trusts. *Ex parte Coppard*, 4 D. & Ch. 102.

The estate of a tenant for life was charged with a sum of 25,000*l.* and interest, from the time that the life estate commenced; and it was provided, that the 25,000*l.* should not be raised until the expiration of two years from the commencement of the life estate. The tenant for life failed to keep down the interest of the 25,000*l.*; and there was raised, on the estate, by the trustees of the term created, for the purpose of the charge, a sum considerably exceeding the 25,000*l.* The persons entitled in remainder, after the life estate, have an equity to recoup out of the future income, which shall accrue to the tenant for life, the excess raised beyond the 25,000*l.*; and the tenant for life, having taken the benefit of the Insolvent Debtors Act, his assignees are affected by the same equity. *Waring v. Coventry*, 2 M. & K. 406.

The managing owner of a ship, chartered by the East India Company, receives the warrants for the freight, and pays them into a bankers' in his own name, drawing cheques from time to time for various sums out of the proceeds, part of which are applied for the use of the ship, and part for other purposes:—Held, that the other part-owners have no lien on this fund in the hands of the bankers, nor any claim against the bankers as their debtors. [*Dubis. Sir J. Cross*]. *Ex parte Gribble*, 3 D. & Ch. 339.

### (C) DISCHARGE OF.

A part delivery of goods to vendee, will not vest the absolute right of possession to the whole in him, unless it be done in progress of the delivery of the



whole; but if it be clear that the intention was to separate the part delivered from the rest, the original right of lien which the vendor had, will still remain.

The defendant employed an agent to sell a certain quantity of hay in a stack, which he did, to one C S, and took his promissory note, payable at three months, to the agent himself, for the price. The agent immediately discounted the note with the plaintiffs, his bankers. The purchaser at several times within the three months, carried away several tons of the hay, and afterwards sold the remainder to the plaintiffs, allowing the note given by him to the agent, to be taken as part payment, and receiving a further sum. The agent afterwards became bankrupt, and upon demand being made by the plaintiffs (after the three months had elapsed,) to be allowed to take away the rest of the hay, the defendant refused. In an action of trover for the hay,—Held, 1st, that the fact of part having been delivered did not take away the defendant's lien: but 2ndly, that the defendant could not be considered as an unpaid vendor, so as to revive the right of lien upon the expiration of the time for which the note was to run. *Bunney v. Poyntz*, 2 Law J. (n.s.) K.B. 55, s.c. 1 N. & M. 229; 4 B. & Ad. 568.

### LIFE.

[PRESUMPTION OF—See POOR, Settlement by Marriage.]

In an action by husband and wife, the defendant, in support of a plea, that at the time of the contract the female plaintiff was the wife of another person, gave in evidence an admission of the wife two years previously, that her first husband was alive; and the jury, under a direction that the presumption of law was, that the first husband was alive until his death was proved, found for the defendant: on a motion for a new trial, an affidavit was made on the part of the defendant, by the father of the first husband, stating, that he had lately received a letter from his son from abroad: the Court refused to disturb the verdict. *Newman v. Goddard*, 3 Law J. (n.s.) Exch. 167.

To support a plea of coverture in an action for goods sold and delivered, it is not necessary for the defendant to prove that her husband was alive at the time of the contract. *Stevenson v. Shipley*, 3 Law J. (n.s.) Exch. 161.

The intention of the 6 Ann. c. 18, is to throw the burden of proving the existence of the *cestui que vie* upon those who hold for lives. *Ex parte Kensington*, 4 Law J. (n.s.) Chanc. 269.

### LIGHTS.

[See TRESPASS.]

A party may so alter the mode of enjoyment of ancient lights, as to lose the right to them altogether. *Garritt v. Sharp*, 4 N. & M. 834; 3 Ad. & E. 325.

The plaintiff purchased a house of A, and the defendant at the same time purchased of A the adjoining land, upon which an erection of one story high had formerly stood. In the conveyance to the

plaintiff, his house was described as bounded by *building ground* belonging to the defendant:—Held, that the defendant was not entitled to build to a greater height than one story, if by so doing he obstructed the plaintiff's lights. *Swansborough v. Coventry*, 2 Law J. (n.s.) C.P. 11, s.c. 9 Bing. 305; 2 Mo. & Sc. 362.

The diminution of light and air, which the law recognizes as the ground of an action against a party who builds near another's premises, is such as really makes them, to a sensible degree, less fit for the purpose of business or occupation. *Parker v. Smith*, 5 C. & P. 438. [Tindal]

### LIGHTING AND WATCHING.

Of Parishes—Repeal of 11 Geo. 4, c. 27, and substitution of other provisions. 3 & 4 Will. 4, c. 90; 11 Law J. Stat. 174.

### LIMITATIONS, STATUTES OF.

[See ANNUITY—CANAL ACT—ATTORNEY, Connection between, and Client—BANKRUPT, Dividend—FOREIGN LAW—GUARANTEE—INCLOSURE—PRACTICE, Altering Process; and Setting aside Proceedings—SHIP AND SHIPPING.

- (A) WHERE AVAILABLE.
- (B) COMPUTATION OF TIME.
- (C) PROMISE OR ACKNOWLEDGMENT.
- (D) PART PAYMENT.
- (E) PLEADINGS AND EVIDENCE.

#### (A) WHERE AVAILABLE.

Limitations of actions relating to real property. 3 & 4 Will. 4, c. 27; 11 Law J. Stat. 77.

Limitations of actions of debt, specialties. See 3 & 4 Will. 4, c. 42, s. 3, 4, 5, 6, 7; 11 Law J. Stat. 98.

*Blakemore v. Glamorganshire Canal Company*, 3 Y. & J. 60, 2 Law J. Dig. 189; affirmed, 5 Bligh, n.s. 547.

A suit instituted for administration of assets, in which the common decree was made; a creditor (whose debt was barred by the Statute of Limitations) applied to prove: the executors refused to interfere, and the residuary legatee insisted upon setting up the statute:—Held, that he, or any other person interested in the fund, might take advantage of the statute before the Master, notwithstanding the refusal of the executors. *Shewen v. Vanderhorst*, 1 Law J. (n.s.) Chanc. 107, s.c. 2 Russ. & M. 75.

Where the ancestor, under whom the lessor of the plaintiff claims, was dispossessed or discontinued the possession or receipt of the rents and profits above forty years before the action brought, the lessor of the plaintiff is barred by the 17th section of 3 & 4 Will. 4, c. 27, and that notwithstanding that he may have a new right. *Doe d. Corby v. Branstons*, 4 Law J. (n.s.) K.B. 166, s.c. 4 N. & M. 664; 3 Ad. & E. 63.

Where lands were settled on the grandfather of the lessor of the plaintiff, for life; remainder in tail; and, it appeared that the plaintiff's father (the first tenant in tail), after the death of the grandfather, thirty-seven years ago, entered and was

possessed; but that, for upwards of twenty years, the defendant had been in the receipt of the rents and profits, and in the peaceable possession of the premises:—Held, that (the father having entered) this was not a case within the statute 21 Jac. 1, c. 16, so as to bar the lessor of the plaintiff: and that, as the father could have conveyed an estate for his life, which would have been good against himself, but not against his heir, the possession of the defendant must be taken to have been by the permission of, and not adverse to, the tenant in tail. *Doe d. Smith v. Pike*, 1 Law J. (N.S.) K.B. 105, s. c. 3 B. & Ad. 738.

The statute 3 & 4 Will. 4, c. 27, s. 42, which limits the arrears of interest and rent to be recovered, to six years, does not apply to actions commenced before it was passed. *Paddon v. Bartlett*, 4 Law J. (N.S.) Exch. 333, s. c. 4 Law J. (N.S.) K.B. 5; 5 N. & M. 383; 3 Ad. & E. 884.

Where, on the face of the bill, it appears that more than six years have elapsed since the cause of action accrued, the defendant may take advantage of the Statute of Limitations by demurrer. *Hoare v. Peck*, 2 Law J. (N.S.) Chanc. 123, s. c. 6 Sim. 51.

Where a person comes in by right, but remains in possession for twenty years after his title has ceased, a remainder-man is barred by the Statute of Limitations, and it is not necessary that there should be any disseisin, in order to create a title by adverse possession. *Doe d. Parker v. Gregory*, 4 Law J. (N.S.) K.B. 19, s. c. 2 Ad. & E. 14; 4 N. M. 308.

Where a judgment creditor had allowed twenty years to elapse, without taking steps to recover his debt, and then ascertained that during the twenty years, a suit had been instituted for the benefit of the specialty creditors of his debtor, and that under a decree in the suit they had received part payment of their debts, and that there was money in court available for the payment of the remainder:—Held; that he was barred by the Statute of Limitations from proving his debt before the Master, and receiving payment rateably with the other creditors. *Berrington v. Evans*, 3 Y. & C. 434.

The French law of prescription with respect to promissory notes, appertains *ad tempus et modum actionis instituendæ*, and not *ad valorem contractûs*, and therefore the payee of such notes may sue the maker, if resident in England, during six years, from the time they have become due. *Huber v. Steiner*, 2 Bing. N.C. 202, s. c. 2 Sc. 304.

In 1799 D A purchased shares in a ship of G R, who retained other shares in the same, and was intrusted by D A and the other owners with the whole management of the ship, and with the keeping of the accounts. The ship was sold by G R in 1805, with the consent of the owners, and he received the proceeds of the sale, and settled accounts with W, one of the owners, to whose credit a balance appeared to be placed, in respect of the earnings of the ship, and the proceeds of the sale. In 1826 D A filed a bill against the administrators of G R, who died in 1824, for an account of D A's share of the earnings and proceeds of the sale of the ship. In G R's account-books, which appeared not to have been referred to for several years, were two accounts with D A, one relating to the ship in the way of debit and credit from 1799 to 1805; the other contained

two items only, in 1811 and 1812, on the debit side, not appearing to relate to the ship. D A was absent from England from 1820, after which time E, his brother-in-law, a witness in the cause, "called frequently on G R with messages from D A, and asked him to come to a settlement of accounts with D A, in respect to the ship; G R evaded the subject, but never stated or intimated, that he was not indebted to D A":—Held, by the Lords, affirming a decree of the Court below, that D A was entitled to an account of the dealings between him and G R, relating to the ship. *Robinson v. Alexander*, 2 C. & F. 717, s. c. 8 Bligh, n.s. 353.

The lord of the manor is barred by the Statute of Limitations, from entering for a forfeiture after twenty years. *Whilton v. Peacock*, 3 M. & K. 325.

A bill of Middlesex was a good continuance of a latitat, in order to save the Statute of Limitations. *French v. Mauwood*, 2 Dowl. P.C. 565.

The effect of a clause in a local act, limiting the time for bringing actions for anything done in pursuance of the act, is not altered by the circumstance of the persons who have done the act complained of having proceeded *mala fide*. *Lord Oakley v. the Kensington Canal Company*, 2 Law J. (N.S.) K.B. 208, s. c. 5 B. & Ad. 138.

By act of parliament, the defendants had certain rates given them for the tonnage and wharfage of coals, &c. conveyed on the canal, and were empowered to "seize the goods in respect of which any such rates ought to have been paid, and the boat or vessel laden therewith, &c., and if such goods were not redeemed within a certain time, they were to be appraised and sold":—Held, that the company had no power to seize goods, except they were on the canal, and that they had no power whatever to sell the boats.

By the 123rd section of the act, "any action or suit against any person, for anything done in pursuance of the act, was required to be brought within six calendar months of the fact committed." A mortgagee of a lease of coal mines, together with certain boats, &c. permitted the mortgagor to remain in possession, who subsequently made a lease of the same mines, and sold the boats to M & Co.; and while the boats were in the possession of M & Co. they were seized, as also some coals which were off the boats on the wharf, by the company, for rates due from M & Co., in respect of those coals carried on the canal: which coals and boats were also sold:—Held, in an action of trover by the mortgagee against the company, that the sale, and not the seizure, was the fact committed, from which the time of limitation began to run; and secondly, that the being in the possession of M & Co. (who afterwards became bankrupts) by the permission of the mortgagor, could not be considered as being in the order and disposition of the bankrupts, with the consent of the true owner (the mortgagee). *Fraser v. the Swansea Canal Navigation Company*, 3 Law J. (N.S.) K.B. 153, s. c. 1 Ad. & E. 354; 3 N. & M. 391.

#### (B) COMPUTATION OF TIME.

[See GUARANTIE, Rights and Liabilities.]

*Fausset v. Carpenter*, 2 D. & Cl. A.C. 232; 2 Law J. Dig. 190, s. c. 5 Bligh, n.s. 575.

A contract to build a toll-house, with trustees of a road, appointed under an act of parliament, which directs them to apply the subscriptions and tolls, first, to the charges of obtaining the act; secondly, to defraying the expenses of erecting turnpikes, toll-houses, &c.; and lastly, in paying the interest and reducing the principal of the money subscribed, gives a complete cause of action as soon as the work is executed; and consequently, the Statute of Limitations begins to run at that period, and not from the time when the trustees have raised funds which they can appropriate in payment for the work. *Emery v. Day*, 3 Law J. (N.S.) Exch. 307, s. c. 4 Tyr. 695; 1 C. M. & R. 245.

The Statute of Limitations in an action by drawer against drawee for not accepting, does not begin to run from the time of the refusal to accept or pay the bill, but from the time when the plaintiff actually sustains damage, e. g. when he is arrested. *Hanley v. Sanderson*, 2 Law J. (N.S.) Exch. 204, s. c. 1 C. & M. 467; 3 Tyr. 469.

A parish vestry resolved to borrow money from H N, who advanced it, and took promissory notes for the amount, made by P, W, and F, who were churchwardens and overseers, and who added to their signatures the titles of their respective offices. Interest was paid on the notes, from the parochial funds, and the accounts containing the item were allowed by the vestry; and W, with other parishioners, signed the allowance in one instance. P, W, and F, resided constantly in the parish. To an action brought on the notes, against P, W, and F, within six years from W's signature of the allowance (but not from the making of the note,) the Statute of Limitations was pleaded; the jury having found for the plaintiff, the Court sustained the verdict. *Rew v. Pettit*, 1 Ad. & E. 196, s. c. 3 N. & M. 456.

A was a tenant for life, with a power of appointment by will, attested by three credible witnesses. By will, attested by three witnesses, he appointed the lands to B for life, and after her death to C in fee. B was one of the witnesses to the will, and the appointment to her was therefore void. On the death of the testator, the husband of B entered, and held the land till his death, which was three years after the death of B:—Held, that the Statute of Limitations did not begin to run against C, till the death of B. *Doe d. Allen v. Blakeway*, 5 C. & P. 563. [Taunton]

Where an action was brought on a claim for wages during a period of thirteen years, and the defendant then distrained on the plaintiff's goods for six years' rent:—Held, that the Statute of Limitations was not prevented from operating upon the first seven years of the plaintiff's claim. *Williams v. Griffiths*, 4 Law J. (N.S.) Exch. 129, s. c. 2 C. M. & R. 45.

#### (C) PROMISE OR ACKNOWLEDGMENT.

"I do hereby charge my reversionary interest, when the same shall fall into possession, and be rendered available to my use, with the payment of 101*l.* 8*s.* 9*d.*"—Held, not to be such an acknowledgment as to raise an implied promise to pay. *Martin v. Knowles*, 2 Law J. (N.S.) K.B. 100, s. c. 1 N. & M. 421.

Proof by one of the trustees of a turnpike road, that at a meeting of trustees, an order was made, that funds should be raised and the tradesmen paid, no such order being entered in the books of the trustees in writing, is insufficient to take the case out of the Statute of Limitations. *Emery v. Day*, 3 Law J. (N.S.) Exch. 307, s. c. 4 Tyr. 695.

The Statute of Limitations is not avoided by an acknowledgment of a debt coupled with a denial of the liability to pay. *Brigstock v. Smith*, 2 Law J. (N.S.) Exch. 187, s. c. 1 C. & M. 483; 3 Tyr. 445.

A promise, to take a case out of the statute, must be absolute; or, if conditional, the condition must be proved to have been performed. Where, therefore, a party stated, "These sums I mean honourably to pay, and I shall not avail myself of the Statute of Limitations. When I may be able to pay you I cannot now say:"—Held, if any promise at all, that this was only conditional, and that the plaintiff must prove the defendant's ability. *Woodham v. Hollis*, 3 Law J. (N.S.) K.B. 70.

The time of writing an acknowledgment, according to 9 Geo. 4, c. 14, s. 1, to take a debt out of the Statute of Limitations, may be proved by parol.

"I shall be most happy to pay you both interest and principal, as soon as convenient," is a conditional promise, and the plaintiff must give some evidence of ability or convenience.

As to the necessity of proving a settlement, where the defendant, in one part of the letter containing the acknowledgment, said, "I shall pay no more interest until we have a fair settling." *Edmunds v. Downes*, 3 Law J. (N.S.) Exch. 98, s. c. 4 Tyr. 173; 2 C. & M. 459.

In a letter written to the plaintiff within six years, the defendant says, "I can never be happy until I have not only paid you everything, but all to whom I owe money;" and, "Your account is quite correct; and oh! that I were now going to inclose you the amount of it:"—Held, that this was evidence to go to the jury of an acknowledgment, taking the case out of the Statute of Limitations.—Held, that such promise, accompanied by this expression, "It is impossible to state to you what will be done in my affairs at present; it is difficult to know what will be best; but immediately it is settled, you shall be informed;" is an absolute unconditional promise, and not a qualified or conditional promise.

Whether proof of such letters, together with proof of a bill drawn more than six years ago, by the plaintiff on the defendant, and accepted by the latter, would entitle the plaintiff to recover more than nominal damages, *quære*. *Dodson v. Mackey*, 4 N. & M. 327.

One of two persons, who were jointly liable for a debt, received a letter from the attorney for the creditor, demanding payment, and alluding to the possibility of the demand being met by a plea of the Statute of Limitations. He wrote an answer, complaining of the conduct of his co-debtor; and thus concluded: "I think no person of any respectability would ever shelter himself under the statute you allude to. I will at any time, pay my proportion of the debt due, on application for the same." In an action against the two for the whole debt, the writer of this letter pleaded the Statute of Limitations: and held, that the letter did not deprive him

of the benefit of that plea. *Lechmere v. Fletcher*, 4 Law J. (N.S.) K.B. 191.

The promise or acknowledgment in writing required by the statute 9 Geo. 4, c. 14, s. 1, to take a debt out of the Statute of Limitations, need not specify the amount of the debt.

Neither, if the amount is not specified, is the plaintiff limited to the recovery of nominal damages only; but he may recover the amount proved by extrinsic evidence.

In a joint action against A and B, B pleaded the general issue, and A the general issue and the Statute of Limitations. A verdict passed, and judgment was entered against B on the general issue, and for A on the general issue and on the Statute of Limitations. The plaintiff afterwards brought an action against A on a new promise to pay his proportion of the debt, made before the former action:—Held, that the judgment in that action was a bar to the action on the new promise. *Lechmere v. Fletcher*, 2 Law J. (N.S.) Exch. 219, s.c. 1 C. & M. 623; 3 Tyr. 450.

The whole of the acknowledgment of a debt, to take the case out of the Statute of Limitations, must, under Lord Tenterden's late act, 9 Geo. 4, c. 14, be in writing; and a written acknowledgment of a debt without specifying the amount, cannot be rectified by the admission of counsel. Where such a written acknowledgment is qualified by a condition, no action can be maintained upon it, if the condition is broken. *Kennett v. Milbank*, 1 Law J. (N.S.) C.P. 8, s.c. 8 Bing. 38; 1 Mo. & Sc. 102.

A promise in writing to pay "the balance" due, is enough under stat. 9 Geo. 4, c. 14, to take a case out of the Statute of Limitations, although the writing does not express the amount of the balance. But if the whole evidence be proof of the writing, and of the original cause of action, the plaintiff can only recover nominal damages. *Dickinson v. Hatfield*, 1 M. & R. 141, s.c. 5 C. & P. 46. [Tenterden]

A letter, by which the defendant admits the plaintiff's demand, but at the same time refers him to a third party (his trustee) for the payment of it, and for any further information, is not sufficient, since the statute 9 Geo. 4, c. 14, to take a case out of the Statute of Limitations. *Whippy v. Hillary*, 4 Law J. (N.S.) K.B. 178, s.c. 3 B. & Ad. 399.

A and B being joint owners of a ship, and indebted to C for repairs, B gave two bills to C, which were dishonoured, and afterwards sold his interest, and became a bankrupt; A proved under B's commission for 3,000*l.*, and in 1822 drew on his assignees a bill of exchange payable to C, which the assignees accepted, and which A delivered to C, on account of the sum due to him for the repairs, and on the bills. It was agreed, that payment of this latter bill should not be demanded of the acceptor, until he should have funds on account of dividends of B's estate. The bill was paid in March 1827. In 1830, C brought an action against A for the sum remaining due on account of repairs, and A pleaded the Statute of Limitations:—Held, that the drawing of the bill, (supposing it to be evidence of a fresh promise on the original demand), was only evidence of a promise at the time when it was drawn, and not when it was paid, and, therefore, did not take

the case out of the statute. *Gowan v. Forster*, 3 B. & Ad. 507.

A letter, stating that an appointment of funds to pay a debt, due from the defendant to the plaintiff, had been made, and that Mr. Y was one of the trustees; but that some time must elapse before the trustees would be in cash, will not take the case out of the Statute of Limitations, as it is at most only a promise to pay as soon as the trustees are in cash. But, *semble*, that the creditor's remedy would be by a bill in equity against the trustees. *Whippy v. Hillary*, 5 C. & P. 209. [Littledale]

A defendant had written a letter to T, to make a proposition to the plaintiff respecting a debt he owed him, and in this letter he desired T to arrange with the whole of his creditors. T wrote a letter to the plaintiff offering an acceptance for 7*s.* 6*d.* in the pound on the debt:—Held, not sufficient to take the case out of the Statute of Limitations. *Gibson v. Baghott*, 5 C. & P. 211. [Parke]

The defendant addressed a letter to the plaintiff, containing these words: "I cannot comply with your request. The best way for you would be to send me the bill that you hold, and draw another for 30*l.* 9*s.* 9*d.*, which will be the balance of your account."

In an action against the defendant, who pleaded the Statute of Limitations,—Held, that the above words amounted to such a distinct acknowledgment of the sum mentioned being due, as to take the case out of the statute. *Dabbs v. Humphries*, 3 Law J. (N.S.) C.P. 189, s.c. 10 Bing. 446; 4 Mo. & Sc. 285.

A had owed money to B for hay for more than six years, and within six years said to B, "You use spirits; why not have them of me as long as I owe you money for hay? If it were ever so little, it would be a way to lessen the debt." B said he would have a gallon at 12*s.* A went home, and sent a gallon of gin to B. In an action by B for the price of the hay,—Held, sufficient to take the case out of the Statute of Limitations, 9 Geo. 4, c. 14. *Hooper v. Stephens*, 7 C. & P. 260. [Denman]

#### (D) PART PAYMENT.

If the parties to a bill of exchange agree, that goods shall be supplied in part payment, and they are supplied and taken accordingly, that is part payment, so as to prevent the operation of the Statute of Limitations. *Hart v. Nash*, 2 C. M. & R. 337.

A payment within six years of interest due not within that period on a promissory note, is sufficient to take a debt out of the Statute of Limitations. *Bealy v. Greenslade*, 1 Law J. (N.S.) Exch. 1, s.c. 2 Tyr. 121; 2 C. & J. 61.

Notwithstanding 9 Geo. 4, c. 14, payment of interest within six years by one of several makers of a joint and several promissory note, takes the debt out of the Statute of Limitations as against all. *Wyatt v. Hodson*, 1 Law J. (N.S.) C.P. 93, s.c. 8 Bing. 309; 1 Mo. & Sc. 442.

A testator bequeathed legacies to each of his daughters, to be paid at the age of twenty-one, and till that period the expense of board, clothes, and education to be paid by his executors, and he appointed executors, and also trustees "with all the

necessary powers to fulfil his will." At a settlement of the testator's affairs, the executors paid over to the trustees, a sum sufficient to pay the legacies of the daughters, when they should attain the age of twenty-one, which sum the trustees then lent to the plaintiff on a promissory note, describing them "as trustees acting under the will of the late Mr. —":—Held, that a payment of principal and interest to one of the legatees within six years, was sufficient to take the case out of the Statute of Limitations, and that an action might be maintained on the note, by the surviving trustee. *Megginson v. Harper*, 3 Law J. (N.S.) Exch. 50, s. c. 2 C. & M. 322; 4 Tyr. 94.

Proof of payment of a sum of money by the direction of the defendant to the plaintiff, within six years, is not sufficient to take a case out of the Statute of Limitations, as, although the jury may be warranted in referring the payment to the account on which the action is brought, if no other account be shewn to exist, it is necessary also to shew that the payment was in part of a greater debt. *Tippett v. Heane*, 3 Law J. (N.S.) Exch. 281, s. c. 1 C. M. & R. 252; 4 Tyr. 772.

Payee of promissory note dies intestate, leaving *bona notabilia*; his administratrix takes out a diocesan administration only, and not for that diocese in which the maker of the note (the debtor of the intestate) resides; consequently the administration is, *quoad* the debt in question, defective. She dies, and plaintiff becomes her administrator *cum testamento annexo*. In such capacity, he receives, within a year before the action, a sum in part payment of the debt. In an action for the remainder, and Statute of Limitations pleaded,—Held, that such payment took the case out of the statute, notwithstanding the defective administration under which it was received. *Clark v. Hooper*, 3 Law J. (N.S.) C.P. 159, s. c. 10 Bing. 480; 4 Mo. & Sc. 353.

#### (E) PLEADINGS AND EVIDENCE.

A plea of the Statute of Limitations to a promissory note, is an admission, by the party pleading it, that he was once liable upon the note set up on the record. Therefore, in an action by the indorsee, it is not necessary that he should prove the indorsement. *Gale v. Copern*, 3 Law J. (N.S.) K.B. 140, s. c. 1 Ad. & E. 102; 3 N. & M. 863.

In an action of debt for goods sold and delivered with pleas of *nihil debet* and *non accrevit infra sex annos*, and issues thereon, it is incumbent on the plaintiff to prove affirmatively, that the cause of action accrued within six years, or a written acknowledgment pursuant to 9 Geo. 4, c. 14. *Wilby v. Henman*, 4 Law J. (N.S.) Exch. 262, s. c. 2 C. & M. 658; 4 Tyr. 957.

To debt for 1,600*l.*, for twenty years' rent, at 80*l.* a year, defendant pleaded to the whole action *actio non accrevit infra sex annos*; and also as to 1,420*l.*, parcel, &c., that seventeen years and three quarters before, plaintiff assigned over his reversion, and that no part of the 1,420*l.* accrued before the assignment. Verdict for the plaintiff on the first issue, and for the defendant on the second. *Semble*, that the plaintiff was entitled to judgment for 180*l.*

The statute of 3 & 4 Will. 4, c. 27, s. 42, (which limits the recovery of arrears of rent to six years),

has not a retrospective operation. *Paddon v. Bartlett*, 4 Law J. (N.S.) K.B. 65, ib. Exch. 333; s. c. 3 Ad. & E. 884; 5 N. & M. 383.

To a plea that the cause of action did not accrue within six years, the plaintiff may reply generally that it did, and give in evidence on that issue a *quo minus* issued in time, and continuances down to the time of the defendant's appearance.

The proviso in the 10th section of the Uniformity of Process Act, as to the mode of continuing writs to save a Statute of Limitations, applies only to the new writs issued under that act.

The roll containing entries of continuances regularly entered up, is conclusive evidence upon an issue, whether the cause of action arose within six years next before the commencement of the suit, and cannot be contradicted by a writ bearing teste of a different day, and shewing that the continuances were not regular. *Dickenson v. Teague*, 3 Law J. (N.S.) Exch. 266, s. c. 1 C. M. & R. 241; 4 Tyr. 450.

In an action for goods sold and delivered, the defendant pleaded a set-off; the plaintiff replied, that the demand was barred by the Statute of Limitations:—Held, that a conversation which took place between the plaintiff and the defendant, at the time of the delivery of the goods for which the action was brought, was admissible in evidence, for the purpose of shewing, that the goods were delivered to the defendant by way of satisfaction for his claim. *Moore v. Strong*, 4 Law J. (N.S.) C.P. 165, s. c. 1 Bing. N.C. 441; 1 Sc. 367.

#### LINEN AND HEMP MANUFACTURES.

Continuation and amendment of regulations relating to, in Ireland. 5 & 6 Will. 4, c. 27; 13 Law J. Stat. 54.

#### LIQUIDATED DAMAGES.

A sum agreed upon in a lease as "a further yearly rent of 5*l.* for every acre of pasture, which the defendant should plough up," is not a penalty, but liquidated damages; and therefore, a plea by way of satisfaction, which does not cover the whole sum claimed in the declaration, is bad on general demurrer—so is a plea of waiver. *Denton v. Richmond*, 2 Law J. (N.S.) Exch. 269, s. c. 1 C. & M. 734; 3 Tyr. 630.

#### LIS MOTA.

[See EVIDENCE.]

#### LIS PENDENS.

Decree, that a bill filed to impeach a vendor's title should be taken *pro confesso*, is binding on a purchaser entering into a contract after the filing of that bill. *Landon v. Morris*, 2 Law J. (N.S.) Chanc. 35.

The doctrine of *lis pendens* applies to all alienations during the pendency of a suit, whether immediate by a party to the suit, or mediate, by persons purchasing from those claiming under parties to the suit. *Robertson v. Cox*, 2 Law J. (N.S.) Chanc. 41.

## LIVERPOOL.

Provisions for payments towards the erection of Revenue buildings in. 2 Will. 4, c. 14; 10 Law J. Stat. 20.

## LIVERY OF SEISIN.

[See FEOFFMENT.]

As a feoffment made by a lessor is a determination of a tenancy at will, he may make livery of seisin of the land, though the tenant at will be off the land, and have had no notice of the determination of the will. *Ball v. Cullimore*, 4 Law J. (N.S.) Exch. 187, s. c. 2 C. M. & R. 120.

## LOADED ARMS.

[See MALICIOUS INJURIES.]

## LOAN SOCIETIES.

Establishment of, in England and Wales. 5 & 6 Will. 4, c. 28; 13 Law J. Stat. 43.

## LOCAL ACT.

[See HIGHWAY—LIMITATIONS—STATUTE—COMPENSATION—MANDAMUS.]

By a local act for paving, watching, lighting, and improving the city of L., commissioners were appointed for carrying the act into effect, and a penalty was imposed upon such of them as, being personally interested in the matter in question, should act as commissioners in the execution of the act. One of the commissioners, being personally interested in the construction of a footpath opposite his own house, attended a meeting of the commissioners, and spoke upon the question of the mode of constructing such footpath:—Held, that this was evidence to go to the jury of an acting as a commissioner. *Charlesworth v. Rudgard*, 4 Law J. (N.S.) Exch. 89, s. c. 1 C. M. & R. 498.

## LOCAL COURT.

In an action tried under 3 & 4 Will. 4, c. 42, before an under-sheriff, the declaration contained special counts on a promise by the defendant, to sell a chattel for plaintiff, at a price not below 4*l.*, averring that defendant sold the same at an inferior price, to wit, 1*l.* 10*s.*: there were also common counts. Evidence was given for the plaintiff of the special contract, and evidence on the other side, tending to discharge or excuse the defendant; and it was proved, that defendant sold the chattel for 1*l.* 11*s.*, which he had not paid over. Defendant, when the action was brought, lived within the jurisdiction of a court of requests established by a statute, which enacted, that no action for any debt below 2*l.* should be brought against any person residing within the jurisdiction, except in that court. The act was insisted upon by the defendant at the trial. The jury found a verdict for the plaintiff for 1*l.* 11*s.*

On motion to enter a nonsuit, or verdict for the defendant, or for a suggestion under the Local Court Act,—Held, that this Court could not consider the action as one brought merely to recover a debt, evidence having been given in support of the special counts, and there being nothing to shew that they were inserted colourably. Also, that it made no difference, that the under-sheriff had at first entered the verdict on the *postea*, as taken on the count for money had and received, and afterwards altered it to a general verdict, on the application of the plaintiff. *Mangfield v. Brearey*, 1 Ad. & E. 847, s. c. 3 N. & M. 471.

## LONDON.

[See METROPOLITAN POLICE.]

Duties of package, scavage, balliage, and portorage, may be purchased by Commissioners of the Treasury. 3 & 4 Will. 4, c. 66; 11 Law J. Stat. 114.

The charter 23 Hen. 6, entitles the City of London to a fine imposed by the Court of King's Bench sitting at Westminster, on an indictment for a misdemeanor committed within the city, and tried at Nisi Prius by the Chief Justice of the King's Bench. *Rez v. the Mayor and Commonalty of the City of London*, 3 Law J. (N.S.) 223, s. c. 1 C. M. & R. 1; 4 Tyr. 709.

## LONDON BRIDGE.

[See COMPENSATION—COSTS—TRUST AND TRUSTEE, COSTS.]

Conveyance of Crown property, between the Tower and London Bridge provided for. 2 & 3 Will. 4, c. 66; 10 Law J. Stat. 190; 3 Will. 4, c. 8; 11 Law J. (N.S.) 29.

## LORDS' ACT.

[See PRISONER.]

## LORD'S DAY.

An attorney is not within the stat. 29 Car. 2, c. 7, which prohibits tradesmen, artificers, workmen, and other persons from working in their ordinary calling on a Sunday.

It seems, that a plea to a contract, that it was made on a Sunday in the exercise of the ordinary calling of the defendant, need not allege it to have been against the form of the statute. *Peate v. Dickin*, 4 Law J. (N.S.) Exch. 28, s. c. 1 C. M. & R. 422; 5 Tyr. 116.

## LOTTERY.

Provisions for taking in and payment of outstanding lottery tickets. 2 Will. 4, c. 2; 10 Law J. Stat. 8.

At Glasgow, prohibition of any further. 4 & 5 Will. 4, c. 37; 12 Law J. Stat. 66.

## LUNATIC.

[See EVIDENCE—INSANE PERSONS—PROPERTY—WARRANT OF ATTORNEY.]

Diminution of inconvenience and expense of commissions *de lunatico inquirendo*, and treatment of idiots and lunatics, found so by inquisition. 3 & 4 Will. 4, c. 36; 11 Law J. Stat. 87.

A committee of the person and estate of a lunatic may levy a fine, or suffer a recovery of copyhold lands, of which the lunatic is tenant in tail, with immediate reversion to himself in fee, under 1 Will. 4, c. 65, s. 28, for effecting a sale for the purposes of the act.

The 28th section of the act applies only to lands, of which a lunatic is tenant in tail, with immediate reversion to himself. *Ex parte Flint re Brand*, 2 Law J. (n.s.) Chanc. 12, s. c. 1 M. & K. 150.

The Vice Chancellor may direct the reference to the Master, in the first instance, in the case of a lunatic trustee or mortgagee. But the order upon the Master's report should be made by the Lord Chancellor. *Anonymous*, 3 Law J. (n.s.) Chanc. 240, s. c. 5 Sim. 322.

One of the next-of-kin of a lunatic having become bankrupt, it was held, that on a petition for increased allowance, it was unnecessary to serve the assignees. *Ex parte Chambers*, 4 Law J. (n.s.) Chanc. 175.

After the death of a lunatic, her personal representatives cannot by petition to the Lord Chancellor, sitting in lunacy, obtain from the committee of the person an account of his expenditure of the allowance for maintenance. *Semble*, such an account may under some circumstances be obtained by a bill in the Court of Chancery. *Grosvenor v. Drax*, 2 Kn. 82.

In a case where a lunatic had two estates, situate at a distance from each other, and of considerable value, the Court under the circumstances, appointed a separate committee for each. *In re Robins*, 2 Russ. & M. 449.

Where the next-of-kin of a deceased lunatic was of unsound mind, though not so found by inquisition, a transfer of the lunatic's personal estate was directed to be made to the person, to whom administration *durante animi vitio* of such next-of-kin had been granted, agreeably to the practice of the Ecclesiastical Court. *Ex parte Evelyn*, 2 M. & K. 3.

The Court has no jurisdiction under the 1 Will. 4, c. 65, and 3 & 4 Will. 4, c. 74, to authorize the committee of the estate of a lunatic tenant in tail in possession to grant leases of the lunatic's estate for a term of twenty-one years, so as to bind the remainder-men. *In re Starkie*, 3 M. & K. 247.

The trustees under a will in which a life annuity of 6,000*l.* a year, and other considerable benefits were given to a person, who, at the death of the testator, was confined in a lunatic asylum, filed a bill for the directions of the Court, in executing the trusts of the will relative to the lunatic. The wife of the lunatic presented a petition, praying an allowance out of the income given to the lunatic, and the Court thereupon referred it to the Master to inquire into his state of mind; and the Master having reported that he was of unsound mind, and not competent to the management of his affairs, the Court, upon the petition of the wife to confirm the report,

directed the trustees to apply to the Great Seal for a commission of lunacy, and referred it to the Master to inquire, what in the meantime would be a proper allowance to be made to the wife. *Bishop of Exeter v. Lord and Lady Ward*, 2 M. & K. 54.

By the law of Scotland, an *interim curator bonis* (provisional committee of the estate,) may be appointed by the Court of Sessions, without notice to the party affected by the appointment, and without cognition or inquest before a jury.

Whether the word "*interim*" means until the patient recovers his faculties, or until some more regular proceeding is instituted, *quære*. By the law of Scotland, a man of weak understanding may appoint *interdictors* by a deed, which binds him to do no act affecting his estate without the consent of the persons appointed *interdictors*. *Interdictors* so appointed having instituted proceedings in the Court of Session to recall a subsequent appointment of an *interim curator*, which was sustained with costs against the *interdictors*:—Held, after a remit to ascertain the practice of the Court of Session, that the judgment should be affirmed, but without costs. *Dickson v. Graham*, 4 Bligh, n.s. 492.

## MAGISTRATE.

[See JUSTICE—RIOT, Depositions.]

## MAGISTRATE'S CLERK.

[See OFFICE.]

## MAIMING.

Pouring acid into the eye of a mare, and thereby blinding her, is a maiming within 7 & 8 Geo. 4, c. 30, s. 17. *Rex v. Owens*, 1 R. & M. C.C. 205.

## MAINTENANCE.

[See INFANT—LEGACY.]

Testator devised his real and personal estates to trustees, in trust to pay certain annual sums for the maintenance of his grandchildren till they attained twenty-five, and to accumulate the surplus income of his estates, which was to form part of his residuary personal estate; and to divide the income of his estates amongst his grandchildren when they attained twenty-five, with benefit of survivorship on any of them dying under twenty-one, without leaving a child that should attain twenty-one; and, on the death of each of them leaving such child, to convey the parent's share to such child; and he empowered his trustees, after the death of the father of his grandchildren, to convey, to his grandsons, absolutely, the shares of his estates, to which under the previous shares, they would be entitled for their lives. A petition, by one of the grandsons, for an increase of the maintenance provided by the testator, was dismissed, the disposition of the property not being such as that the grandchildren must, of necessity, take the whole fund. *Turner v. Turner*, 4 Sim. 430.

The Court will not direct an inquiry as to the propriety of an allowance to the father, for the past maintenance of the infant, unless a special case be

made. *Es parte Bond*, 4 Law J. (n.s.) Chanc. 84, s. c. 2 M. & K. 489.

If, under a marriage contract, a fund has been settled upon trust for the children of the marriage at twenty-one, with a proviso, that till their shares become payable, the interest shall be applied towards their maintenance, the father is entitled to receive such interest for that purpose, without reference to his own ability to maintain them. *Meacher v. Young*, 2 M. & K. 490.

#### MAINTENANCE OF SUITS.

A stranger deposited 500*l.* for the purpose of assisting a party to defray the expense of carrying a divorce bill through parliament:—Held, that this did not amount to maintenance. *Moore v. Usher*, 4 Law J. (n.s.) Chanc. 205.

It is not maintenance to purchase an interest which is the subject of a suit, but if the purchaser give an indemnity against all costs that have been or may be incurred by the seller, in the prosecution of the suit, the transaction amounts to maintenance. Where after a decree in a creditor's suit, the plaintiff sold a debt which he had proved in the cause, and took from the purchaser a deed of indemnity against all expenses which he had incurred, and might incur, in the suit, and his name continued to be used as plaintiff in the suit, together with that of the purchaser:—it was held, that this transaction amounted to maintenance, and the bill, was, upon that ground, dismissed. *Harrington v. Long*, 2 M. & K. 591.

Agreement to lease the rectorial tithes of a parish, including the tithes of ninety acres, supposed to be within that parish, but which had not paid tithes to the lessor during his incumbency, with a stipulation that the intended lessee would, within a given time, take such legal proceedings for the recovery of the tithes of the ninety acres, as his counsel should advise:—Held, not to be within the Statute of Maintenance. *White v. Gardiner*, 1 Y. & C. 885.

#### MALICE.

[See CASE.]

#### MALICIOUS AND VEXATIOUS ARREST.

[See BAIL, Affidavit to hold to bail—LANDLORD AND TENANT, Rent.]

(A) ACTION FOR.

(B) COSTS.

(A) ACTION FOR.

In an action for a malicious arrest, in arresting for the amount due on the one side of the account, without deducting what was due on the other, although there is want of reasonable or probable cause, from which may be inferred malice, it is for the jury to draw that inference, and not for the Judge. *Mitchell v. Jenkins*, 3 Law J. (n.s.) K.B. 35, s. c. 5 B. & Ad. 588; 2 N. & M. 301.

A party cannot be held to bail unless there be a defined debt, to the existence of which the opposite

party can swear; therefore, if A and B enter into an agreement to leave certain matters to arbitrators, whose decision shall be final, who are to strike balances, and make deductions, and if the parties in the agreement refer to certain memoranda of former agreements, the matters contained in which are also referred to arbitrators with similar powers; under such circumstances, if one party arrest the other whilst anything remains to be done under these various agreements, such arrest is unlawful, and an action is maintainable against him by whom it is made. *Smith v. Fielder*, 2 Law J. (n.s.) C.P. 123, s. c. 3 Mo. & Sc. 853.

In an action for holding the plaintiff to bail maliciously, and without reasonable and probable cause, the want of probable cause is to be decided by the Judge, upon a state of facts previously found by the jury. Where, in such action, the Judge nonsuited the plaintiff without referring the belief of the defendant, in holding to bail, to the jury:—Held, that such nonsuit was wrong, inasmuch as the belief of the defendant was a fact, and should be determined like any other fact by the jury. *Venafra v. Johnson*, 3 Law J. (n.s.) C.P. 51, s. c. 10 Bing. 301; 3 Mo. & Sc. 847.

*Quere*, whether in an action for a malicious arrest, the mode in which the suit is determined must be such as in itself to be *prima facie* evidence of malice; and whether, if the defendant arrested the plaintiff on an affidavit for a debt on a promissory note which at the time of the arrest was discharged, it is an immaterial fact, that the plaintiff was indebted to him above 20*l.*, on a general balance of accounts. *Norriah v. Richards*, 4 Law J. (n.s.) K.B. 254, s. c. 5 N. & M. 268; 3 Ad. & E. 733.

Where a writ has been sued out against a party, and no declaration filed within a year from the time of suing out the writ, the cause is out of court; and this is sufficient proof of the "end and determination" of the suit, to satisfy the averment in a declaration for a malicious arrest. *Pierce v. Street*, 1 Law J. (n.s.) K.B. 147, s. c. 3 B. & Ad. 397.

Where, in case for a malicious arrest, the declaration alleges certain facts, "whereupon and whereby the suit was ended and determined," the plaintiff cannot shew any other determination of the suit than the mode stated. The acceptance of the debt and costs in satisfaction of the action under a Judge's order, or a rule of reference, is a sufficient determination of a suit. *Combe v. Capron*, 1 M. & R. 398. [Patteson]

On an application for costs, under 43 Geo. 3, c. 46, s. 3, the question is, whether the plaintiff had reasonable or probable cause to arrest for so large an amount, and not whether the arrest was malicious. *Erie v. Wynne*, 2 Law J. (n.s.) Exch. 231, s. c. 1 C. & M. 532; 3 Tyr. 386; 2 Dowl. P.C. 23.

An arrest and holding to special bail are both essential to entitle a defendant to costs under 43 Geo. 3, c. 46, s. 3. *Bates v. Pilling*, 3 Law J. (n.s.) Exch. 87, s. c. 2 C. & M. 374; 4 Tyr. 231.

An arrest founded on a cause of action, upon which, by law, no arrest can be made, is an arrest without any reasonable or probable cause, and the defendant is entitled to costs under 43 Geo. 3, c. 46. *Beare v. Pinkus*, 4 Law J. (n.s.) K.B. 163, s. c. 4 N. & M. 846.



When the defendant is arrested for a certain sum, and the jury by their verdict find that a less is due, the Court will not grant the defendant his costs, under the 43 Geo. 3, c. 46, if the conduct of the plaintiff, in making such arrest, is doubtful or uncertain; they must see clearly and to their satisfaction, that there was a want of probable or reasonable cause for holding the defendant to bail. *Mentell v. Southall*, 4 Law J. (n.s.) C.P. 267, s. c. 2 Bing. N.C. 74; 2 Sc. 132.

The Court will not allow the defendant his costs, under the 43 Geo. 3, c. 46, s. 3, unless he shew to their satisfaction, that the plaintiff had not reasonable or probable cause for arresting and holding him to special bail. *Burrell v. Brady*, 4 Law J. (n.s.) C.P. 16.

An award of a much smaller amount than that for which the defendant was arrested, is sufficient *prima facie* evidence of a vexatious arrest, and throws the onus upon the plaintiff, on an application for costs under 43 Geo. 3, to satisfy the Court that he had reasonable and probable cause. *Summers v. Grosvenor*, 3 Law J. (n.s.) Exch. 61, s. c. 2 C. & M. 341; 4 Tyr. 222.

A plaintiff, who has arrested for the value of a quantity of goods supplied, is not liable to costs under 43 Geo. 3, c. 46, if part of the goods, which were supplied on sale or return, have been sent back, and received by his shopman without his personal knowledge at the time of the arrest. *Roper v. Sheasby*, 2 Law J. (n.s.) Exch. 239, s. c. 1 C. & M. 496; 3 Tyr. 486.

Upon a bailable writ for 28*l.*, the defendant was not actually arrested, but his attorney gave an undertaking to put in bail, and ultimately entered a common appearance, there being a defect in the affidavit to hold to bail:—Held, that the defendant was not entitled to costs under 43 Geo. 3, c. 46, upon the plaintiff's recovering less than 15*l.* *Amor v. Blagfield*, 1 Law J. (n.s.) C.P. 169, s. c. 9 Bing. 91; 2 Mo. & Sc. 156; 1 Dowl. P.C. 277.

The defendant was arrested for 180*l.*, and, by a Judge's order before trial, the cause was referred to an arbitrator, which order of reference contained this clause—"That the costs of the said suit, and the costs of the reference and award, shall abide the event in like manner as upon a verdict":—Held, that this was not sufficient to give the Court power to grant the application for costs under the stat. 43 Geo. 3, c. 46, as upon a recovery by judgment and verdict. And, *quære*, whether, if the words had been sufficiently strong and explicit, the Court would have accepted such jurisdiction.

*Quære*—whether the proper mode would not be, to give the arbitrator (by the order of reference) a power to give costs under that statute. *Holder v. Raitt*, 4 Law J. (n.s.) K.B. 73, s. c. 2 Ad. & E. 445; 4 N. & M. 466.

The statute 43 Geo. 3, c. 46, s. 3, for allowing a defendant costs in case of arrest without reasonable or probable cause, does not extend to cases where the defendant, under rule 17, R. Gen. Hil. 4 Will. 4, pleads payment of money into court, and the plaintiff replies, accepting a smaller sum than what is sought to be recovered, in satisfaction and discharge of the cause of action. *Brooks v. Rigby*,

4 Law J. (n.s.) K.B. 10, s. c. 2 Ad. & E. 21; 4 N. & M. 3.

The defendant cannot obtain costs for a vexatious arrest, under statute 43 Geo. 3, c. 46, where money has been paid into court, and taken out by the plaintiff. *Rowe v. Rhodes*, 3 Law J. (n.s.) Exch. 125, s. c. 2 C. & M. 379; 4 Tyr. 216.

The defendant was arrested for 20*l.*, and the plaintiff recovered only 8*l.*; but it appeared, that the price of the goods for which the action was brought, had been agreed upon in writing, which the plaintiff, by accident, was unable to prove at the trial, and there was contradictory evidence as to the value of the goods:—Held, that the defendant was not entitled to costs under the 43 Geo. 3, c. 46. *Shatwell v. Barlow*, 3 Dowl. P.C. 709.

Where a defendant was held to bail in a much larger sum than the plaintiff recovered,—*Quære*, whether, if it had been a case within the act, 43 Geo. 3, c. 46, by reason of the absence of a reasonable or probable cause for holding to bail to such an amount, the mere fact of the defendant not having been actually arrested, would have been sufficient to deprive him of the benefit of that act? *Wilson v. Broughton*, 2 Dowl. P.C. 631.

The plaintiff arrested the defendant for 400*l.*, having previously obtained acceptances for 320*l.* for part of the debt from the defendant's agents, to meet which remittances were made to the latter by the defendant:—Held, that the arrest for 400*l.* was made without reasonable or probable cause; and, therefore, that the defendant was entitled to costs under the 43 Geo. 3, c. 46, s. 3. *Reynolds v. Flower*, 3 Mo. & Sc. 801.

On an application for defendant's costs under the 43 Geo. 3, c. 46, s. 3, the onus of proving that the arrest was without reasonable and probable cause lies on the defendant; and the Court will not inquire whether the finding of the jury was correct. In order to obtain costs under the 43 Geo. 3, c. 46, s. 3, it is not necessary to shew that the arrest was malicious. *Twiss v. Osborne*, 4 Dowl. P.C. 107.

If a defendant be arrested on process from the Palace Court, and the cause is removed into the Court of King's Bench, and the plaintiff does not recover to the amount sworn to in the affidavit of debt, the defendant is not entitled to his costs under the 43 Geo. 3, c. 46, s. 3. *James v. Dawson*, 1 Dowl. P.C. 341.

If a cause has been removed by *habeas corpus* into the King's Bench from the Palace Court, and the plaintiff recovers less than the sum for which the defendant was arrested, the former Court cannot grant the defendant his costs under the 43 Geo. 3, c. 46, s. 3. *Connel v. Watson*, 2 Dowl. P.C. 139.

Defendant having been arrested for 65*l.* when there was not probable cause for arresting him for more than 44*l.*, the Court allowed him his costs under 43 Geo. 3, c. 46. *Bradley v. Milnes*, 1 Bing. N.C. 738.

Where a defendant obtains costs under the 43 Geo. 3, c. 46, s. 3, on the ground that the arrest was without reasonable or probable cause, neither party is entitled to the costs of a prior unsuccessful motion to enter a nonsuit. *Bradley v. Milnes*, 1 Sc. 697.

The mere fact of a defendant being arrested for more than is recovered, is not sufficient to disentitle the plaintiff to costs under the 43 Geo. 3, c. 46, s. 3; but there must also appear to be a want of reasonable and probable cause. *Roper v. Shevely*, 2 Dowl. P.C. 14.

Where the reduction of the plaintiff's claim was occasioned by a dispute as to the right of the defendant to claim a set-off:—Held, that though the arbitrator awarded in favour of the defendant in respect of the set-off, and thereby reduced the plaintiff's claim a third, that the defendant was not entitled to his costs under the 43 Geo. 3, c. 46, s. 3. *Cawthorne v. Cawthorne*, 4 Dowl. P.C. 182.

B, a builder, is employed by A in altering A's house. During the progress of the work, A countermands the employment, whereupon B requests A to appoint a valuer; and upon receiving no answer to his application, B continues the work, completes it, and arrests A for the whole amount, but recovers only for the work done previously to the countermand. The defendant is entitled, under 43 Geo. 3, c. 46, to costs. *Russell v. Atkinson*, 3 N. & M. 667.

Where the plaintiff failed in recovering the sum for which he arrested the defendant, the Court allowed the defendant his costs under the 43 Geo. 3, c. 46, though the account was very long, and had been running for several years; it appearing that there must have been either gross neglect or wilful overcharges in making out the account. This act is rather to be extended than confined in its operation. *Hall v. Forget*, 1 Dowl. P.C. 696.

Where owing to the omission of a count in the declaration, applicable to part of the plaintiff's demand, the plaintiff was prevented from recovering an amount equal to the sum for which the defendant was arrested, and which the jury had found to be due; but, on the omission in the declaration being discovered, the verdict was ultimately given for a less sum:—Held, that the defendant was not entitled to costs under 43 Geo. 3, c. 46, s. 3.—Held, also, that he was not so entitled, although the indorsement for bail on the *capias*, by mistake, stated a larger sum than that stated in the affidavit of debt, the defendant not having been arrested for the amount so indorsed, but for the amount really due.

Where a defendant is arrested, and goes to prison, it is "an arrest and holding to bail" within the meaning of the statute. *Preedy v. M'Farlane*, 3 Law J. (N.s.) Exch. 65, s.c. 1 C. M. & R. 819; 5 Tyr. 355.

A party is not warranted in arresting another for a debt, of which he has not, at the time of making the arrest, some evidence besides his own personal knowledge of its existence; and, therefore, a plaintiff arresting a defendant for a large sum of money, and having at the time of arrest evidence only as to a small portion of the amount, was held to be liable to costs under 43 Geo. 3, c. 46, s. 3; although, at the time of the trial, some evidence of a subsequent acknowledgment by the defendant was given. *Griffiths v. Pointon*, 2 N. & M. 675.

Plaintiff and defendant had mutual accounts and dealings; the former arrested and held the latter (who claimed a set-off,) to bail for a certain sum;

the amount of the set-off was disputed by the plaintiff, but was made out upon the trial. A verdict being found for the plaintiff for his claim, reduced by the amount of the set-off proved:—Held, that the arrest was without reasonable or probable cause; and that the defendant was entitled to his costs, under 43 Geo. 3, c. 46, s. 111. *Stims v. Jacques*, 3 Law J. (N.s.) C.P. 167, s.c. 10 Bing. 510; 4 Mo. & Sc. 380.

Upon a defendant's being arrested, and held to bail, for a sum less than that which is finally found to be due, the Court will not order his costs to be taxed under the stat. 43 Geo. 3, c. 46, s. 3, unless the want of reasonable or probable cause for making the arrest be distinctly shewn, and unless it be made appear to the satisfaction of the Court, that the plaintiff had not any reasonable cause for causing the defendant to be arrested and held to bail. *Dogal v. Mathews*, 3 Law J. (N.s.) C.P. 195.

Upon moving to make absolute a rule, under 43 Geo. 3, c. 46, s. 3, to deprive the plaintiff of costs, the Court will permit the defendant to refer to the Judge's notes, at the trial, as to the amount of the verdict, in order to supply an omission of a statement of that fact in his affidavit. And, *semble*, that the fact may be ascertained by reference to the Nisi Prius record.

To entitle a party to avail himself, in support of a rule, of a fact appearing on the Nisi Prius record, it is not necessary that the rule should have been drawn up as upon reading that record. *Van Nieuwen v. Hunter*, 5 N. & M. 376, s.c. 3 Ad. & E. 243.

A plaintiff is bound, before he makes an affidavit to hold to bail, or before he makes an arrest, to see that he has evidence to support his claim; and it is no answer to an application for costs under the stat. 43 Geo. 3, c. 46, for arresting for a larger sum than is recovered, that the plaintiff would have obtained a verdict for the whole amount but for the absence in America of one, and the death of another material witness. *Nicholas v. Hayter*, 4 Law J. (N.s.) K.B. 63, s.c. 2 Ad. & E. 348; 4 N. & M. 882.

In an action for goods sold and delivered, the defendant rested his defence on the bad quality of the goods, which it was proved had, on that account, been sent back to the plaintiff, but were returned by him. A verdict was entered for the plaintiff for the sum of 15*l.* only, a part of the value of the goods. The defendant, having been arrested for 37*l.*, the price of the whole of the goods, on an affidavit, uncontradicted, that he had objected to the quality, and that the plaintiff had agreed to take back the goods,—was held entitled to costs under 43 Geo. 3, c. 46, s. 3, for an arrest without reasonable or probable cause. *Linsley v. Bates*, 1 Law J. (N.s.) Exch. 247, s.c. 2 C. & J. 659; 2 Tyr. 746.

If there be mutual dealings and mutual debts between two parties, and if one arrest the other without striking a balance, and deducting that sum in which he himself is indebted, such arrest is without reasonable or probable cause; and the party by whom it is made is liable to costs under the statute. *Ashton v. Naule*, 2 Law J. (N.s.) C.P. 137, s.c. 3 Mo. & Sc. 184.

## MALICIOUS INJURIES.

[See GRIEVOUS BODILY HARM—WOUND.]

A was indicted for stabbing B, there being another indictment against him for stabbing C:—Held, that, on the trial of the indictment for stabbing B, both C and the surgeon might be asked as to what kind of wound C received, with a view of identifying the instrument used. *Rex v. Furssey*, 6 C. & P. 81.

A sent a tin box to B containing three pounds of gunpowder and two detonators, which were intended to ignite the gunpowder when any person opened the box, and so destroy the person who opened it:—Held, that this was not an "attempt to discharge loaded arms at B," within the statute 9 Geo. 4, c. 31, s. 11 & 12. *Rex v. Mountford*, 7 C. & P. 242. [Williams]

## MALICIOUS INFORMATION.

An action for maliciously, and without probable cause, causing the plaintiff to be informed against, convicted, and imprisoned by a Justice of Peace, under an act of parliament, which gives a right of appeal, cannot be sustained if the plaintiff has not appealed, and the conviction is still subsisting. *Mellor v. Baddeley*, 3 Law J. (N.S.) Exch. 217, s.c. 2 C. & M. 675; 4 Tyr. 962; 6 C. & P. 374. [Park]

## MALICIOUS PROSECUTION.

In an action for maliciously and without probable cause issuing a warrant and taking the plaintiff before a Magistrate, the plaintiff is not bound to give in evidence the depositions taken before the Magistrate. *Biggs v. Clay*, 3 Law J. (N.S.) K.B. 124, s.c. 3 N. & M. 464.

In an action on the case for laying a complaint before a Magistrate, of threatening language, in consequence of which the plaintiff was taken into custody, and imprisoned till he found bail, if it appear that the threat was used in consequence of a private dispute, and was not uttered to the defendant, but related to him by a servant, who gave evidence of it before the Magistrate, the question for the jury will be, whether the defendant acted *bona fide* upon the threat mentioned to him, or merely used it as a pretext for accomplishing his own private purposes. *Venafra v. Johnson*, 6 C. & P. 50. [Park]

In an action for a malicious prosecution, the want of probable cause is a mixed question of law and fact. In such an action for indicting for perjury, it appeared that a bill (not having the defendant's name on the back of it) was ignored; that the defendant afterwards prosecuted another indictment, and appeared before the grand jury, which bill was found. This was afterwards removed into the King's Bench, and, after being suspended for some time, the plaintiff himself finally took the record down for trial, when the defendant, although called as a witness, did not appear. The Judge told the jury, that if he did not appear as a witness, from a consciousness in his own mind that he had no evidence to give which would support the in-

dictment, then there was such want of probable cause for the prosecution, as would make this action maintainable; but, if the jury thought that the non-appearance of the prosecutor to give evidence did not proceed upon that ground, then there was no proof of want of probable cause. Upon a writ of error upon a bill of exceptions annexed, in which it was objected that he ought to have determined whether there was want of probable cause, without leaving it to the jury:—Held, that it was a question properly for the consideration of the jury, and that it was rightly left to them.

A letter proved to have been written by Lord Tenterden's clerk, purporting to be by his Lordship's authority, to Sir Richard Birnie, (but without any proof of that,) was given in evidence, for the purpose of explaining why Sir Richard Birnie acted differently from his first opinion; and it was held, that it was unnecessary to prove his Lordship's authority, but that the letter so proved was admissible.

An affidavit, made by the defendant's attorney's clerk in the prosecution, was likewise put in, to prove that those who conducted the prosecution, had taken every means in their power to prevent a person becoming bail, who was willing to do so. This was held admissible, as a step in the cause, without calling the clerk to prove that he had authority from his master, the attorney. *Taylor v. Wilkins* (in error), 1 Law J. (N.S.) K.B. 17, s.c. 2 B. & Ad. 845.

To maintain an action against a person for having made a false charge of felony before a Magistrate, it is not necessary to shew that the charge was taken down in writing, and acted upon by the Magistrate; but it is necessary that the jury should be satisfied that it was made to the Magistrate, with a view to induce him to entertain it as a charge of felony. *Clarke v. Postan*, 6 C. & P. 423. [Bosanquet]

## MALICIOUS TRESPASS.

[See COMMITMENT.]

The effect of section 39 of 7 & 8 Geo. 4, c. 30, is, that a conviction and commitment under that act, are to be read together, and to be held explanatory the one of the other; and, if the conviction justifies the commitment so explained, the commitment is good.

A commitment, under 7 & 8 Geo. 4, c. 30, s. 24, stated, that the party committed had been charged with having unlawfully trespassed upon lands, and with having cut down, and carried away therefrom, a quantity of rushes, of which offence he had been convicted and ordered to pay 10s. as a penalty, and so much for costs, &c., and required the gaoler, &c. safely to keep him for the space of one month, or until he should be thence delivered by the due order of law:—Held, that the omission of the statement, that the trespass was wilful or malicious, was cured by an allegation in the conviction that the act was done "unlawfully and maliciously."

Secondly, that the conviction supported the commitment, although it was for "cutting and carrying away a quantity of rushes," which, it was objected, was an injury to personal property, whereas the commitment was for an injury to real property;

because it was clear, that both proceeded upon the same statute, and were for the same offence:

Thirdly, that it was no objection that the commitment was for the non-payment of a penalty, and the adjudication of imprisonment in the conviction for the non-payment of a sum of money by way of compensation for the damage, as the party aggrieved had been examined in proof of the offence, and the money was directed to be applied in the manner in which penalties are directed by the act to be applied:

Fourthly, that, although the words "until he be delivered by the due order of law," were not equivalent to the words of qualification in the act, "unless the money should be sooner paid;" yet, that, under section 39, the defect and ambiguity in the conclusion of the warrant might be supplied and explained by reference to the conviction, containing an adjudication of imprisonment in the language of the statute. *Daniell v. Phillips*, 4 Law J. (N.S.) M.C. 67, s. c. 1 C. M. & R. 662.

#### MAN, ISLE OF.

Regulations of importation of corn into. 5 & 6 Will. 4, c. 13; 13 Law J. Stat. 10. And see STATUTES, Construction of.

#### MANDAMUS.

[See CERTIORARI, (1 Ad. & E. 563)—COMPENSATION—CONSTABLE—CORPORATION, Disfranchisement, Mayor—RIOT—SAVINGS BANK—SESSIONS, Case from—TITHES—WITNESS, Commission and Mandamus to examine.]

- (A) WHEN GRANTED OR REFUSED.
- (B) RETURN.
- (C) PRACTICE.
- (D) COSTS.

#### (A) WHEN GRANTED OR REFUSED.

The Lords of the Privy Council cannot be required by mandamus to rehear the matter of an appeal to them from the Arches Court of Canterbury, upon which they have decided; nor can they be so required to receive a petition to His Majesty in council to re-hear. *Ex parte Smyth*, 4 N. & M. 582, s. c. 5 N. & M. 145; 3 Ad. & E. 719.

The Court will grant a rule for a mandamus to serve the office of mayor, upon an affidavit merely stating the election and refusal. *Re v. Simmons*, 3 Doug. 237.

Where the mayor, who presides at the election of a new mayor, is only mayor *de facto* and not *de jure*, and is subsequently removed by judgment of ouster, the election of the new mayor is void; and the Court will grant a mandamus for the election of a new mayor, under stat. 11 Geo. 1, c. 4; although a *quo warranto* is depending against the present mayor. *Re v. the Corporation of Bridgewater*, 3 Doug. 379.

The Court will not grant a mandamus to the mayor of a corporation, directing him to put a particular question to the vote. *Re v. the Mayor of Newcastle*, 1 Law J. (N.S.) K.B. 128, s. c. 3 B. & Ad. 252.

A party found guilty by a jury at a sessions irregularly holden, is entitled to have the record of the proceedings correctly made up according to the fact; and the Court of King's Bench will grant a mandamus to the Justices to make up such record. *Re v. Justices of Middlesex*, 3 Law J. (N.S.) M.C. 32, s. c. 5 B. & Ad. 1113; 3 N. & M. 110.

The Court of King's Bench will not issue a mandamus to a court of criminal jurisdiction, to alter the minutes of a verdict according to the fact, or to cancel an alteration in such minutes, on a representation that the verdict was erroneously entered at the trial. As where a jury at sessions on an indictment for poisoning horses, found a verdict of "guilty by mischance," and were then told by the chairman, that they must say either guilty or not guilty, whereupon they brought the defendant in guilty, and recommended him to mercy, on the ground that he had no malicious intent, but administered the material to benefit the condition of the horses; upon which finding and explanation, a verdict of guilty was entered. *Re v. Hewes*, 5 Law J. (N.S.) M.C. 45, s. c. 3 Ad. & E. 725.

Where the Quarter Sessions have improperly decided against an appeal on a preliminary objection, the Court of King's Bench will grant a mandamus to them to enter continuances, and hear the appeal; but where an objection has been made during the trial of an appeal, to the reception of a particular piece of evidence, and the Sessions have held such objection valid, in consequence of which the appeal has been dismissed, the Court of King's Bench will not interfere, unless the Sessions send up a case. *Re v. Inhabitants of Frieston*, 5 B. & Ad. 597.

By statute, parties were enabled, in certain cases, to appeal to the Quarter Sessions for a particular district, giving ten days' notice. The act said nothing as to further notice in the event of such appeal being respited, nor did it appear that there was any rule of practice on the subject at those sessions.

An appeal under the statute, of which due notice had been given, was respited, and came on at a subsequent sessions, pursuant to the respite. The appellant was called upon to prove that he had given notice of trial of the respited appeal, and on his failing to do so the appeal was dismissed:—Held, that the Sessions were wrong in requiring such notice, and that the case was one in which the Court might overrule their decision. Mandamus granted to hear the appeal. *Re v. Justices of W. R. Yorkshire*, 3 Law J. (N.S.) M.C. 21, s. c. 5 B. & Ad. 667; 2 N. & M. 390.

The Court will not grant a mandamus, requiring the Justices at sessions to direct the putting in suit of a bond given by a high constable for the due performance of his office,—for the purpose of procuring reimbursement to a parish, upon which the high constable has levied excessive rates in disobedience of an order of sessions. *Ex parte Inhabitants of Carlton High Dale*, 4 N. & M. 312.

The Court of King's Bench will not enter into the question, whether the Sessions have or have not done right in refusing to postpone the hearing of an appeal, on the ground of the absence of the witnesses on the part of the appellant. *Re v. the Justices of Middlesex, ex parte Becke*, 1 Law J. (N.S.) M.C. 96, s. c. 3 B. & Ad. 704.

A resolution of a Court of Quarter Sessions, that whenever an appeal against an order of removal shall be entered and respited, notice thereof shall, within one month after such entry and respite, be given to the officers of the removing parish, is void; and where the Court of Quarter Sessions had dismissed an appeal for want of such notice, the Court of King's Bench granted a mandamus to them to hear it. *Rez v. the Justices of Norfolk*, 3 Law J. (N.S.) M.C. 66, s.c. 5 B. & Ad. 990; 3 N. & M. 55.

Where the Quarter Sessions have confirmed an order of removal, subject to a case for the opinion of the Court of King's Bench, and the Justices cannot agree for several sessions on the terms of the case, the Court of King's Bench will grant a mandamus, commanding them to enter continuances, and hear the appeal; for the order of sessions being only conditional, there is no decision unless the case is returned. *Rez v. the Justices of Suffolk*, 1 Dowl. P.C. 163.

The Court will not grant a mandamus, commanding the Justices in sessions to try an appeal dismissed for want of notice of trial, where the Court of Quarter Sessions has granted a case upon the question, whether it had been rightly dismissed, which has been abandoned by the party applying for the mandamus. *Rez v. the Justices of W. R. Yorkshire*, 3 N. & M. 757, s.c. 1 Ad. & E. 606.

The Court will not issue a mandamus to Magistrates to do an act, subjecting them to an action, of which the event may be doubtful. *Rez v. the Justices of Bucks*, 3 N. & M. 68, s.c. 2 Ad. & E. 618, (*nomine Rez v. Morgan*).

The Court will not compel a Magistrate, by mandamus to issue a distress warrant for a parish highway rate, under stat. 13 Geo. 3, c. 78, s. 45 & 67, made upon the occupier of lands within his district, if it appear that, in the Magistrate's belief, and in fact, there is a legal doubt as to the occupier being liable to contribute to the repairs of the parish highways, and that the Magistrate is likely to be sued, if the warrant be granted and acted upon; and this although the occupier has not appealed against the rate. *Rez v. Greame*, 2 Ad. & E. 615.

A local act gave power to commissioners to raise money for paving, lighting, and watching a town, by rating and assessing the proprietors of houses according to the value at which the houses were taxed to the poor. It also empowered them to assess and levy a rate on certain proprietors, for the purpose of certain improvements, such rate to be levied and assessed in the same manner as the other rates. In default of payment, a Justice was authorized to issue a distress warrant. The act also provided, that, in case any person thought himself aggrieved by any rate or assessment, he might appeal to the commissioners, who were authorized to give relief; and, further, that any one who thought himself aggrieved by anything done in pursuance of the act, might appeal to the Quarter Sessions. The commissioners assessed a proprietor to a rate levied for the purpose of the improvements, at an annual value above that at which he was assessed to the poor:—Held, (*Taunton, J. dissentiente*), that, on his refusing to pay, a Justice might be required by mandamus to issue a distress

warrant, the proprietor not having appealed. *Rez v. Trecothick*, 2 Ad. & E. 405.

The Court will not grant a mandamus to Justices of Middlesex, commanding them to issue distress warrants for levying paving rates made in any district within the metropolis; but will leave the commissioners (or other persons having the controul of the pavements of the district) to their remedy by action, under 57 Geo. 3, c. 29, s. 38.

The 57 Geo. 3, c. 29, s. 38, applies as well to those districts within the metropolis, the paving commissioners of which have already, by a local act, a limited power of bringing actions for the recovery of rates, as to other districts. *Rez v. the Justices of Middlesex*, 5 N. & M. 126, s.c. (called *Rez v. Halls*) 3 Ad. & E. 494.

The Court refused to award a mandamus, commanding Justices to enforce, by issuing a warrant of distress, a highway rate assessed upon land which had never been rated before, and the liability of which to be rated was denied. And the prosecutor, having previously to the motion for a rule for a mandamus, merely proposed to call a meeting for the purpose of obtaining an indemnity for the Magistrates, without actually offering a sufficient indemnity, the rule was discharged with costs. *Rez v. the Justices of Somersetshire*, 4 N. & M. 394, s.c. 2 Ad. & E. 632.

By a local act, commissioners were empowered to make paving rates, and to hear and relieve parties complaining of such rates. The act also gave an appeal from the commissioners to the Sessions; and it provided, that, on non-payment of rates for seven days after personal demand, it should be lawful for certain Justices upon proof upon oath of such demand and non-payment, to issue a distress warrant. Justices, being applied to for such warrant, refused to grant it; but stated that they would do so, if a proper information were sworn, and the party summoned before them:—The Court refused a mandamus to compel the Justices to issue a warrant without summoning the party.

Supposing that the act authorized the Justices to grant a warrant without a summons:—Held, nevertheless, that they acted rightly in not so granting it. *Rez v. Hughes*, 3 Ad. & E. 425.

The Court will not issue a mandamus to the treasurer of a town or county, commanding him to obey an order made by a Judge of assize, for payment by him of the costs, &c. of the prosecutor of, and witnesses in, an indictment for misdemeanor, under 7 Geo. 4, c. 64, s. 23. *Rez v. Jeyes*, 5 N. & M. 101, s.c. 3 Ad. & E. 416.

Where a vicar, after summons to the parish clerk to attend and answer a charge of intoxication, removes him upon insufficient evidence of intoxication, the Court will issue a mandamus requiring the vicar to restore the clerk. *Rez v. Neale*, 4 N. & M. 868.

A rule *nisi* was granted for a mandamus to the principal of Clifford's Inn to attend the benchers of the Inner Temple, and produce the records and regulations of the society of Clifford's Inn, to enable the benchers to decide on the validity of his election to that office. But on cause shewn, the rule was discharged, no sufficient proof appearing that the benchers of the Inner Temple had a compulsory authority over Clifford's Inn for this pur-

pose. *Rex v. Allen*, 5 B. & Ad. 984, s. c. 8 N. & M. 184.

A mandamus may be granted, directed to the parishioners at large liable to be rated to the church rate, commanding them to meet in vestry, and elect churchwardens. *Rex v. the Inhabitants of Wis*, 1 Law J. (N.S.) M.C. 36, s. c. 2 B. & Ad. 197.

It being suggested, that there was a prescriptive day for holding a court leet, which had passed, but, it appearing doubtful upon the affidavit whether there was any such prescription, the Court granted a mandamus to be directed to the lord and his steward to hold a court leet forthwith. *Rex v. the Lord of the Manor and Hundred of Milborton*, 4 Law J. (N.S.) M.C. 88, s. c. 3 Ad. & E. 284.

The Court of King's Bench will not grant a mandamus, unless the parties against whom the application is made have refused to do what is required; and, although that refusal need not be in direct terms, such circumstances must be shewn as are conclusive of a refusal. *Rex v. the Brecknock and Abergavenny Canal Company*, 4 Law J. (N.S.) M.C. 108, s. c. 4 N. & M. 871; 3 Ad. & E. 217.

A demand made at the Quarter Sessions to inspect a county rate is not made at a proper time, and is not sufficient to support an application for a mandamus. *Rex v. the Justices of Nottingham*, 4 Law J. (N.S.) M.C. 113, s. c. 3 Ad. & E. 500; 5 N. & M. 166.

Where a local statute confers a power of investigating accounts upon auditors to be annually elected, and to be summoned by the vestry clerk, at certain stated intervals, to audit the accounts, the Court will not grant a mandamus to compel the latter, when new auditors have been elected for the succeeding year, to call a meeting of the old auditors to audit the accounts of the past year. *In re St. Giles and St. George's Parishes*, 1 Dowl. P.C. 540.

A vestry having, by a show of hands, passed a resolution directing an illegal application of some charitable funds, and a poll having been demanded of the person presiding at the vestry, and not granted, the Court refused a rule for a mandamus to compel such person to grant a poll. *Rex v. the Churchwardens of St. Saviour's, Southwark*, 1 Ad. & E. 380, s. c. 3 N. & M. 878.

Where a statute directs an election by poll—semble, that the poll may be taken from the holding up of the electors' hands. But if the tellers appointed to take the numbers differ, and a poll is demanded, and refused, the Court will grant a mandamus to enter adjournment of the election meeting, and to proceed to complete the election. *Rex v. St. Luke's, Vestrymen and Vestry Clerks*, 2 N. & M. 464.

Mandamus lies to admit a clerk of trustees under the general Turnpike Act. *Rex v. the Trustees of the Cheshunt Turnpike Roads*, 5 B. & Ad. 438.

In Hilary term, 1829, the Court granted a rule nisi for a mandamus to the trustees of the Hincksey turnpike roads (Berkshire) to admit certain persons to the office of clerks to the said trustees. *Rex v. Hincksey Turnpike Roads*, 5 B. & Ad. 439.

A local turnpike act directed that the trustees should keep books, in which they should enter their accounts, and also their orders and proceedings; and that all persons should have access to

such entries. By a subsequent local act, it was directed, that the trustees should keep a book, in which they should enter their accounts, which book should be open to the inspection of the trustees, or any creditor on the tolls. The general Turnpike Act, 3 Geo. 4, c. 126, s. 75, re-enacted the latter provision as to all turnpike road accounts; and section 72 directed, that all trustees of turnpike roads should keep a book of their orders and proceedings, which should be open to the inspection of any of the trustees, and should be read as evidence in courts, as there directed. That act also provides, that the enactments therein contained shall extend to all other turnpike acts, except where, by that act, it is ordered otherwise:—

Held, that these clauses of the general and of the second local act superseded the provisions of the original act, and limited the power of inspection at first given to the whole public, confining it to trustees, and to trustees and creditors, in the respective cases of orders and accounts.

To ground an application for a mandamus to inspect books—*quare*, whether it is sufficient to shew that the party entitled to inspect demanded liberty to do so, that his claim was disputed, but inspection offered him as a favour, and that he refused to accept it otherwise than as a right—(per Deaman, C.J.) *Rex v. the Trustees of the North Leach and Witney Roads*, 5 B. & Ad. 978.

Where a canal act gives the controul over the company's affairs to a committee, and authorizes every proprietor to inspect the books in which the committee are directed to enter accounts, &c., a mandamus will not be granted to compel the company to permit a proprietor to inspect the books, where there has been no refusal by the committee, although there has been a direct refusal by the clerk, in whose possession the books are. So, although upon an application to the committee they say they must consider of the application, as it is a novel one, and inspection is afterwards positively refused by the clerk. Before the Court will grant a mandamus, there must be a direct refusal by the proper parties to do the act. *Rex v. Wills and Berks Canal Company*, 5 N. & M. 344, s. c. 3 Ad. & E. 477.

By authority of act of parliament, a company were enabled to sue and to be sued in the name of their treasurer. It was also provided, that goods of individuals should not be taken in execution upon judgment against the company. Certain actions depending between the plaintiff and the treasurer of the company, and all matters in difference between the parties, were referred to an arbitrator, who awarded certain sums to be paid to the plaintiff:—Held, that there was no mode of obtaining execution on a judgment against the treasurer, in an action brought upon the award; and therefore, that a mandamus would lie. *Corpe v. Glynne*, 2 Law J. (N.S.) K.B. 66.

By stat. 11 Geo. 4, c. 20, the Hungerford Market Company were empowered to purchase certain premises for the purposes of the act; and by section 6 it was enacted as follows—that if any person interested in such premises shall, for twenty-one days next after notice given him of their being required for the purposes of the act, refuse to treat, or not agree, for the sale thereof, in every

such case the company shall cause the value of, and recompense to be made for, such premises, to be inquired of by a jury; and for summoning and returning such jury, they are empowered to issue their warrant to the high bailiff of Westminster, who is required to impannel, summon, and return such jury; and is empowered to swear twelve, and to examine witnesses before them, &c.; and they shall assess the damages and recompense, &c.:—Held, that the company, having given such notice to an occupier, could not withdraw from it, though they offered to pay all reasonable costs incurred by him in consequence; but that the act obliged them, on his demand, to issue their warrant to the high bailiff for summoning a jury. And the Court granted a mandamus to compel them so to do. *Rez v. the Hungerford Market Company, ex parte Davies*, 4 B. & Ad. 327, s.c. 1 N. & M. 112. See also *Rez v. the Commissioners for improving Market Street, Manchester*, *ibid*, 333.

The St. Katherine Dock Company were incorporated by act of parliament, which directed, that all actions against the company should be prosecuted against the treasurer, or a director for the time being; but that the body, or goods, lands, &c. of such treasurer or director should not, by reason of his being defendant in such action, be liable to execution. An action having been brought by T C against the treasurer, as such, and another by the company, in the name of the treasurer, against T C, all matters in difference were referred to an arbitrator, who awarded that T C had cause of action against the defendant, as such treasurer, for a certain sum, and directed that the treasurer should pay T C that sum on demand; and as to the other suit, he awarded that the treasurer, as such, had no cause of action, and ordered him, as such treasurer, to pay T C the costs on demand:—Held, that a mandamus would lie to the treasurer and directors, commanding them to pay the sums awarded. *Rez v. St. Katharine Dock Company*, 4 B. & Ad. 360, s.c. 1 N. & M. 121.

#### (B) RETURN.

*Quere*—whether, by the stat. 9 Anne, c. 20, s. 2, the return to a mandamus can be demurred to. *Rez v. the Lord of the Manor of Oundle*, 1 Ad. & E. 283, s.c. 3 N. & M. 496.

A party prosecuting out a mandamus, is not entitled, under the stat. 9 Anne, c. 20, first, to take the opinion of the Court upon the sufficiency of the return, and afterwards, upon its being given against him, to traverse the fact stated in the return.

There may be several and distinct matters returned to a mandamus to admit, provided they are not inconsistent with each other; and, if one of those matters amounts to a sufficient excuse, the return is good.

A custom for a particular body of a corporation to examine and determine the fitness of a party elected by another part of the corporation, to fill the office to which he is elected, and to admit or reject him according to their "discretion and sound consciences," is a good and valid custom. Therefore, to a mandamus to the Mayor, &c. of London, to admit a party who, at a wardmote, had been elected alderman, the return of such a custom

by the court of aldermen, and that they had adjudged the party an unfit and an improper person, according to their discretion and sound consciences, was held good.

The statute 11 Geo. 1, c. 18, s. 7, by which the right of election of aldermen is declared to be in the householder, paying scot and lot, applies only to the mode of election, and does not at all interfere with the right which before existed, by custom, in the aldermen, of approving or disapproving of the person so elected, on his application to be admitted. *Rez v. the Lord Mayor and Aldermen of London*, 1 Law J. (n.s.) K.B. 79, s.c. 2 B. & Ad. 255.

The right of election of an alderman of London, being in the citizens of the wardmote, with a power in the Court of Aldermen to judge of the fitness of the person elected, it is no incongruity in a return to a mandamus by the latter, that it state that the right of election is in a majority of the citizens; that the applicant was elected by a majority, but still (as the Court of Aldermen thought him unfit,) that he was not duly elected. *Rez v. the Mayor and Aldermen of London*, 2 Law J. (n.s.) K.B. 186, s.c. 1 Nev. & M. 285; 5 B. & Ad. 233; 2 N. & M. 126.

To a mandamus requiring A, a waywarden, to deliver to the churchwardens certain books of account, assessments, &c. in his custody, power, or possession, it is a good return to say, that on and since the teste of the writ, A had not, nor has had the books, &c., or any of them, in his custody, power, or possession.

If A goes on unnecessarily to state that he had them not on a prior day, when it is surmised in the mandamus that they were demanded by the churchwardens, he is not bound to negative a possession intermediate between the demand and the teste of the writ. Whether, under the circumstances, the books, &c. were in the power of A, is a question to be raised by a traverse to the return, or by an action for a false return. *Rez v. Round*, 5 N. & M. 42.

A statute directed that a sum of money should be paid to certain commissioners, who were therewith to execute all such works, &c. as should from time to time be deemed necessary, proper, or expedient for putting certain banks and bridges in a permanent state of stability and security, and for constructing the forelands and slopes of the banks, as far as practicable, upon one uniform system.

By mandamus reciting this clause, and that the money had been paid to the commissioners, they were ordered to proceed to put the banks forthwith in a permanent state of stability and security, and to construct the forelands and slopes of the banks, as far as practicable, upon one uniform system.

Return, that the commissioners had, from time to time, at all times from the passing of the act hitherto, proceeded to execute all such works as should be or were from time to time deemed necessary, proper, or expedient for putting the banks in a permanent state of stability and security, and for constructing the forelands and slopes of the banks, as far as practicable, upon one uniform system:—Held, an insufficient return, and a peremptory mandamus awarded. *Rez v. Ouze Bank Commissioners*, 3 Ad. & E. 544.

## (C) PRACTICE.

Rule for a mandamus to admit the prosecutor to the freedom of a corporation, absolute in the first instance. *Rez v. the Mayor, &c. of Coventry*, 3 Doug. 236.

It is discretionary in the Court, either to determine the validity of a return to a mandamus on motion, or to order the case to be set down in the crown paper for argument. *Rez v. St. Katharine Dock Company*, 4 B. & Ad. 360, s. c. 1 N. & M. 121.

A mandamus to appear, and produce and explain accounts to auditors, cannot direct the parties to appear, &c. "at such time and place as the auditors may appoint and give notice thereof," where, by statute, the parties are only required to appear at a meeting directed to be held at a certain place.

When, upon a motion to quash the return to a mandamus for insufficiency, and to issue a peremptory mandamus, the matter is set down in the crown paper for argument, the counsel for the Crown is entitled to begin, although the counsel for the defendants purpose to urge objections to the mandamus itself.

The Court has power to mould the rule for a mandamus, but cannot re-mould the writ after it has issued, and award a peremptory mandamus in a more limited form than the original mandamus. *Rez v. the Trustees of St. Pancras New Church*, 5 N. & M. 219, s. c. 3 Ad. & E. 535.

The rule for a mandamus commanding the ecclesiastical authorities to swear in a churchwarden duly appointed, is absolute in the first instance. *Ex parte Lowe*, 4 Dowl. P.C. 15.

The Court will grant a rule absolute in the first instance for a mandamus to the archdeacon to swear in a party as churchwarden on affidavit of due election demanded, and refusal, and of notice to the archdeacon of the application to the Court, the ground of refusal not appearing by the affidavit in support of the rule. *Ex parte Winsfield*, 3 Ad. & E. 614, s. c. 5 N. & M. 42, (*Rez v. Archdeacon of Litchfield*).

Where, on a return to a mandamus (to admit a copyholder), a *concilium* has been obtained, and the return, on argument, held sufficient in law, and a peremptory mandamus awarded, the Court will not, at the instance of the party making such return, direct the prosecutor to demur, in order that the case may go to a court of error. *Rez v. the Lord of the Manor of Ousdale*, 1 Ad. & E. 283, s. c. 3 N. & M. 496.

## (D) COSTS.

Costs of a mandamus moved for before the 1 Will. 4, c. 21, s. 6, came into force, not allowed. *Rez v. the Inhabitants of Wix*, 1 Law J. (N.S.) M.C. 36, s. c. 2 B. & Ad. 197.

Under stat. 1 Will. 4, c. 21, s. 6, the costs of a mandamus, and of applying for it, may be obtained of the Court, by a distinct motion after the issuing of the writ.

And upon such motion for costs, the Court will refer for its guidance to the affidavits filed in support of the application for a mandamus, if it be clear that both applications are made by the same parties. *Rez v. Kirke*, 5 B. & Ad. 1089.

Where a rule nisi for a mandamus to Justices to hear an appeal is discharged with costs, to be paid to the Justices by the appellants, the parish which appeared to support the refusal of the Justices is not entitled to its costs, although served with the rule nisi, and although the Justices did not appear by counsel. *Rez v. the Justices of Staffordshire*, 1 Dowl. P.C. 507.

## MANGEL WURZEL.

Distillation of spirits from, permitted. 2 & 3 Will. 4, c. 74; 10 Law J. Stat. 198.

## MANSLAUGHTER.

[See MURDER AND MANSLAUGHTER.]

## MARINES.

Annual acts relating to. 2 Will. 4, c. 23; 10 Law J. Stat. 28;—3 Will. 4, c. 6; 11 Law J. Stat. 24;—4 Will. 4, c. 4; 12 Law J. Stat. 2;—5 Will. 4, c. 7; 13 Law J. Stat. 6.

## MARITAL RIGHT.

A lady, pending a treaty of marriage, which afterwards took effect, made a voluntary assignment of part of her property to her sister:—Held, that the husband, who was, under the circumstances, presumed to have had notice of the assignment before his marriage, was not entitled to set it aside on the ground of fraud upon his marital right. Relief against a disposition of property by the intended wife, pending a treaty of marriage, can only be given where the husband has been kept in ignorance of the transaction;—and *semble*, that in applying the principle upon which conveyances made by the intended wife, pending a treaty of marriage, are avoided on the ground of fraud upon the marital right, the Court will take into consideration the meritorious object of such conveyances, and the situation of the intended husband in point of pecuniary means. *St. George v. Wake*, 1 M. & K. 610.

## MARKET.

The owner of a market within a town, who receives stallage for the stalls erected therein on his own land, may maintain an action against a person, who erects other stalls within the town upon his own land, for the sale of articles which pay no toll to the owner of the market. *Mooley v. Chadwick*, 3 Doug. 117.

*Quers*, if the grantee of a newly-created market can, by virtue of such grant merely, maintain an action for disturbance of franchise against a person selling marketable articles in his own shop, within the franchise, but not within the limits of the market-place, on the market day. But a claim by immemorial custom to exclude others from selling such commodities on the market day, except in the market-place, is valid in law. And where a market for meat, &c. was proved to have been in existence in the reign of James I., proof that the grantees of the market had for the last hundred years, appointed market-lookers, that no butchers' shops



had existed out of the market-place until 1810, and that the shops then set up were objected to by the grantees, was held to be sufficient evidence of such immemorial right. *Mayor of Macclesfield v. Podley*, 4 B. & Ad. 397, s. c. 1 N. & M. 709.

### MARRIAGE.

[See **BARON AND FEME—CONSPIRACY—DIVORCE.**]

- (A) VALIDITY OF.
- (B) BREACH OF PROMISE OF.
- (C) EVIDENCE OF.

#### (A) VALIDITY OF.

Marriages, at Hamburg, declared valid in certain cases. 3 & 4 Will. 4, c. 45; 11 Law J. Stat. 105.

Laws relating to, in Scotland, amended. 4 & 5 Will. 4, c. 28; 12 Law J. Stat. 45.

Repeal of certain penal enactments against Roman Catholic clergymen, relating to the celebration of marriages in Ireland. 3 & 4 Will. 4, c. 102; 11 Law J. Stat. 209.

Marriage within the prohibited degrees, before the passing of the act, valid; after the passing of the act, void. 5 & 6 Will. 4, c. 54; 13 Law J. Stat. 118.

Suit of nullity of marriage, under 4 Geo. 4, c. 76, by reason of undue publication of banns, sustained; both parties having "knowingly and wilfully intermarried" after such undue publication. *Tongue v. Allen*, 1 Curt. 38.

Marriage without due publication of banns not void under stat. 4 Geo. 4, c. 26, s. 22, where only one of the parties knew of the false publication. *Wright v. Elwood*, 1 Curt. 49.

Marriage solemnized by banns, in a parish where neither party resided, held valid. *Connell v. Masson*, 1 Law J. (N.S.) Chanc. 140.

In order to render a marriage during minority valid, under stat. 3 Geo. 4, c. 75, s. 8, actual cohabitation up to the time of the death of one of the parties, is not necessary.

But where the parties separate, though not voluntarily, and subsequently one of them expressly denies the validity of the marriage, and they continue to live apart until the death of that party, this cannot be construed as a living together within the meaning of the provisions of the statute. *Poole v. Poole*, 1 Law J. (N.S.) Exch. 63, s. c. 2 C. & J. 66; 2 Tyr. 76.

Testator bequeathed certain leasehold interests to his widow, as long as she remained unmarried. Upon her marriage, the bequest was to go over to his daughter, the female plaintiff. The widow did contract a marriage *de facto*, with G. The banns were published in her maiden name, and in such name she was married. In an action against the representative of G, for the rents received by him, during cohabitation with the widow, and the marriage *de facto* being proved by the plaintiffs:—Held, that on such proof they should be nonsuited, as the marriage on which they relied to work a forfeiture was, by the statute 26 Geo. 2, c. 38, s. 1, null and void.

*Semble*—that, in such case, the nullity of the marriage may be given in evidence by either party.

DIGEST, 1831—35.

*Allen v. Wood*, 3 Law J. (N.S.) C.P. 219, s. c. 4 Mo. & Sc. 510; 1 Bing. N.C. 8.

#### (B) BREACH OF PROMISE OF.

[See **ADULTERY.**]

Action for breach of promise of marriage. It appeared, that the first promise was made by the defendant, in consideration that the plaintiff would go to bed with him, which she did, but there was evidence of subsequent promises. *Semble*—that this is not such a *furtive contractus*, as to prevent the plaintiff from recovering. *Morton v. Fenn*, 3 Doug. 211.

#### (C) EVIDENCE.

The registry of a marriage is evidence, between strangers, of the time of the marriage. *Doe d. Wolleston v. Barnes*, 1 M. & Ro. 386. [Denman]

In an action against husband and wife, on the note of the wife made *dum sola*, a witness stated, that he knew A B (the wife) formerly, and had heard that she was afterwards married to E F (the husband); the witness was not cross-examined:—Held, sufficient *prima facie* evidence of marriage. *Evans v. Morgan*, 2 C. & J. 453, s. c. 2 Tyr. 396.

### MARRIAGE ARTICLES.

[See **SETTLEMENT.**]

### MARSHAL.

[See **ESCAPE.**]

After a defendant had been attached by the sheriff for non-payment of money, a writ of *habeas corpus cum causa* issued in an action brought against him in the Court of King's Bench, under which he was turned over, by a Judge's order, to the Marshal of the King's Bench, who suffered him to escape. The Court of Chancery, on motion, ordered the Marshal to pay the money for which the defendant had been attached. *Dewes v. Beresford*, 5 Sim. 531.

### MARTINMAS.

[See **PLEADING.**]

### MASTER AND SERVANT.

[See **JUSTICES OF THE PEACE, Power and Duties.**]

- (A) RIGHTS AND LIABILITY OF MASTER.
- (B) RIGHTS AND LIABILITY OF SERVANT.
- (C) CONTRACTS BETWEEN.
- (D) EMBEZZLEMENT.

#### (A) RIGHTS AND LIABILITY OF MASTER.

[See **ACTION, Where maintainable—WARRANTY.**]

By the Scotch law, the master is liable for the consequence of any act done negligently by the servant, within the scope or in the discharge of his general or prescribed duty. Where a female servant, whose duty it was to keep good fires, made a fire of straw and furze in a grate, for the purpose of cleansing the chimney:—Held, that the master was not liable for the effect of a fire occasioned by

such misconduct, as the act was not within the general scope of the servant's duty, nor was it directed by the express command of the master. *Mackenzie v. Macleod*, 3 Law J. (N.S.) C.P. 79, s. c. 10 Bing. 385; 4 Mo. & Sc. 249.

A master in giving the character of his late servant to a person intending to take her, charged her with theft, and in support of that charge stated, that she had borrowed money when she came into his service, and repaid it before she received any wages. In reply to an inquiry made afterwards by a relation of the servant, he admitted, that the time when he paid the wages was entered in a book, which he produced, but refused to state what the time was; and on the same party remonstrating, and observing that the servant in consequence of her loss of character, might have gone upon the town, he answered, "What is that to us?"—Held, that this conduct was evidence to go to the jury (though slight), that the communication to the intended master was made maliciously. *Kelly v. Partington*, 4 B. & Ad. 700.

A servant of two partners may maintain trespass against one of the partners, for turning him out of the joint dwelling-house, where the business is carried on, after the expiration of a notice to quit by that partner, if he has been authorized by the other partner to remain. *Donaldson v. Williams*, 2 Law J. (N.S.) Exch. 173, s. c. 1 C. & M. 345; 3 Tyr. 371.

A boatman left his boat to a lad in his employ, who was accustomed to ply in it for hire, and to carry passengers across a haven; and the lad on one occasion received a passenger, and carried him across near to the line of an ancient ferry, paying the fare over to his master:—Held, that the master was responsible for his act. *Huxxy v. Field*, 4 Law J. (N.S.) Exch. 239, s. c. 2 C. M. & R. 432.

If a servant brings a good written character, and is dismissed for ill-behaviour,—*semble*, that the master is justified, if he returns the character to the servant, in writing upon it, that the servant was dismissed for ill-behaviour. *Taylor v. Rowan*, 7 C. & P. 73. [Abinger]

A master is not liable to the overseers of a parish, who have been compelled to pay the amount of a surgeon's bill for curing his servant, in consequence of an accident happening to him in the parish. *Newby v. Wiltshire*, 4 Doug. 284.

#### (B) RIGHTS AND LIABILITY OF SERVANT.

A head gardener to a gentleman, having the management and superintendence of extensive grounds, with assistant gardeners under him, but living in a house, rent-free, on the grounds, and near to his master's residence, was held to be a menial servant, and, as such, dismissible at a month's warning. *Nowlan v. Ablett*, 4 Law J. (N.S.) Exch. 165, s. c. 2 C. M. & R. 54.

If a yearly servant be dismissed by his master before the year expires, for such misconduct as will justify his dismissal, the servant is not entitled to any wages for the time during which he served. *Turner v. Robinson*, 6 C. & P. 15. [Denman]

In an action by a servant, who was dismissed, for wages, the proof was, that he was to have wages at the rate of 80*l*. per annum:—Held, that the *prima facie* presumption was, that the hiring was

for a year; and that having been rightfully dismissed for misconduct before the year expired, he could not recover wages *pro rata*. And this, although the master had brought an action against him for the misconduct, and recovered damages. *Turner v. Robinson*, 5 B. & Ad. 789, s. c. 2 N. & M. 129.

The bankruptcy of the master does not of itself effect a dissolution of the contract of hiring. And, where a servant was hired for a year, and no specified times appointed for payment, but the jury found a dissolution of the contract by mutual consent at a time subsequent to the commission, and in the course of the current year:—Held, that the servant was entitled to recover *pro rata* for the time he so served, and that the bankrupt's certificate was no bar. *Thomas v. Williams*, 3 Law J. (N.S.) K.B. 212, s. c. 1 Ad. & E. 685; 3 N. & M. 545.

If, at the time when a master dismisses his servant, the servant has been guilty of misconduct, the master may set up his misconduct as an answer to an action for wages, whether the dismissal proceeded on the ground that the servant had misconducted himself, or upon some other ground.

*Semble*, that evidence of successive quarterly payments is sufficient to establish an allegation that the salary of a clerk is payable quarterly, although his appointment is entered in a book at an annual salary only, and no mention made of the periods when it is to be paid. *Ridgway v. the Haggerford Market Company*, 4 Law J. (N.S.) K.B. 157, s. c. 4 N. & M. 797; 3 Ad. & E. 171.

#### (C) CONTRACTS BETWEEN.

[See FRAUDS, STATUTE OF.]

A master having admitted, that, by his factor's agreement, he promised to his servant, in addition to ordinary wages, a present of 20*l*., the service to be at all events till the end of one year; and that sum not having been paid at the expiration of the year, and the service having continued for several years:—Held, that the contract was renewed in all its parts from year to year; and, nothing being said to the contrary by either party, that 20*l*. was due for every year of service. *Earl Mansfield v. Scott*, 1 C. & F. 319.

#### (D) EMBEZZLEMENT.

[See SLANDER.]

### MEASURES AND WEIGHTS.

[See CUSTOM.]

Where there had been a contract for the sale of goods by an illegal measure, and the purchaser received them, and allowed for the price of them in an account which was settled between the parties:—Held, that he could not afterwards impeach the sale, such settlement of account being equivalent to payment. *Owens v. Denton*, 4 Law J. (N.S.) Exch. 68, s. c. 1 C. M. & R. 713; 5 Tyr. 359.

### MEDICAL ATTENDANCE.

[See POOR—SURGEON.]

MEETING, ILLEGAL.

[See RIOT.]

MEMORANDUM, TO REFRESH MEMORY.

[See EVIDENCE, Secondary and Parol.]

MENAI AND CONWAY BRIDGES.

Commissioners of Woods and Forests empowered to pay the proceeds of the tolls of, to the account of the Consolidated Fund. 4 & 5 Will. 4, c. 66; 12 Law J. Stat. 135.

MERCHANT.

(A) ACCOUNTS.

[See LIMITATIONS, STATUTE OF.]

(B) SEAMEN.

Amendment and consolidation of laws relating to, and for forming a register of. 5 & 6 Will. 4, c. 19; 18 Law J. Stat. 18.

(C) SHIPPING.

[See SHIP AND SHIPPING.]

(D) SERVICE.

[See SEAMEN'S WAGES.]

Amendment of 20 Geo. 2, c. 28, relating to the relief of sick and disabled seamen, and the widows and children of such as shall be killed in. 4 & 5 Will. 4, c. 52; 12 Law J. Stat. 90.

MERGER.

A lease was granted in 1759 for ninety-nine years, if certain parties should so long live; the lessees in 1818 demised the premises to P for sixty-two years, from the 25th of March 1821, if their interest should so long continue, subject to a rent of 42*l.* and various covenants, with a proviso for re-entry in case of default. P had already the reversion in fee, subject to a mortgage granted by him before the last-mentioned demise. By lease and re-lease executed in 1820, to which the mortgagee was a party, P, in consideration of a sum of money, (part of which went to discharge the mortgage,) conveyed the premises in fee to a purchaser, to whom the mortgagee also assigned his term; and it was stipulated, that the purchaser should retain 300*l.* of the purchase-money, upon trust, that, if P should pay the 42*l.* rent, and perform the covenants contained in the lease of 1818, the purchaser should pay over to him 300*l.* at the expiration of the term, or extinguishment of the lease of 1759, and interest in the meantime:—Held, that the deed of 1818 was an assignment of all the interest of the then lessees to P, and that by the conveyance of 1820, that interest, as well as the reversion in fee, passed to the purchaser, and (the mortgage being at the same time put an end to,) the term became merged in the inheritance, and consequently, that as soon as the terms became vested in the purchaser, P was discharged from the rent and covenants, and entitled to the 300*l.* *Thorn v. Woulcombe*, 3 B. & Ad. 586.

MESNE PROFITS.

In an action of trespass for mesne profits by the lessor of the plaintiff, after a recovery in ejectment, it is no answer to the action, that a *remittitur damna* has been entered on the record in the action of ejectment. *Harper v. Eyles*, 3 Doug. 399.

A judgment in ejectment is not conclusive evidence of title in the action for mesne profits, unless it be pleaded by way of estoppel. Therefore, under a plea (to a declaration in the ordinary form,) that the premises in the declaration mentioned were not the premises of the plaintiff, it was held, that the defendant might give evidence of title in himself, though he had let judgment go by default in the ejectment.

Where there is judgment by default in an ejectment, the plaintiff may, in the action for mesne profits, recover all the expenses he has been necessarily put to in the ejectment, and is not limited to the taxed costs as between party and party. *Doe v. Huddart*, 4 Law J. (N.S.) Exch. 316, s. c. 2 C. M. & R. 316.

In an action for mesne profits, where the defendant has taken possession before the end of a quarter, he is entitled to deduct from the damages a payment for ground-rent for the whole of that quarter. *Doe v. Hare*, 3 Law J. (N.S.) Exch. 17, s. c. 2 C. & M. 146; 4 Tyr. 29.

The representative of an agent, who had given no notice of his title to land, on which he advised and permitted his principal to lay out money on permanent buildings, restrained from proceeding at law for mesne profits, although he had obtained a verdict in ejectment, and established his title at law.

No set-off being allowed in an action for mesne profits, an injunction to restrain proceedings at law will be granted, where an action is brought against a party having a cross demand against the plaintiff at law, for money laid out upon the land. *Cawdor v. Lewes*, 4 Law J. (N.S.) Exch. 59, s. c. 1 Y. & C. 427.

Trespass for mesne profits lies against a person who comes in under the party against whom there had been recovered a previous judgment in ejectment, which was afterwards executed. *Doe v. Whitcomb*, 1 Law J. (N.S.) C.P. 9, s. c. 8 Bing. 46; 1 Mo. & Sc. 107.

Trespass for mesne profits does not lie against a person who occupies the premises during the interval between a recovery of a judgment in ejectment against another person and the execution of a writ of possession under that judgment, unless it is shewn that the defendant occupied under the person against whom the judgment was obtained.

Parol evidence is not admissible to prove under whom the defendant occupied, if it is shewn that there was a written agreement. *Doe v. Harvey*, 1 Law J. (N.S.) C.P. 10, s. c. 8 Bing. 239; 1 Mo. & Sc. 374.

Where the lessee of lands is in possession under the judgment of a court of law in Scotland, which judgment, upon appeal to the House of Lords, was held to be erroneous, the possession is *bond fide*; and the lessee, by the law of Scotland, is not accountable to the owner for the profits of the lands during the possession. *Carnegy v. Scott*, 7 Bligh, n.s. 462.

## METROPOLITAN POLICE.

[See COSTS, Certificate.]

Provisions for the more effectual administration of justice in police offices of the metropolis, and prevention of depredations upon the Thames and its vicinity for three years. 3 Will. 4, c. 19; 11 Law J. Stat. 44.

Authority for issue of money towards support of, out of the Consolidated Fund. 3 & 4 Will. 4, c. 89; 11 Law J. Stat. 173.

## MIDDLESEX.

[See JUDGES OF ASSIZE.]

## MILITIA.

Annual Acts. 2 & 3 Will. 4, c. 76; 10 Law J. Stat. 201;—4 & 5 Will. 4, c. 63 & 64; 12 Law J. Stat. 132 & 133;—5 & 6 Will. 4, c. 37; 13 Law J. Stat. 67.

Making of lists, ballots, and enrolments for, suspended. 2 Will. 4, c. 50; 10 Law J. Stat. 107;—3 Will. 4, c. 21; 11 Law J. Stat. 57.

Provisions relating to the pay, clothing, and expenses of, and for allowances to certain officers of. 5 & 6 Will. 4, c. 68; 13 Law J. Stat. 151.

## MILLER.

[See TITHES, What titheable.]

## MILLS.

[See FACTORIES.]

## MINISTER.

[See DISSENTING MINISTER.]

## MINISTERS TO SCOTCH CHURCHES.

Regulations of appointment of. 4 & 5 Will. 4, c. 41; 12 Law J. Stat. 71.

## MISDEMEANOUR.

[See NEW TRIAL.]

An attempt to commit a misdemeanour, created by statute, is itself a misdemeanour. A count, in an indictment, charged that a defendant "did attempt to assault," a girl, "by soliciting and inducing her" to place herself in an indecent attitude, he doing the like:—Held, that such a count was bad. *Rex v. Butler*, 6 C. & P. 368. [Patteson]

## MISDIRECTION.

[See LANDLORD AND TENANT, What demised—NEW TRIAL.]

## MISNOMER.

[See AMENDMENT, Declaration—PRACTICE, Process—BAIL, Affidavit to hold to bail.]

The rule Hilary, 2 Will. 4, No. 32, regarding misnomers of persons arrested, applies to mistakes in the Christian name only—per Alderson, B. *Finch v. Cocken*, 4 Law J. (n.s.) Exch. 131, a.c. 2 C. M. & R. 126. And see BAIL, Bail-bond.

Where the defendant justified under process sued out of a county court "against the said plaintiff," whose name was Elizabeth Shee, and upon production of the writ it appeared to be against Sarah Shee;—*quære*, whether evidence was admissible, if objected to at the trial, to prove that she was as well known by the one name as the other; but, at all events, as such evidence had been received without being objected to at the trial, it was held to be too late to make the objection on a motion for a new trial. *Shee v. Jupp*, 1 Law J. (n.s.) K.B. 145.

A defendant waives an objection by misnomer by taking out a Judge's order, wherein he uses the name by which he was arrested. *Nathan v. Coker*, 3 Dowl. P.C. 370.

A defendant, whose name was Cocken, was arrested upon a *capias* against him by the name of Cocker: he gave a bail-bond to the sheriff in the name of Cocken sued as Cocker; and the bail-bond being afterwards assigned to the plaintiff, he declared thereon against the defendant as Cocken, sued by the name of Cocker. The defendant pleaded, that no such writ as that stated in the declaration, was issued against him. It was admitted, that he was the real defendant. The plaintiff was nonsuited; but the Court set aside the nonsuit, and ordered a verdict to be entered for the plaintiff, because, in point of fact, there was a writ against the defendant by the name of Cocker.—Held, also, upon motion in arrest of judgment, that the declaration was bad, because a writ against Cocker did not authorize an arrest of Cocken, unless he was known as well by one name as the other; and there was no averment of that fact in the declaration; and that neither the 3 & 4 Will. 4, c. 42, s. 11, nor the rule of Hilary term, 2 Will. 4, s. 32, had made any alteration in the law in this respect. *Finch v. Cocken*, 3 Law J. (n.s.) Exch. 93, a.c. 3 Dowl. P.C. 678.

Where a defendant moves to set aside a *ca. m.*, on the ground of misnomer, the affidavits in support of the motion must be entitled in the right name. *Thorpe v. Hook*, 1 Dowl. P.C. 494.

Where a cause had proceeded to issue in the wrong Christian name of the plaintiff, the Court refused to amend the proceedings by inserting the right name, because it was only a misnomer, which was immaterial, there being no plea. *Moody v. Delatt*, 4 Law J. (n.s.) Exch. 78, a.c. 5 Tyr. 492.

## MISREPRESENTATION.

[See FALSE REPRESENTATION.]

## MISTAKE.

A party who, under misapprehension of his legal rights, parts with his property for a *bond fide* and

valuable, but not an adequate consideration, cannot have the transaction set aside on the mere ground of mistake. *Marshall v. Collett*, 1 Y. & C. 232.

A trustee having, by mistake, paid to the mother of a child, interest on a legacy to the child, which was contingent,—the Court held it to have been paid to the mother as guardian of the child, for maintenance, and would not permit the trustee to recover back the monies as expended. *Webb v. Brookes*, 1 Law J. (N.S.) Chanc. 191.

#### MODUS.

[See TITHES.]

#### MONEY COUNTS.

[See RATE, Poor-rate—USE AND OCCUPATION.]

- (A) IN GENERAL.
- (B) MONEY LENT.
- (C) MONEY HAD AND RECEIVED.
- (D) MONEY PAID.

##### (A) IN GENERAL.

If A has accepted three bills for the accommodation of B, and is obliged to pay them, and also to pay the costs of two actions brought upon two of them:—Held, that A cannot, in an action against B, recover the amount of the costs of the two actions, if his declaration contain only the common money counts; but that to recover these costs, he should have declared specially. *Seaver v. Seaver*, 6 C. & P. 673. [Denman]

##### (B) MONEY LENT.

[See CONTRACT, Action upon.]

##### (C) MONEY HAD AND RECEIVED.

*Semble*, that money had and received for rent cannot be maintained where the title to land comes in question. *Decharms v. Horwood*, 9 Law J. (N.S.) C.P. 198, s. c. 10 Bing. 526; 4 Mo. & Sc. 400.

J & Co., merchants at Rio de Janeiro, being indebted to the plaintiffs, merchants in London, consign certain coffee, with bills of lading, to the defendants residing at Hamburgh, and desire them to realize the property as speedily as possible, and remit the proceeds to the plaintiffs. The plaintiffs being apprised of the order, write to the defendants, and request to know the probable amount of the remittance. In their answer, the defendants acknowledge that they were ordered to remit the proceeds of the coffee to the plaintiffs, but state that it is not yet sold:—Held, that the defendants were to be considered as having consented to the appropriation of the coffee, as directed by their correspondents at Rio, and that they were liable to the plaintiffs for the amount, in an action for money had and received. *Fruhling v. Schroeder*, 4 Law J. (N.S.) C.P. 169, s. c. 2 Scott, 135; 7 C. & P. 103. [Tindal]

Money paid by mistake cannot be recovered back, if the party paying had the means of knowing all the facts; and no fraud has been practised upon him.

Accordingly, a creditor drew upon his debtor, and, by anticipation, wrote the acceptance across, (leaving a blank for the name of the debtor,) making the bill payable at the house of a friend of the debtor, but without any previous authority from that friend. The bill was accepted by the debtor, negotiated by the creditor, and on its becoming due, was presented by the holder at the friend's house; he mistaking it for another bill, paid it:—Held, that he could not recover the amount back from the drawer. *Davis v. Watson*, 2 Law J. (N.S.) K.B. 175, s. c. 2 N. & M. 109.

If goods are distrained for rent, and replevied by the tenant, and afterwards the tenant becoming a bankrupt, they are sold by the assignees, the landlord succeeding in the action of replevin, and obtaining a *retorno habendo*, cannot recover the amount of the rent against the assignees in an action for money had and received. *Braddyll v. Jones*, 4 Doug. 52.

A contracted with B for the purchase of the goodwill and fixtures of a public-house at the sum of 120*l.*; 50*l.* was to be paid as a deposit on the landlord's consenting to the change of tenancy; and, on the remainder of the purchase-money being paid, A was to have possession. The landlord, on application, gave a verbal consent, and the 50*l.* was accordingly paid. A sent part of his furniture to the house, and went to reside in part of it; B, however, still continuing to reside and carry on the business there. Some time afterwards, the remainder of the purchase-money not having been paid, and possession not having been given up to A, the landlord withdrew his consent:—Held, that the contract was conditional on the landlord's consent being obtained; and that the verbal consent, originally given, having been withdrawn before any change of tenancy had taken place, it must be considered as not having been given, and the condition not having been performed, that the money was paid on a consideration which had failed, and that A might maintain money had and received to recover back the 50*l.* paid. *Wright v. Newton*, 2 C. M. & R. 124.

Assumpsit for money had and received, lies to recover money paid by the plaintiff under a forgetfulness of facts which were within his knowledge. *Lucas v. Worrick*, 1 M. & R. 293. [Denman and Bolland]

An action for money had and received, to recover the amount of rents received, cannot be maintained, unless the fact that they were received as an agent, and not under an adverse title, be clearly established.

Thus, the defendant's wife having been admitted to copyhold premises in 1804, in 1810 died intestate, seized in fee of such copyhold and also of freehold premises, leaving a daughter sole heiress, who was shortly afterwards admitted tenant of the copyhold, and in 1815 was married to the plaintiff. The defendant remained in possession of the freehold and copyhold, to the commencement of the action in 1832, letting them from time to time at one entire rent, and receiving the rents without accounting to his daughter or the plaintiff, or recognizing their right to them or to the copyhold. No title appeared, except from the entries on the

count rolls, of which it was not shown that the defendant was possessed:—Held, that, according to the doctrine of *possessione rebus*, the defendant could not be taken to have acted as trustee or friend of his daughter, to protect and preserve her possession; and as there was no proof of agency, and no evidence of recognition by the defendant of any partnership that it is wife, is daughter, or the plaintiff, a question of fact was involved, which precluded the plaintiff from recovering the costs of the copy-book by an action of money had and received.

*Query*, whether the action has been sustained, whether the plaintiff might have sued more, or must have joined in with *Garrett v. Marshall*, 3 Law J. (n.s.) K.B. 182, s.c. 3 Ad. & E. 118, 4 Tyr. 47.

A, B, and others were owners of a ship in the service of the East India Company. B was managing owner, and employed C as his agent for general purposes, and amongst others, to receive and pay monies on account of the ship; and C kept a separate account in his book with B as such managing owner. To obtain payment of a sum of money due from the East India Company on account of the ship, it was necessary that the receipt should be signed by one or more of the owners, besides the managing owner, and upon a receipt, signed by B and one of the other owners, C received, on account of the ship, 2,000*l.* from the East India Company, and entered it to B's credit, in his books, as managing owner. The part owners having brought money had and received, to recover the balance of that account.—Held, that C had received the money as the agent of B, and was accountable to him for it; and there was no privity between the other part owners and C, and, consequently, that the action was not maintainable. *Sims v. Brittain*, 4 B. & Ad. 373, s.c. 1 N. & M. 394.

Where an overseer had stopped part of a pauper's parochial weekly allowance, and engaged to pay it over to the landlord of the pauper in pursuance of an understanding between the three:—Held, that the landlord could not support assumpsit for money had and received against the overseer. *Blackledge v. Harman*, 1 M. & Ro. 344 [Alderson].

Where money is paid after suing out process to recover it, the defendant, before he pays, knowing the cause of action, for which the writ is sued out, and there being no fraud on the part of the plaintiff, no action is maintainable to recover such money back. *Hamlet v. Richardson*, 9 Bing. 644, s.c. 2 Mo. & Sc. 811.

In assumpsit for money had and received, and on an account stated, the only evidence was, the production by the plaintiff of an account signed by the defendant, containing items for sums received and disbursements made by the defendant for the plaintiff. It appeared, that after the defendant had signed this account, another account had been produced, relative to a further claim by him against the plaintiff, which he did not admit to be correct, but said he must look over it:—Held, that the plaintiff was entitled to recover on the count for money had and received. *Lorymer v. Stephens*, 3 Law J. (n.s.) Exch. 312, s.c. 1 C. M. & R. 62; 4 Tyr. 869.

Where a bailee, without reward, admits the

receipt of money from the plaintiff for a particular purpose, but says, that he lost the money by his negligence, money had and received will lie against him; though, if he were to prove that he lost it by accident, and not by gross negligence, that would be an answer to the action. *Parry v. Roberts*, 4 Law J. (n.s.) K.B. 189, s.c. 3 Ad. & E. 118.

Plaintiff gave defendant a bill of exchange for 34*l.* 4*s.* and a sum of 13*l.* 16*s.*, to be paid over by him to one T W in discharge of a debt due from the plaintiff to the latter, and they were received by the defendant for that purpose, but were not paid over to T W:—Held, that, in an action for money had and received, the defendant was entitled to set off a sum of money due from the plaintiff to him. The plaintiff should have brought trover for the bill, or a special action for not paying over to T W: as, by bringing money had and received, he confirmed the contract, and let in all the consequences. *Thorpe v. Thorpe*, 1 Law J. (n.s.) K.B. 179, s.c. 3 B. & Ad. 580.

A defendant, on arrest, gave a bail-bond, and did not afterwards perfect his bail, so that the sheriff was fixed. He paid to his attorneys a sum of money towards the payment of the debt and costs, and four days after became a bankrupt. His attorneys took out a summons before a Judge, to stay proceedings against the sheriff on payment of the debt and costs; and the application being stated to be on behalf of the bail, an order was made, upon which the money was paid over:—Held, that this was to be considered as a payment under legal process, and, therefore, the assignees had no right to recover it from the party who had received it. *Belcher v. Mills*, 4 Law J. (n.s.) Exch. 160, s.c. 2 C. M. & R. 150.

Money received by an agent or servant of A, for B, cannot be recovered in an action for money had and received, brought by B against the agent or servant. *Hoswell v. Batt*, 3 Law J. (n.s.) K.B. 49, s.c. 5 B. & Ad. 504; 2 N. & M. 381.

An action for money had and received, is not maintainable by the principal against the servant of his agent, to recover money received by him in that capacity on the principal's account; on the ground, that, so far from there being any privity of contract between the principal and the servant of the agent, the privity is between the principal and the agent. *Stephens v. Badcock*, 1 Law J. (n.s.) K.B. 75, s.c. 3 B. & Ad. 354.

A party who is imbecile, and incapable of managing his own affairs, cannot appoint an agent: therefore, where an assignee of a bankrupt becoming in that state, A, his brother, managed the bankrupt's affairs, and new assignees were afterwards appointed,—it was held, that the money received by A, whilst he so acted for his brother in the management of the bankrupt's affairs, was money had and received to the use of the newly-appointed assignees. *Stead v. Thornton*, 1 Law J. (n.s.) K.B. 74, s.c. 3 B. & Ad. 357.

A stockholder, whose stock has been sold without his knowledge under a forged power of attorney, may sustain an action for money had and received, against the party who holds the proceeds of the sale. *Marsh v. Keating*, 1 Bing. N.C. 198, s.c. 1 Sc. 5; 2 C. & F. 250; 8 Bligh, n.s. 651.

In order to maintain an action against the Commissioners of the Police for money detained by an officer after the trial of a prisoner, it must be distinctly shewn that it was accounted for by the officer to the Commissioners. *Green v. Rowan*, 7 C. & P. 48. [Gurney]

A, a clerk to Justices, verbally agreed to permit B to act in lieu of him, and to allow him half the fees of the office, provided C and D should say he ought to do so. C and D were consulted, and they approved of this arrangement. B, having acted as clerk,—Held, that he might maintain an action for money had and received, for half the fees received by A. *Rowland v. Hall*, 1 Sc. 539.

Money deposited with an agent, and expended by him in illegal disbursements, cannot be recovered from him by the principal, if the principal was at the time aware of the illegal disbursements, or if he subsequently assented to them. *Baynton v. Cattle*, 1 M. & Ro. 265. [Alderson]

In an action for money had and received, to recover the amount of a bill of exchange paid to the defendant's bankers, on his account, the bill must be produced in order to prove that it has not been dishonoured, and that the defendant has had the benefit of it; and it is not sufficient to prove, that the bankers gave him credit for it, and never debited him on account of it. *Atkins v. Owen*, 4 Law J. (N.S.) K.B. 15, s. c. 2 Ad. & E. 38; 4 N. & M. 123.

#### (D) MONEY PAID.

[See CORPORATION—ACCOUNT STATED—  
ASSUMPSIT.]

#### MONEY FOUND UPON AN ACCUSED PERSON.

If a person, taken on a charge of stealing a horse, have the horse in his possession when he is apprehended, any money found upon him ought not to be taken away from him. *Rez v. Jones*, 6 C. & P. 343. [Patteson]

#### MORTGAGE.

[See FIXTURES—WILL.]

- (A) WHAT CONSTITUTES A MORTGAGE.
- (B) EQUITABLE MORTGAGE.
- (C) RIGHTS OF THE MORTGAGOR.
- (D) RIGHTS AND LIABILITIES OF THE MORTGAGEE.
- (E) REDEMPTION.
- (F) FORECLOSURE.
- (G) ACCOUNTS.

#### (A) WHAT CONSTITUTES A MORTGAGE.

A, being entitled to a freehold estate in remainder expectant on the decease of B, demised his interest to C, for a term of five hundred years, subject to a proviso for redemption on payment of the sum of 1,000*l.* and interest, without any time being

fixed by the proviso for payment of the money: the deed contained a covenant by A, for payment of the money on demand, and also a covenant that it should be lawful for B to enter into the property, and to hold and enjoy the same until the payment of the principal money and interest:—Held, that the mortgage was in the nature of a Welsh mortgage; and a bill of foreclosure, filed by B, against a person to whom A had conveyed his reversionary interest, was dismissed, but without costs. *Teulon v. Curtis*, 2 Law J. (N.S.) Exch. Eq. 17, s. c. 1 You. 610.

A gave an undertaking to pay C 35*l.* upon the execution of a mortgage from S to B; S conveyed to B the property intended to be the subject of the mortgage, by assigning it to him in trust to sell it; and for B to pay himself the sum that he had advanced, and to pay 22*l.* to C as part of his claim, and after other payments, which were specified, to pay the surplus to S. C was not only aware of this arrangement, but was at one time intended to have been a trustee under the deed of assignment:—Held, that this conveyance was a mortgage within the meaning of the undertaking; but that C could not recover, in an action on the undertaking, the 22*l.* mentioned in the deed, as he allowed that to become a subject of the trust. *Crook v. Beetham*, 6 C. & P. 761. [Tindal]

#### (B) EQUITABLE MORTGAGE.

[See BANKRUPT, Assignment and Sale of mortgaged Premises.]

An equitable mortgage may be created by deposit of one title-deed, where the other deeds are in the hands of the depositor's solicitors, but not as equitable mortgages. *Ex parte Chippendale*, 2 M. & A. 299, s. c. 1 Doug. 67.

The circumstances under which deeds are deposited will decide, whether or not an equitable mortgage has been created.

There may be an equitable mortgage of copyhold, as well as of freehold property.

A purchaser for valuable consideration will be fixed with notice, if he has omitted to use due diligence in his inquiries, previous to the purchase. *Whitbread v. Jordan*, 4 Law J. (N.S.) Exch. Eq. 38, s. c. 1 Y. & C. 303.

Deposit of title-deeds for an equitable mortgage will cover subsequent advances made, where evidence can be gathered, either from written memoranda, or other circumstances, as to the intention of the parties at the time of making the advances. *Ex parte Sanders re Morgan*, 3 Law J. (N.S.) Bankr. 92.

Where the bankrupt deposited his attested copy of a lease of some coal-mines, wherein he was jointly interested with five others, the Court refused to order a sale, and declare a party an equitable mortgagee, until the partnership accounts had been taken. *Ex parte Broadbent re Barrow*, 3 Law J. (N.S.) Bankr. 95, s. c. 1 M. & A. 635; 4 D. & Ch. 8.

A, to enable B to complete the purchase of some property for which he had contracted, lent him 200*l.* on the security of the premises; the purchase

was afterwards completed, and the vendor gave to B a receipt for the purchase-money, in which the property was described, and to this receipt was attached a plan of the property; no conveyance was made to B, and he had no other muniments of title:—Held, that by the deposit of the receipt and plan as a security for the sum lent, A obtained an equitable mortgage on the property. *Goodwin v. Waghorn*, 4 Law J. (N.S.) Chanc. 172.

An equitable mortgagor, by deposit of title-deeds, is entitled to have six months to redeem, to be computed from the time when the Master makes his report of the amount due, and in the same way as if there had been a legal mortgage.

Whether the mortgagee, in the case of an equitable mortgage, is entitled to have a sale of the mortgaged premises—*quære*. *Parker v. Housefield*, 4 Law J. (N.S.) Chanc. 57, s. c. 2 M. & K. 419.

Where deeds were deposited for securing 150*l.*, to be advanced in cash by discounting bills, and 150*l.* in goods,—Held, the security could not be extended to 162*l.* for cash advanced (the additional 12*l.* being for interest and stamps on a renewed bill), although only 63*l.* was advanced in goods, but must be limited to the 150*l.* in cash, and 63*l.* in goods—213*l.* *in toto*. *Ex parte Hansen*, 1 D. & Ch. 407.

M & Co. deposit with S & Co. the mortgage deeds of certain colonial property, for securing a floating balance due from M & Co. to S & Co., and afterwards executed an assignment of the mortgage debt, "in addition to the securities then already held by S & Co.," but without making any actual assignment of the mortgage itself, or the mortgaged property:—Held, that S & Co. continued nevertheless the equitable mortgagees of the mortgaged property. *Ex parte Smith*, 2 D. & Ch. 271.

The bankrupt kept an account with A, B & Co. as bankers, who afterwards took into partnership the son of C; after which, the bankrupt executed a legal mortgage to A, B & C, for securing the repayment of the loan of 6,000*l.* Subsequently to this, the bankrupt addressed a letter to A, B & C, authorizing them to consider all the securities they then held as responsible for any advances made or to be made by them to the bankrupt:—Held, that this letter must be taken to have been addressed by the bankrupt to the four partners, and amounted to an equitable mortgage to the four, of the previous legal mortgage to the three, operating as a security for all the advances made either by the three or the four partners. *Ex parte Parr*, 4 D. & Ch. 426.

#### (C) RIGHTS OF THE MORTGAGOR.

In an ejectment on a forfeiture in not paying mortgage-money, the defendant is entitled to have proceedings stayed under the 7 Geo. 2, c. 20, upon payment of the principal and interest due on the mortgage deed, with the costs incurred at law and in equity, without paying any by-gone interest, or the expense of preparing the mortgage deed, or any assignment of it. *Doe d. Bragg v. Steel*, 1 Jonnl. P.C. 359.

#### (D) RIGHTS AND LIABILITIES OF THE MORTGAGEE.

##### [See FIXTURES.]

A mortgagee, who has taken the body of his debtor in execution for the mortgage debt, is nevertheless entitled to the benefit of his mortgage security. *Davis v. Battine*, 2 Russ. & M. 76.

The mortgagee of a ship cannot sue in his own name for the freight accruing after the mortgage. *Chinnery v. Blackman*, 3 Doug. 391.

In covenant by a first mortgagee, the Court will stay the proceedings, and direct the plaintiff to reconvey the premises and deliver up the mortgage deeds, on payment of principal, interest, and costs, notwithstanding he has received notice from the second mortgagee of the existence of his interest. *Dixon v. Wigram*, 1 Law J. (N.S.) Exch. 233, s. c. 2 C. & J. 613.

Tenant in tail in remainder, assuming to be tenant in fee in remainder, made a mortgage in fee with a covenant for further assurance. He became tenant in tail in possession, and afterwards, pursuant to his covenant, suffered a recovery and made a new mortgage. In the meantime, however, he had notoriously committed an act of bankruptcy, on which, subsequently, a commission issued:—Held, that the second mortgage was good as to principal, interest, and costs to the date of the act of bankruptcy. *White v. Hayward*, 1 Law J. (N.S.) Chanc. 120.

Where the attorney or agent of a prior mortgagee has deeds deposited in his hands by such mortgagee, he has a lien to retain those deeds against a subsequent mortgagee, until what is due from the prior mortgagee to such attorney or agent is discharged, notwithstanding that such second mortgagee may have paid all that is due for principal and interest to the first mortgagee. *Ogle v. Story*, 2 Law J. (N.S.) K.B. 110, s. c. 1 N. & M. 474; 4 B. & Ad. 735.

On an agreement for a mortgage, stipulating that unless abstracts shall be delivered, and a good title made within a fixed period, it shall be at the option of the intended mortgagee to consider the agreement void, and that the intended mortgagor shall forthwith pay all the costs and charges incurred by him in investigating the title; the intended mortgagee, if he continue to negotiate for the completion of the title, after the time fixed, cannot recover interest upon the mortgage money, which has been lying idle during the interval between that time and the termination of the treaty by the failure to make a good title. *Sweetland v. Smith*, 2 Law J. (N.S.) Exch. 190, s. c. 1 C. & M. 585; 3 Tyr. 491.

A second mortgagee cannot, by giving notice to the first, prevent a third mortgagee from obtaining a priority over his security, if the latter advance his money without notice of the second mortgage, and afterwards obtain the legal estate by buying up the first mortgage.—The third mortgagee, being a purchaser for valuable consideration, is not bound by the notice to the first mortgagee. *Peacock v. Burt*, 4 Law J. (N.S.) Chanc. 33.

A person mortgaged his estate for 80,000*l.*, and died intestate; the mortgagee applied to the heir to pay off 30,000*l.*, part of the mortgage, which he



effected by getting another person to advance that sum on the security of a part of the estates subject to the 80,000*l.*, and by the transfer of mortgage; the estates so transferred were exonerated by the original mortgagee from the other part of the mortgage debt remaining due to him, and the rate of interest was varied, and the times of payment of interest were changed; and it was stipulated, that the money should not be paid off for five years:—Held, that this could not be considered as a mere assignment of the old mortgage; and on the death of the heir of the original mortgagee, intestate, his personal representatives were bound to pay the mortgage debt, to the exoneration of his heir, upon whom the real estate descended.

The same testator died, leaving large estates, held by the tenure of gavelkind, subject to heavy mortgages. These estates descended upon the testator's two sons equally, and the elder of them agreed to purchase the share of the younger; and the share of the mortgage money, payable by the younger, was treated as part of the consideration for the purchase, and one of the terms of the release was the consideration of the mortgage money, which the purchaser agreed to pay, and the purchaser covenanted with the vendor to pay the same. Upon the death of the purchaser, intestate, leaving his brother his heir, according to the custom of gavelkind:—Held, that these transactions did not alter the primary liability of the estate to the payment of these mortgages. *Barham v. the Earl of Thanet*, 3 Law J. (N.S.) Chanc. 223.

Where an equitable security is given by the deposit of deeds, the plaintiff, on a bill brought to give effect to his security, is entitled to a decree for a sale. *Pain v. Smith*, 2 M. & K. 417.

#### (E) REDEMPTION.

Where two distinct estates are mortgaged to different persons, these mortgages may be redeemed separately, though both mortgages have come into the hands of one person. *Feobrooke v. Walker*, 2 Law J. (N.S.) Chanc. 16.

Motion for final dismissal of bill for redemption, after default made in payment of money, refused, —the plaintiff having, subsequently to the day appointed for payment, and before the motion was made, tendered the full amount then due on the mortgage. *Faulkner v. Bolton*, 4 Law J. (N.S.) Chanc. 81.

A court of equity regards more the antiquity of possession of a defendant, than the novel accruer of title by a plaintiff; and, therefore, will not interfere against a person claiming under a mortgage title, who has been in possession more than twenty years, without recognizing the right of the mortgagor to redeem. *Ashton v. Milne*, 3 Law J. (N.S.) Chanc. 52, s.c. 6 Sim. 369.

If, in a suit for redemption against several successive mortgagees, the first mortgagee does not appear at the hearing, a subsequent mortgagee will be allowed to make the decree absolute against him. *Cottingham v. Lord Shrewsbury*, 5 Sim. 395.

#### (F) FORECLOSURE.

[See WILL.]

On an advance of a loan, the lender took, as a security, a mortgage from the borrower by way of

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demise for one hundred years of an estate, of which the borrower was seized in fee simple. The title deeds were not delivered to the lender, nor was there any covenant in the mortgage to deliver them to him. The mortgagor died, leaving an infant heir; and a gentleman, who assumed his guardianship, possessed himself of the title deeds. On a bill against the infant heir to foreclose, and against his guardian to deliver up the title deeds, the Court would only make the common decree of foreclosure, and would make no order upon the guardian, but, as against him, dismissed the bill with costs. *Knight v. Knight*, 1 Law J. (N.S.) Chanc. 125.

A second mortgagee taking a release from the mortgagor of his equity of redemption, and therein covenanting with the mortgagor to pay off the first and third mortgages, and to indemnify him against all costs, &c. relating thereto, not entitled to have his mortgage paid before the third. *Brown v. Stead*, 2 Law J. (N.S.) Chanc. 46, s.c. 6 Sim. 535.

In a foreclosure suit, where the mortgagor is bankrupt, he need not be made a party.

Mortgage for years, and trust for sale in default of payment. Mortgagee not entitled to foreclosure of the fee, but to foreclosure of the term, or a sale; and if the term is foreclosed, the trust for sale is at an end. *Kerrick v. Saffery*, 4 Law J. (N.S.) Chanc. 162.

A demise, by way of mortgage, of the interest of a reversioner in fee for a term of 500 years, subject to a proviso for redemption on payment of principal and interest, without limitation as to the time of payment, and containing covenants for payment of principal and interest on demand, and until payment thereof, for the mortgagee to enter into, and hold and enjoy the premises, is in the nature of a Welsh mortgage; and the mortgagee cannot sustain a bill for foreclosure against the party to whom the reversionary interest has been conveyed. *Teulon v. Curtis*, 2 Law J. (N.S.) Exch. Eq. 17, s.c. 1 You. 610.

#### (G) ACCOUNTS.

During the first ten years that a mortgagee was in possession, the rents were insufficient to keep down the interest on the incumbrances; afterwards, they afforded a surplus. The mortgagee had been in possession twenty-four years:—the account against him not allowed to be taken with annual rests. *Latter v. Dashwood*, 3 Law J. (N.S.) Chanc. 149, s.c. 6 Sim. 462.

Where the interest on a mortgage is in arrear at the time of the mortgagee taking possession, annual rests will not be directed.

A direction to the Master to make annual rests between mortgagor and mortgagee, will not, after a decree, be given on motion. *Stephens v. Wellings*, 4 Law J. (N.S.) Chanc. 281.

The mere circumstance that a mortgagor has recovered the mortgaged property by ejectment, and has retained possession, is not sufficient to induce the Court to direct annual rests to be made in the accounts between a mortgagor and mortgagee, although the rents exceed the interest. *Baldwin v. Lewis*, 4 Law J. (N.S.) Chanc. 113.

A mortgagee in possession of a West India estate is not entitled to charge the mortgagor with com-

mission on the amount of bills paid, on the value of the consignment, or on the costs and insurance of supplies shipped for the use of the estate; but stands in precisely the same situation as a mortgagee in possession of an estate in England.—Principles on which the expense of the home management of such estates is to be calculated. *Leith v. Irvine*, 1 M. & K. 277.

### MORTMAIN.

The Statute of Mortmain held not to extend to the taking of a husbandry lease by a corporate body. *Jesus College, Oxford, v. Gibbs*, 4 Law J. (N.S.) Exch. Eq. 42, s. c. 1 Y. & C. 145.

A member of a charitable society offers land for the purposes of the charity, and lets the trustees into receipt of the rents and profits. A testator bequeaths to the institution a sum of money, towards building almshouses, for the objects of the society, and dies before the land is formally conveyed:—Held, that the bequest is void under the Statute of Mortmain. *Giblet v. Hobson*, 4 Law J. (N.S.) Chanc. 41, s. c. 5 Sim. 681.

### MOTIVES.

[See DEBTOR AND CREDITOR, Composition.]

### MULTIFARIOUSNESS.

[See PLEADING, Bill, Information.]

### MUMBLES HEAD LIGHTHOUSE

Placed under the management of the corporation of Trinity House. 4 & 5 Will. 4, c. 69; 12 Law J. Stat. 142.

### MURDER AND MANSLAUGHTER.

[See ARREST—EVIDENCE, Confessions, Declarations—POACHING—WARRANT.]

- (A) IN GENERAL.
- (B) INDICTMENT.
- (C) EVIDENCE.

#### (A) IN GENERAL.

If two persons fight, and one overpower the other, and knock him down, and put a rope round his neck, and strangle him, this will be murder. *Res v. Shaw*, 6 C. & P. 372. [Patteson]

It is not every slight provocation, even by a blow, which will, when the party receiving it strike with a deadly weapon, and death ensues, reduce the crime from murder to manslaughter. *Res v. Lynch*, 5 C. & P. 324.

In a case of death by stabbing, if the jury are of opinion that the wound was given by the prisoner while smarting under a provocation so recent and so strong, that the prisoner might be considered as not being, at the moment, the master of his own understanding, the offence will be manslaughter; but if there had been, after the provocation, sufficient time for the blood to cool, and for reason to resume its seat, before the mortal wound was given, the offence will amount to murder; and if the prisoner

displayed thought, contrivance, and design in the mode of possessing himself of the weapon, and again replacing it immediately after the blow was struck, such exercise of contrivance and design denotes rather the presence of judgment and reason than of violent and ungovernable passion. *Res v. Hayward*, 6 C. & P. 157. [Tindal]

If a child has breathed before it is born, this is not sufficiently life to make the killing of such child murder. There must be an independent circulation or the child cannot be considered as alive for this purpose. *Res v. Enoch*, 5 C. & P. 589. [Parke]

A child must be actually wholly in the world, in a living state, to be the subject of a charge of murder; but if it is wholly born, and is alive, it is not essential that it should have breathed; but the jury must be satisfied that the child was wholly born into the world at the time it was killed, or they ought not to convict the prisoner of murder. *Res v. Brain*, 6 C. & P. 349. [Park]

To justify a conviction on an indictment charging a woman with the wilful murder of a child, of which she was delivered, and which was born alive, the jury must be satisfied affirmatively that the whole body was brought alive into the world; and it is not sufficient that the child had breathed in the progress of the birth. Where the indictment in such a case states the child to have been born a bastard, the proof that it was so, lies on the prosecutor; but evidence that the prisoner told a person that she had only mentioned her being with child to the father of it, who had lately got married, has been held to be sufficient proof to support the allegation. *Res v. Poulton*, 5 C. & P. 329. [Littledale]

Giving a child, whilst in the act of being born, a mortal wound in the head, as soon as the head appears, and before the child has breathed, will, if the child is afterwards born alive, and dies thereof, and there is malice, be murder. *Res v. Senior*, 1 M. C.C. 346.

Killing an officer who attempts to arrest a man, will be murder, though the officer had no warrant, and though the man has done nothing for which he was liable to be arrested, if the officer has a charge against him for felony, and the man knows the individual to be an officer, though the officer do not notify to him that he has such a charge. *Res v. Woolmer*, 1 M. C.C. 334.

A warrant leaving a blank for the Christian name of a person to be apprehended, and giving no reason for omitting it, but describing him only as the son of J S L, and stating the charge to be for assaulting A B, without particularizing the time, place, or any other circumstance of the assault, is too general and unspecific; a resistance to an arrest thereon, and killing the person attempting to execute it, will not be murder. *Res v. Hood*, 1 M. C.C. 281.

The interference by a gamekeeper, with persons found armed in the pursuit of game, on the lands of an adjoining proprietor, without any attempt forcibly to apprehend, is not a sufficient provocation to reduce a malicious wounding and killing to manslaughter. *Res v. Warner*, 1 M. C.C. 380.

Under 9 Geo. 4, c. 69, s. 2, a keeper, &c. may apprehend poachers, though there are three or more, and found armed; for though sect. 2. only authorizes

apprehending for what are offences under sect. 1, and when there are three or more armed, they are punishable under sect. 9; yet, what is punishable under sect. 9 is nevertheless an offence under sect. 1, though the circumstances of aggravation make it liable to a heinous punishment. And, if the keeper, &c. be killed in the attempt to apprehend, the offender will be guilty of murder, though the keeper had previously struck the offender, or any of his party, if he struck in self-defence only, and to diminish the violence illegally used against him, and not vindictively to punish.

If a keeper attempting lawfully to apprehend a poacher, be met with violence, and in opposition to such violence, and in self-defence, strike the poacher, and then is killed by the poacher, it will be murder. *Rez v. Ball*, 1 M. C.C. 330, 333.

A servant of Mr. C attempted to apprehend A, who was out at night poaching in a wood, and he was killed by A; Mr. C was neither the owner nor the occupier of the wood, nor the lord of the manor, he having only the permission of the owner to preserve game there:—Held, that this was manslaughter only in A. *Rez v. Addis*, 6 C. & P. 388. [Patteson]

Where a person, grossly ignorant of medicine, administers a dangerous remedy to one labouring under disease, proper medical assistance being at the time procurable, and that dangerous remedy causes death, the person so administering it is guilty of manslaughter. *Rez v. Webb*, 1 M. & R. 405. [Lyndhurst]

Any person, whether a licensed medical practitioner or not, who deals with the life or health of any of His Majesty's subjects, is bound to have competent skill; and is bound to treat his or her patients with care, attention, and assiduity; and if a patient dies for want of either, the person is guilty of manslaughter. *Rez v. Spiller*, 5 C. & P. 333. [Bolland and Bosanquet]

Although all persons present at and sanctioning a prize fight, where one of the combatants is killed, are guilty of manslaughter, as principals in the second degree; yet they are not such accomplices as require their evidence to be confirmed, if they are called as witnesses against other parties charged with the manslaughter. *Rez v. Hargrave*, 5 C. & P. 179. [Patteson]

All persons who by their presence encourage a fight, from which death ensues to one of the combatants, are guilty of manslaughter, although they neither say nor do anything. But if the death be caused not by blows given in the fight itself, but by other parties breaking the ring, and striking the deceased with bludgeons, the persons who merely encouraged the fight by their presence are not answerable. *Rez v. Murphy*, 6 C. & P. 103.

A foot-passenger was walking at lamp-light in the carriage road, along a public highway, when the owner of a cart, who was proved to be near-sighted, drove along at the rate of eight or nine miles an hour, sitting at the time on a few sacks laid on the bottom of the cart, and ran over the foot-passenger, and killed him:—Held, that he was guilty of such carelessness, as amounted to the crime of manslaughter. *Rez v. Groult*, 6 C. & P. 629.

If A and B be riding fast along a highway (as if racing), and A ride by without doing any mischief, but B rides against the horse of C, whereby C is

thrown and killed, this is not manslaughter in A. *Rez v. Mastin*, 6 C. & P. 396. [Patteson]

A, being on board a ship, and B in a boat alongside, had a dispute about payment for some goods, both being intoxicated, A to get rid of B, pushed away the boat with his foot; B, reaching out to lay hold of a barge, to prevent his boat from drifting away, overbalanced himself, and fell into the water and was drowned. A was charged with manslaughter on the coroner's inquisition:—Held, on the trial, that these facts did not constitute that offence. *Rez v. Waters*, 6 C. & P. 328. [Park]

The captain and the pilot of a steam-boat were both indicted for the manslaughter of a person, who was on board of a smack, by running the smack down. The running down was attributed, on the part of the prosecution, to the improper steering of the steam-boat, arising from there not being a man at the bow to keep a look-out at the time of the accident. It was proved, that there was a man on the look-out when the vessel started, about an hour previous. According to one witness, the captain and the pilot were both on the bridge between the paddle-boxes; according to another, the pilot was alone on one paddle-box:—Held, that, under the circumstances, there was not such personal misconduct on the part of either, as to make them guilty of felony. *Rez v. Allen*, 7 C. & P. 153. [Park and Alderson]

To make a captain of a steam-vessel guilty of manslaughter, in causing a person to be drowned, by running down a boat, the prosecutor must shew some act done by the captain; and a mere omission on his part, in not doing the whole of his duty, is not sufficient. But, if there be sufficient light, and the captain of a steamer is either at the helm, or in a situation to be giving the command, and does that which causes the injury, he is guilty of manslaughter. *Rez v. Green*, 7 C. & P. 156. [Park and Alderson]

In a case of manslaughter, after the jury were charged, it was ascertained, that the surgeon who examined the body was absent. The prisoner's counsel asked that the jury should be discharged:—Held, that if the prisoner asked that the jury should be discharged, the Judge had authority to order it to be done. *Rez v. Stokes*, 6 C. & P. 151. [Gurney]

#### (B) INDICTMENT.

An indictment for manslaughter charged, that A gave the deceased divers mortal blows at P, in the county of M, and that the deceased languished and died at D, in the county of K; and that the prisoner was then and there aiding in the commission of the felony:—Held, that the indictment was good, and that the word there referred to P, in the county of M. *Rez v. Hargrave*, 5 C. & P. 170. [Patteson]

In an indictment for murder, where the death is alleged to have been caused by a wound, it is not necessary to describe either the length, breadth, or depth of such wound. *Rez v. Tomlinson*, 6 C. & P. 370. [Patteson]

In an indictment for manslaughter, it is not necessary to allege the causes merely natural, which conduced to the death of the party; it is sufficient to allege truly, the act with which the prisoner is charged, if that act accelerated the death. *Rez v. Webb*, 1 M. & R. 435. [Lyndhurst]

## (C) EVIDENCE.

The deceased was a child twelve days old. It was not suggested that it had been baptized, but the prisoner, its mother, had said, that she should like to have the child named "Mary Anne; and on two occasions afterwards, called the child "Mary Anne," and, on other occasions, "Little Mary." The prisoner's master, who was the father of the child, had stated to one of the witnesses for the prosecution, that he was a baptist. The indictment alleged the child to be "a certain female child, whose name to the jurors was unknown." The prisoner was convicted, and the fifteen Judges held the conviction right. *Rex v. Smith*, 6 C. & P. 151. [Gurney]

The indictment charged, that the offence had been committed by cutting the throat of the deceased:—Held, that the "throat" means what is commonly so called, and that this allegation was proved by shewing, that the jugular vein was divided, although the carotid artery was not cut, and although the surgeon stated, that what he should call the throat was not cut. *Rex v. Edwards*, 6 C. & P. 401. [Patteson]

If, in a case of murder, the death of the deceased is charged to be suffocation, by placing the hand on the mouth of the deceased:—Held, that this allegation is made out, if the jury are satisfied that any violent means were used to stop the respiration of the deceased. *Rex v. Waters*, 7 C. & P. 250. [Drewman]

A was indicted for the manslaughter of B, by a blow of a hammer. No proof was given of the striking of any blow, only of a scuffle between the parties. The appearance of the injury was consistent with the supposition, either of a blow with a hammer, or a push against a lock or key of a door:—Held, that if it was occasioned by a blow with a hammer, or any other hard substance held in the hand, it was sufficient to support the indictment; but otherwise, if it was the result of a push against the door. *Rex v. Martin*, 5 C. & P. 128. [Parke]

In an indictment for murder or manslaughter, when the cause of death is knocking a person down with the fist, upon a stone or other substance, and the mortal wound is from such stone or substance, the charge should be accordingly; a charge that the prisoner with a stone, &c. which he held in his right hand, gave and struck a mortal blow, will not be sufficient, especially if there be no statement that the prisoner knocked the deceased down on the ground. *Rex v. Aris*, 1 R. & M. C.C. 113.

In an indictment for murder or manslaughter, when the cause of death is knocking a person down upon a stone or other substance, and the mortal wound is from such substance, the statement should be accordingly: a statement that the prisoner struck and beat the deceased, and thereby gave him divers mortal blows and bruises, is not sufficient. *Rex v. O'Connell*, 1 R. & M. C.C. 139.

An allegation in an indictment, charging that the death of a person was caused by a plaster, made and applied by the prisoner, is sufficiently proved, by shewing that three plasters were applied, and that two of them were applied by the prisoner, and the third made from materials furnished by the prisoner. *Rex v. Spencer*, 3 C. & P. 333. [Bolland and Bonanquet]

## MUSIC ROOM.

It is not necessary that a room should be kept or used *exclusively* for music or dancing, to come within the 25 Geo. 2, c. 36. *Gregory v. Tuff*, 3 Law J. (N.S.) Exch. 295, s.c. 1 C. M. & R. 810; 4 Tyr. 820; 1 M. & R. 313; 6 C. & P. 271. [Lyndhurst]

If a room be continually used for the purpose of music and dancing, it will be for the jury to say, whether it is not kept for those purposes; and a room kept for drinking, music and dancing, is within the stat. 25 Geo. 2, c. 36. *Gregory v. Tesser*, 6 C. & P. 280. [Gurney]

Proof that there is nothing painted on the house denoting that it is licensed under that statute, is sufficient *prima facie* evidence, in an action for penalties that it is unlicensed. *Gregory v. Tuff*, 6 C. & P. 271. [Lyndhurst]

## MUNICIPAL CORPORATIONS.

Provisions for the regulation of, in England and Wales. 5 & 6 Will. 4, c. 76; 13 Law J. Stat. 166.

## MUTINY.

Annual Acts. 2 Will. 4, c. 28; 10 Law J. Stat. 41;—3 Will. 4, c. 5; 11 Law J. Stat. 13;—4 Will. 4, c. 7; 12 Law J. Stat. 13;—5 Will. 4, c. 5; 13 Law J. Stat. 5.

## MUTUAL CREDIT.

[See SET-OFF.]

## NAME,—CHANGE OF.

Where an estate is devised, on condition of the devisee's changing his name, it is sufficient if he changes it within a reasonable time; and it is not necessary that he should apply for the royal sign manual. *Davis and Wife dem. v. S. Lowndes tem.*, 4 Law J. (N.S.) C.P. 217, s.c. 1 Bing. N.C. 618; 2 Sc. 103.

## NATIONAL CHARACTER.

A person who possesses the characters both of a French subject under the municipal law of France, and of a British subject under the stat. 13 Geo. 3, c. 26, as the grandson of a natural-born British subject, although both he himself and his father were born in a foreign country, is not entitled to claim compensation for a loss he has sustained from a confiscation of his property by the French Government, under a treaty between Great Britain and France, giving compensation for such a loss to British subjects. *Drummond's case*, 2 Kn. 295.

An Englishman, who has taken out letters of naturalization in France, is not entitled to compensation as a British subject under such a treaty. *Fanning's case*, 2 Kn. 301.

The foreign wife of a British subject is not entitled to compensation for the loss of her separate property, under a treaty providing such compensation for British subjects, unless she has herself acquired a domicile in Great Britain at the time of her loss. *Countess de Conway's case*, 2 Kn. 364.

A foreigner, domiciled in Great Britain, is, under such a treaty, entitled to claim compensation for his losses. *Ibid.*

A corporation of British subjects in a foreign country, existing for objects in opposition to British law, and under the controul of a foreign government, is not entitled to claim any compensation from the government of the country in which they existed for the confiscation of their property, under a treaty giving that right to British subjects. *Daniel v. Commissioners for claims on France*, 2 Kn. 23.

The individual members of such a corporation are also incapacitated from making any claim, as British subjects, for the loss of their income arising from the funds of such a corporation. *Id.*

A corporation of Irishmen, existing in a foreign country, and under the controul of a foreign government, must be considered as a foreign corporation, and is not, therefore, entitled to claim compensation for the loss of its property, under a treaty giving the right of doing so to a British subject.

It makes no difference whether the purpose for which such a corporation existed were or were not contrary to the law of Ireland, *semble*. *Long v. Commissioners for claims on France*, 2 Kn. 51.

A country re-conquered from an enemy reverts to the same state that it was in before its conquest. The British inhabitants of a part of the French dominions, which was conquered by the Dutch, and afterwards conquered by the French, ought, therefore, to have had, after its re-conquest, the same protection that they were entitled to under the treaty of commerce of 1786, and awarded compensation in respect of losses after the re-conquest, by sequestration of their property, in contravention of that treaty by the French Government. *Gumbes's case*, 2 Kn. 369.

The son of a British father, who had entered into the service of France, and taken the oath of a knight of the order of St. Louis, is entitled to the character of a British subject, although he himself was born in France of a French mother, and had served in the French army. *Count Wall's case*, 3 Kn. 13.

An inhabitant of an island, ceded by Great Britain, who, immediately after its cession, comes over to England, and, finding the climate not agree with his health, returns to the ceded island in which he had left his family, and resides with them there for upwards of six years, and then emigrates with them to another country under the government of Great Britain, retains the character of a British subject, and one of his children born after the capitulation of the island, and before its final cession by treaty, is not an alien. *Jephson v. Riera*, 3 Kn. 130.

#### NATIONAL DEBT.

Amendment of Act for regulating the reduction of. 3 & 4 Will. 4, c. 24; 11 Law J. Stat. 75.

#### NAVIGATION.

[See SHIPPING.]

By an act for making the river Nen navigable, certain commissioners were empowered to nominate a clerk, whose salary and expenses were directed by the act to be paid by the proprietor of the tolls

of the navigation:—Held, that a party who had acted as, and assumed to be, the proprietor, was liable to the clerk, although the legal estate was in some one else. *Tibbitts v. Yorke*, 3 Law J. (n.s.) K.B. 38, a. c. 5 B. & Ad. 605.

#### NAVY.

Amendment of laws relating to the business of civil departments of. 2 Will. 4, c. 40; 10 Law J. Stat. 62.

Amendment of 11 Geo. 4, c. 20, relating to the pay of the Royal Navy. 4 & 5 Will. 4, c. 25; 12 Law J. Stat. 41.

Provisions for the enlistment of seamen and manning of the Navy. 5 & 6 Will. 4, c. 24; 13 Law J. Stat. 45.

#### NE EXEAT REGNO.

The Court refused to discharge the writ on the ground of the plaintiff having sworn in one affidavit to 1,000*l.* due, and in another to 500*l.*; the defendant not having sworn that he did not owe the money, but referred to the accounts, which he swore *might be* in his favour. *Grove v. Emerson*, 1 Law J. (n.s.) Chanc. 30.

A party having recovered damages in an action at law for a breach of a covenant, dies before the judgment is perfected; his executors file a bill for the specific performance of the covenant, and obtain a writ of *ne exeat*, marked with the amount of damages found. The writ discharged.

If a defendant cannot be held to bail, that is a reason for not granting a writ of *ne exeat* against him.

Generally, if the equity be not clear, the writ shall not issue.

As to the principle in *Denton v. Stewart* (17 Ves. 276, note)—*quere*. *Jenkins v. Parkinson*, 3 Law J. (n.s.) Chanc. 36, a. c. 2 M. & K. 5.

A writ of *ne exeat regno* will not be granted to a plaintiff residing in a foreign country. *Smith v. Nethersole*, 2 Russ. & M. 450.

#### NEGLIGENCE.

[See ACTION—PRINCIPAL AND AGENT—MASTER AND SERVANT.]

A person driving a carriage is not bound to keep on the regular side of the road; but, if he does not, he must use more care, and keep a better look-out, to avoid concussion, than would be necessary if he were on the proper part of the road. *Pluckwell v. Wilson, Bart.*, 5 C. & P. 375. [Alderson]

A foot passenger, though he may be infirm from disease, has a right to walk in the carriage-way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it. *Boss v. Litton*, 5 C. & P. 407. [Denman]

In an action for trespass for an injury done to a horse by a pony and chaise running against it, it was sworn, on the part of the defendant, that his wife was holding the pony by the bridle, and a showman came by and frightened the pony, who ran off with the chaise:—Held, that, if true, this was a good defence on a plea of not guilty. *Goodman v. Taylor*, 5 C. & P. 410. [Denman]

In an action against the captain of a steam vessel for swamping a loaded wherry on the river, by a swell produced by a too rapid rate of passage, the jury, to find for the plaintiff, must be satisfied that the mischief was occasioned by the swell alone; and if they think it doubtful whether it was or not, or think that the plaintiff contributed to the injury he sustained by his own improper conduct, either in mismanaging or overloading the boat, they must find their verdict for the defendant. *Luxford v. Large*, 5 C. & P. 421. [Denman]

#### NET PROFIT.

The vendor of a trading concern guaranteed the net profit of the business sold, and of another business, in which the purchasers were also engaged, at a certain specific sum:—Held, that this guarantee applied to the profits made by the two concerns, after deducting the interest allowed on the amount of further capital advanced by the purchasers, for the purpose of carrying on the concerns. *Kerkby v. Wright*, 2 M. & K. 131.

#### NEW ASSIGNMENT.

[See ASSAULT—COSTS—PLEADING—TRESPASS.]

#### NEW TRIAL.

[See ISSUE—JURY—MISDIRECTION—PORT DUTY—TRESPASS, Pleading—WARRANTY.]

##### (A) WHERE GRANTED OR REFUSED.

- (a) *In general.*
- (b) *Amount of Damages.*
- (c) *Against Evidence.*
- (d) *Admission and Rejection of Evidence, and Absence of Witnesses.*
- (e) *Surprise.*
- (f) *Misdirection.*
- (g) *Terms.*

##### (B) MOTION FOR.

##### (C) COSTS.

##### (D) PRACTICE.

##### (A) WHERE GRANTED OR REFUSED.

###### (a) *In general.*

[See INSURANCE BROKER—LANDLORD AND TENANT—SURRENDER. And see, *post*, Motion for.]

An inferior court cannot grant a new trial, except on the ground of fraud, or irregularity in obtaining the verdict. *Rez v. Mayor of Oxford*, 3 N. & M. 877.

A new trial granted, without costs, on a variance between the particulars of demand delivered, and the particulars of demand annexed to the record, after a verdict obtained by the plaintiff for a claim included in the latter only, where the Judge expressed himself dissatisfied with the verdict, although the defendant entered into evidence to resist the claim upon which the verdict was obtained. *Morgan v. Harris*, 1 Law J. (N.S.) Exch. 144, s. c. 2 C. & J. 161; 2 Tyr. 385; 1 Dowl. P.C. 570.

*Semble*—that the Court have no power to order a new trial, where, upon an indictment for a mis-

demeanor, a verdict has passed for the defendant, though the Judge may have misdirected the jury.

But they will, in such a case, order the entry of the judgment upon the verdict to be stayed until after the trial of a new indictment. *Rez v. Manners Sutton*, 2 Law J. (N.S.) M.C. 76, s. c. 5 B. & Ad. 52; 2 N. & M. 57.

Motion for a new trial on the ground of perjury, or to stay proceedings. *Petrie v. Milles*, 3 Doug. 37. *Macpherson v. Petrie*, ib. 26.

After a conviction for perjury, it is no ground for a new trial, that the jury hesitated in giving their verdict; nor will the Court receive affidavits of the jurymen, stating that they did not intend to find a verdict of guilty. *Rez v. Parker*, 3 Doug. 242.

The Court will not grant a new trial upon an affidavit by the defendant, stating that he was kept in ignorance, by his late attorney, of the state of the action, that he had a good defence upon the merits; and that the verdict passed against him by reason of the negligence of such late attorney. *Semble*—that the defendant's remedy is by action against the attorney for negligence. *Moody v. Dick*, 4 N. & M. 348.

At the Assizes, in Yorkshire, the causes are entered by the marshal in two lists, one for the East Riding, and the other for the West Riding. A cause having, by mistake, been entered by the marshal in the wrong list, was tried as an undefended cause, the defendant's attorney having searched only one list without finding it. The Court granted a new trial; and held, that the attorney was not bound to search both lists. *Hunter v. Hornblower*, 3 Dowl. P.C. 401.

Where the cause is called on, and tried in its regular turn, the Court will not grant a new trial, on the ground that briefs were not delivered by the defendant to his counsel, although the cause came on for trial much sooner than was expected. *Twit v. Crawley*, 1 Law J. (N.S.) C.P. 49, s. c. (*Gwill v. Crawley*), 8 Bing. 144; 1 Mo. & Sc. 229.

Where the defendant pleads, after taking out a summons to stay proceedings on payment of debt and costs, and obtaining an order thereupon for the taxation of costs, the Court will not grant a new trial, by reason of the cause having, through the mistake or negligence of the defendant's attorney, been taken as an undefended cause, on the common affidavit of merits; but will require the defendant to state some special facts, or that new information has come to his knowledge since the summons and order, constituting a good ground of defence. *Lloyd v. Price*, 1 Law J. (N.S.) Exch. 152.

Neglecting to deliver a brief, and to procure the attendance of the defendant's witnesses, before the sixth day of the Assizes—Held, no ground for refusing a new trial of an action on a bill of exchange, taken as undefended; or for granting the rule only on payment of costs by the defendant or his attorney, where the cause was entered No. 63 in the list, and stood thirty off at the time when the brief was delivered and the witnesses attended; the defendant having given notice of set-off and to prove the consideration of the bill, and having paid money into court; and the plaintiff's attorney being aware, from frequent conversations, that the cause was to be defended. *Aust v. Fenwick*, 3 Law J. (N.S.) Exch. 5, s. c. 2 Dowl. P.C. 246.

In an action for slander, after a verdict for the plaintiff, with 100*l.* damages, the Court refused to allow the defendant to have a new trial, and to be allowed to plead the truth of the words upon any terms, though it was alleged, that there was ample evidence to support a justification, and the general issue only was pleaded, through the mistake of the pleader, which was not discovered till the day before the trial by the counsel, when an application had been made for leave to add a justification; but the defendant did not swear that he had never used the words, and one of the witnesses had pointed out the want of a special plea a considerable time previously. *Kerby v. Simpson*, 3 Dowl. P.C. 791.

In an action on a bill of exchange, after a verdict for the defendant, on the ground that the bill was drawn originally for a gambling debt, the Court will not grant a new trial upon affidavits negating such defence, where there has been no surprise upon the plea. *Allen v. Howell*, 1 N. & M. 191.

Whilst a cause stood in the paper for trial, the plaintiff having obtained an order to amend, (which was, in fact, unnecessary,) the defendant took out a summons to rescind that order for irregularity, and an order to that effect was obtained. Whilst the second order was in discussion at chambers, the cause was tried, and the plaintiff obtained a verdict. The Court refused to grant a new trial without an affidavit of merits. *Clark v. Manns*, 1 Dowl. P.C. 656.

Where a plaintiff gave notice that he should take the cause down to trial as an undefended cause; and when it was called on, the defendant's counsel said it was defended, whereupon it was not tried, but the plaintiff again took the record down, and got the cause tried as undefended, without any new notice or setting it down in the paper:—the Court granted a new trial without payment of costs. *Sprigge v. Rutherford*, 2 Dowl. P.C. 429.

A notice of trial had been given for the sittings after Easter term; in the notice to continue, Hilary was, by mistake, inserted for Trinity term; the defendant failing to appear, the cause was taken as undefended, and a verdict found for the plaintiff:—The Court refused to grant a new trial, there being nothing to shew that the defendant could possibly have been misled by the erroneous continuance. *Morgan v. Pearce*, 2 Mo. & Sc. 159.

*Indebitatus assumpsit* for goods sold and delivered. Plea, *plene administravit*. It appeared that the goods were sold, to be paid for on the marriage of the plaintiff, which did not happen till fifteen years after the sale. Objection at the trial, that this being a special contract, could not be given in evidence under this form of declaration. Verdict for plaintiff. On motion for new trial,—Held, that whether the form of the declaration was right or not, the Court would look to the merits; and, as no injustice had been done, they would not grant a new trial. *Stokes v. Saunders*, 3 Doug. 401.

Supposing that an attorney attending as a witness under a *subpoena duces tecum* to produce a deed of one of his clients, who was a stranger to the cause, is privileged, not only from producing the deed itself, but, from giving parol evidence of its contents, yet, as that is the privilege of the client, and not of the defendant, if the Judge has improperly compelled him to give such evidence, the Court of King's Bench will not grant a new trial.

*Quere*—whether he is protected so far. *Seemle*, that he is. *Marston v. Downes*, 3 Law J. (n.s.) K.B. 168, s.c. 1 Ad. & E. 21; 3 N. & M. 861.

Where a defendant conducts his own cause in person, and has a good defence, which, from ignorance of the rules of evidence, he fails in proving, the Court will not grant a new trial. *Boaden v. Smith*, 1 Law J. (n.s.) C.P. 47.

After a trial had been had, the Court refused to grant a *venire de novo*, on an allegation, that the secondary who struck the jury was the brother and partner of the plaintiff's attorney; it not being shewn that the party came to the knowledge of the fact in such a manner, and at such a time, as to render it impossible for him to tender a formal challenge at the proper time. *Brunskill v. Giles*, 1 Law J. (n.s.) C.P. 143, s.c. 9 Bing. 18; 2 Mo. & Sc. 41.

*Quere*—whether a plaintiff, who has rested his case at the trial upon one ground, viz. the *bona fides* of a transfer of goods, can obtain a new trial upon another, viz. the mere possession of the goods as against a wrong-doer. *Jones v. Brown*, 4 Law J. (n.s.) C.P. 124, s.c. 1 Bing. N.C. 484; 1 Sc. 453.

If a Judge at Nisi Prius decides erroneously as to the right to begin, the Court will not on this account (at least without other reasons) grant a new trial. *Bird v. Higginson*, 4 Law J. (n.s.) K.B. 124, s.c. 2 Ad. & E. 160.

To an action on a bill of exchange against an indorser, the defendant pleaded, that he had no notice of presentment, and concluded his plea to the country. The plaintiff omitted to add the *similiter*; and, after a verdict for the plaintiff, the defendant moved for a new trial, because there was no issue joined; but as the plea concluded with an "&c.,"—Held, that after verdict the "&c." might be considered to include the *similiter*, and that the record was sufficient. *Swain v. Lewis*, 3 Dowl. P.C. 700.

#### (b) Amount of Damages.

[See *Brown v. Hinder*, *post*, Against Evidence.]

The Court will only grant a new trial, where the verdict is under 20*l.*, where they can grant it without costs. Where a tender of 12*l.* 10*s.* was pleaded, and found for the defendant, with a verdict of 19*l.* 10*s.* for the plaintiff, on non assumpsit pleaded to the rest of the demand, the Court refused to hear a motion for a new trial, as against evidence. *Nicholson v. Phillips*, 1 C. & M. 26, s.c. 3 Tyr. 181.

Plaintiff having recovered a verdict under 20*l.*, as damages for his inability to let a house for six weeks, in consequence of defendant having omitted to do certain repairs to which he was liable as tenant, the Court refused to disturb the verdict, notwithstanding the substantial repairs were to be done by plaintiff. *Woods v. Pope*, 1 Bing. N.C. 467, s.c. 1 Sc. 536.

In a cause, decided by the Judge of an inferior court, on a writ of trial, the Court of King's Bench will hear a motion for a new trial, on the ground that the verdict was against evidence, though the damages were below 20*l.* *Taylor v. Helpe*, 6 B. & Ad. 1068.

The rule that where the sum in dispute is less than 20*l.* a new trial will not be granted, applies where the verdict is for the defendant as well as for

the plaintiff. *Young v. Harrison*, 1 Law J. (N.S.) Exch. 5, s.c. 2 C. & J. 14; 2 Tyr. 167.

Where the damages are excessive, and the Judge reported that he thought them too high, the Court will grant a new trial, even in actions of tort. *Newton v. Houghton*, 1 Law J. (N.S.) C.P. 47.

3,500*l.* having been awarded by a jury as damages in an action against an attorney for breach of promise of marriage, the Court refused to set aside the verdict on the ground that the damages were excessive. *Wood v. Hurd*, 5 Law J. (N.S.) C.P. 312, s.c. 2 Bing. N.C. 166.

#### (c) Against Evidence.

Where the Judge who tried the issue stated that he was not dissatisfied with the verdict, though he should have found otherwise, had he been himself upon the jury, the Court will not direct a new trial of the issue, if the application for a new trial rested solely upon the ground that the verdict was against the weight of the evidence. *Gibbs v. Hooper*, 2 M. & K. 253.

Where a Judge left as a question for the jury a point which, upon the evidence, could only be determined one way, and the jury found a verdict against the evidence, the Court refused to grant a new trial otherwise than upon payment of costs. *Doe d. Smith v. Pike*, 1 N. & M. 385.

Where the jury have incorrectly, and contrary to the Judge's direction, found for the defendant, the Court will not grant a new trial to enable the plaintiff to recover nominal damages only. *Harris v. Jones*, 1 M. & R. 173.

Where a party, sued for money had and received, rested his defence on his having obtained the money *bond fide*, in satisfaction of an equitable claim; and the plaintiff, at the trial, merely endeavoured to impeach the fairness of the receipt and the claim generally, and the jury found for the defendant,—the Court refused to entertain a motion for a new trial, made on the ground that, admitting the fairness of the transaction, the defendant appeared, upon the plaintiff's case at the trial, to be not entitled to retain more than a part. *Moore v. Eddowes*, 2 Ad. & E. 133.

Where an action was brought by a builder for the amount of extra work done, there having been a written contract between the parties,—Held, that the plaintiff ought to have produced the written contract at the trial, in order that it might appear what was within the contract, and what not; but, as the objection was not taken by the defendant at the trial, the Court set aside the verdict which the jury had found for the defendant—ordered a new trial, without costs. Where a rule for a new trial is moved for on the under-sheriff's notes, on the ground of the absence of evidence to warrant the verdict of the jury, it is not competent for the other party to use affidavits. *Jones v. Howell*, 4 Dowl. P.C. 176.

A misapprehension of the law by the jury, whether occasioned by their own mistake, or the misdirection of the Judge, is good ground for granting a new trial in a penal action, where the verdict has passed for the defendant, if the Court are satisfied that the verdict proceeded entirely on such misapprehension.

*Semble*—that the Judge at Nisi Prius ought not to allow the act of parliament, upon which an action

is founded, to be delivered to the jury, at their request, or their retiring to consider their verdict. *Gregory q. t. v. Tufts*, 3 Law J. (N.S.) Exch. 296, s.c. 1 C. M. & R. 310; 4 Tyr. 820.

The Court will not grant a new trial on the ground of the verdict being against evidence, in a case where the subject-matter in dispute is under the value of 20*l.*, although the Judge who tried the cause express himself to be dissatisfied with the verdict. *Brown v. Hindes*, 1 Law J. (N.S.) K.B. 208.

#### (d) Admission and Rejection of Evidence, and Absence of Witnesses.

A new trial will not be granted for the improper rejection of evidence to facts before proved. *Alexander v. Barker*, 1 Law J. (N.S.) Exch. 40, s.c. 2 C. & J. 133; 2 Tyr. 140.

Where the defendant consented that the examination of an incompetent witness should go on, the plaintiff's attorney undertaking to have him released after the trial, and the plaintiff obtained a verdict, but afterwards refused to execute the release, the Court refused to disturb the verdict, at the instance of the defendant. *Hemming v. English*, 4 Law J. (N.S.) Exch. 3, s.c. 1 C. M. & R. 568; 5 Tyr. 186.

Where evidence is rejected which is tendered for one purpose, and is inadmissible for that purpose, but is admissible in another view of the case, not alluded to at the trial, the Court will not grant a new trial as upon an improper rejection of evidence. *Res v. Grant*, 3 N. & M. 106.

In an action against Magistrates for a distress under a regular conviction, but by a warrant informal in not setting out the jurisdiction, the Court, after a verdict for the defendants, refused to grant a new trial, the objection to the warrant not having been taken at the trial, and being *strictissimi juris*. *Pemprase v. Johns*, 2 N. & M. 376.

Where evidence has been improperly rejected, the Court will grant a new trial, unless, with the addition of the rejected evidence, a verdict given for the party offering it would be clearly and manifestly against the weight of evidence. *Crease v. Barrett*, 4 Law J. (N.S.) Exch. 297, s.c. 1 C. M. & R. 919; 5 Tyr. 458.

Where a material witness for the plaintiff is prevented from attending, by the fraud and practice of the defendant's attorney, the plaintiff ought to apply to the Judge to put off the trial, or ought to withdraw the record. If he proceeds to trial, and is nonsuited, the Court will not grant a new trial. *Turquand v. Dawson*, 1 C. M. & R. 709, s.c. 5 Tyr. 488.

Upon a contract for the sale and purchase of a wood, in which the vendor reserved a power to retain a certain number of acres, to be taken out of belt; and in a suit in the Court of Sessions respecting the price or value of the part selected to be reserved, evidence was admitted by the Court which ought to have been rejected, and judgment was given for the vendor, the purchaser not having asked of the Court to direct an issue to the jury court. Upon appeal against this decision, the House of Lords, being of opinion that the judgment was supported by other evidence in the cause, and ought to have been the same if the evidence improperly admitted had been rejected, and that the Court



was judge of the law as well as the fact:—Held, that the judgment was right, and that an issue as to the value ought not to be directed.

N.B.—That the same exception to the general rules as to new trials prevails in the English courts of law, where, although the effect produced upon the jury by the improperly admitted evidence cannot be ascertained, the Courts, in some instances, refuse to direct a new trial. *Pentland v. Willoughby*, 7 Bligh, n.s. 453.

(e) *Surprise.*

At the time of an issue on a question of legitimacy, a witness was called to prove a fact, shewing that there might have been access between husband and wife at a particular place and time. This witness had not been examined in a suit in the Ecclesiastical Court, to which the mother of the child, whose legitimacy was disputed, was a party, and in which his evidence would have been material to her; nor was any attempt made by her in that suit to establish the case of access, which his testimony went to make out. The testimony of this witness was a surprise upon the party against whom it was produced; and its accuracy being impeached by affidavits, the Court directed a new trial of the issue. *Gibbs v. Hooper*, 2 M. & K. 353.

(f) *Misdirection.*

[See *TRASSAS*, Pleading.]

The election of the plaintiff's counsel to be nonsuited, on a statement by the Judge, that he will put the case to the jury, with an opinion, that, in point of law, the plaintiff is not entitled to recover, does not preclude the plaintiff from obtaining a new trial, if the Court consider such opinion erroneous; but the application will be considered in the same manner as if the case had gone to the jury under a misdirection. *Alexander v. Barker*, 1 Law J. (n.s.) Exch. 40, s.c. 2 C. & J. 133; 2 Tyr. 140.

An omission in the Judge's direction to the jury is not always a misdirection. *Page v. Ratcliff*, 1 Law J. (n.s.) C.P. 57.

Where two issues were raised by the pleadings, and the jury found upon both, but the Judge before whom the cause was tried discharged the jury upon the second issue, upon misapprehension that the verdict upon one issue rendered the other issues immaterial, the Court held, that the proper course was not to move for a new trial, but to apply to the Judge to have the verdict corrected according to his notes. *Hes v. Turner*, 3 Dowl. P.C. 211.

A sum of 400l., belonging to A, was put by him into the hands of B, his solicitor, who laid it out on mortgage, and the deeds were deposited with A. Interest being in arrear, and A pressing for payment, B gave a promissory note, payable three months after date, to A, for the amount of principal and interest; and it was agreed, at the time of giving the note, that A should deliver up the deeds to B, and should hold the note till the sale of the mortgaged premises should be completed. When the note became due, A sued B upon it, though the deeds had not been delivered up, or the sale of the mortgaged premises been completed. The Judge left it to the jury to say, whether the note was given on a condition precedent, that the deeds should be delivered up:—Held, that it ought to have been

left to them to say what the consideration of the note was, and whether it had wholly failed or not. *Richards v. Thomas*, 1 C. M. & R. 772.

(g) *Terms.*

The Court, on granting a new trial for an assessment of damages on an erroneous principle, will not limit the inquiry to the question of damages. *Mahoney v. Frost*, 2 Law J. (n.s.) Exch. 101, s.c. 1 C. & M. 325; 3 Tyr. 264; 1 Dowl. P.C. 703.

Where the Court, on granting a new trial, will not impose terms to prevent advantage being taken of the death of the defendant after the former verdict. *Swainston v. Garrick*, 2 Law J. (n.s.) Exch. 255.

A rule to shew cause why there should not be a new trial granted on bringing the amount of the verdict into court, must not be drawn up until the money has been brought into court. *Clare v. Fiestel*, 3 Law J. (n.s.) Exch. 212, s.c. 2 Dowl. P.C. 617.

Where the plaintiff makes many parties defendants without cause, upon verdict for all the defendants except one, who suffers judgment by default, and motion by plaintiff for a new trial against some of the defendants, and a new assessment of damages against him who suffered judgment by default—the Court will consider the plaintiff, as nearly as possible, as if he were nonsuited at the trial, and will make the payment of costs, and the entry of a *nolle prosequi*, as to the other defendants, conditions which must be complied with before they grant a new trial against the defendants, in whose favour a verdict has been improperly pronounced.

The Court will also protect the party against whom damages have been assessed, from the consequences of any higher assessment upon a new trial. *Price v. Harris*, 3 Law J. (n.s.) C.P. 73, s.c. 10 Bing. 331; 3 Mo. & Sc. 834.

Where, upon shewing cause against a rule for a nonsuit or new trial, it appears that the verdict has been entered for an amount not warranted by the evidence, the Court will make the rule absolute, unless the parties consent that the damages shall be reduced. *Leeson v. Smith*, 4 N. & M. 304.

(B) *MOTION FOR.*

[See *WRIT OF TRIAL*.]

Where the plaintiff has been nonsuited in his absence, the Court will entertain a motion for a new trial after the first four days of term, if satisfied that the motion is made as early as possible.

Accordingly, the plaintiff's attorney entered his cause No. 21, in the cause list, on the commission day at the assizes, and, on the first sitting day, attended in court at two o'clock, without having delivered any brief to counsel, or procured the attendance of his witnesses. He was informed that the cause had been struck out, and did not hear there had been a nonsuit until the time for moving for a new trial had expired. The Court granted a new trial on payment of the costs of the day, and of the application for a new trial. *Anonymous*, 1 Law J. (n.s.) Exch. 116.

A rule for a new trial having been moved for by mistake, in a wrong court, and the mistake not having been discovered till after the first four days of the term had elapsed, the Court of Exchequer,

under the circumstances, allowed the motion to stand good as of that court. *Piggott v. Kemp*, 2 Dowl. P.C. 20.

The Court refused to grant a new trial for a verdict alleged to be against evidence, and the presiding Judge's direction, in a cause tried in an inferior court of record, under 3 & 4 Will. 4, c. 42, s. 17, because the notes of the presiding Judge were not produced, nor their non-production accounted for. *Burney v. Mawson*, 1 Ad. & E. 348.

Where a cause has been tried before a sheriff or Judge of an inferior court, by order pursuant to 3 & 4 Will. 4, c. 42, s. 17, the Court of King's Bench will not hear a motion for a new trial, unless the notes of the sheriff or other Judge be produced and verified by affidavit. Such notes, however, need not be filed. *Mansfield v. Brearey*, 1 Ad. & E. 347, s. c. 3 N. & M. 471.

A motion for a new trial in a cause heard before the sheriff, under the Writ of Trial Act, must be made within the four days; and if the sheriff's notes cannot be obtained within that time, there must be a special affidavit of facts. *Muppin v. Gillatt*, 4 Dowl. P.C. 190.

Where the under-sheriff refuses to send his notes of the trial, a motion for new trial must be made on affidavit of the facts. *Thomas v. Edwards*, 1 C. M. & R. 382, s. c. 4 Tyr. 833.

#### (C) Costs.

The rules of Hil. 2 Will. 4, are not retrospective; and a party, who before these rules succeeded on two trials, is still entitled to the costs of both, and to the costs of entering up judgment *nunc pro tunc*, if the delay has not been occasioned by himself. *Carlisle v. Garland*, 9 Bing. 85, s. c. 2 Mo. & Sc. 180.

Where a new trial is granted, and nothing said in the rule of the costs of the former one, and after various subsequent proceedings one party succeeds, he is not entitled to the costs of the first trial. *Newberry v. Colvin*, 2 Dowl. P.C. 415.

Where a new trial is granted upon payment of costs, remanet fees are to be considered as part of those costs. *Robinson v. Day*, 3 Law J. (N.S.) K.B. 40, s. c. 5 B. & Ad. 814; 2 N. & M. 670.

On verdict for the plaintiff, a new trial was granted for misdirection, "the costs of the former trial to abide the event." On the second trial the defendant obtained the verdict:—Held, that he was entitled to the costs of the second trial only, and not to the costs of the first. *Sherlock v. Barned*, 1 Law J. (N.S.) C.P. 11, s. c. 8 Bing. 21; 1 Mo. & Sc. 58.

The rule as to the payment of costs on a motion for a new trial, is the same in principle, in criminal and civil cases. *Rex v. Ford*, 1 N. & M. 776.

Where a first trial became fruitless by the absconding of a juror, before an effectual verdict was returned, and the plaintiff obtained a verdict on a second trial:—Held, that the defendant must pay the costs of the first trial. *Harrison v. Bennett*, 2 Law J. (N.S.) Exch. 38, s. c. 1 Cr. & M. 203; 2 Tyr. 740.

#### (D) PRACTICE.

[See PRACTICE, Term's Notice of Proceeding.]

Statements, in an affidavit, on a motion for a new trial, of disclosures made by some of the jurors of what took place whilst deliberating on their verdict,

ordered by the Court to be struck out. *Dack v. Dandy*, 1 Law J. (N.S.) Exch. 7.

Where the plaintiff has carried down the cause to trial, and, a verdict having passed against him, has obtained a rule for a new trial, the Court will not grant an application by the defendant, to compel him to proceed to trial again, within a given time. *Crone v. Garment*, 4 Law J. (N.S.) C.P. 241, s. c. 1 Bing. N.C. 318; 1 Sc. 275.

An affidavit to contradict the statement of a Judge, as to what occurred at the trial before him, is inadmissible. *Rex v. Grant*, 3 N. & M. 106, s. c. 5 B. & Ad. 1031.

#### NEWSPAPERS.

Regulation of transmission of, by post, to colonies and foreign parts. 4 & 5 Will. 4, c. 44; 12 Law J. Stat. 73.

Repeal of provisions of acts affecting the printers, publishers, and proprietors of, in Ireland. 4 & 5 Will. 4, c. 71; 12 Law J. Stat. 144.

Amendment of 38 Geo. 3, c. 78, relating to the printing and publication of. 5 Will. 4, c. 2; 13 Law J. Stat. 2.

A person who lets out types and men to print a newspaper, is not the printer within the meaning of 38 Geo. 3, c. 78; the party who hires the types, and superintends the printing, is the person responsible to the Stamp Office. *Bagster v. Robinson*, 9 Bing. 77, s. c. 2 Mo. & Sc. 160.

The proprietor of a newspaper, who has been convicted and fined for a libel inserted therein by the editor without his knowledge or consent, cannot, it seems, maintain an action against the editor for the damages occasioned by the conviction.

A declaration stated that the defendant had been employed and retained by the plaintiff as the editor of a publication called the 'Court Journal,' for reward in that behalf, and that he did not perform the duties of editing the same in a proper manner, but without the knowledge, leave, authority, or consent of the plaintiff, "falsely, maliciously, and negligently inserted and published in the same a false and malicious libel," &c. That afterwards, an information was exhibited against the plaintiff "for the falsely and maliciously printing and publishing" of the said libel, and such proceedings were thereupon had that the plaintiff was convicted of that offence, and fined 100*l.*:—Held, in arrest of judgment, that the declaration was insufficient, as it did not appear that the "printing and publishing," which was the act for which the plaintiff was convicted, was the same act as that alleged in the declaration as a breach of duty, i. e. the "inserting and publishing," and, therefore, that the injury sustained was not properly connected with that breach of duty.

An allegation that a party has been convicted, is sustained by proof that he pleaded guilty; and where he seeks to recover damages by reason of a conviction occasioned by the defendant's misconduct, it is no objection that he pleaded guilty, unless it appear that he would have had a defence if he had pleaded not guilty, and gone to trial. *Colburn v. Patmore*, 3 Law J. (N.S.) Exch. 317, s. c. 1 C. M. & R. 73; 4 Tyr. 677.

A printer of a newspaper who has made an affidavit under 38 Geo. 3, c. 78, describing himself as the sole proprietor thereof, cannot recover against the real proprietors for printing, or for anything that is done in furtherance of the sale of such newspaper, during the time to which such affidavit is applicable. *Stephens v. Robinson*, 1 Law J. (N.S.) Exch. 85, s. c. 2 C. & J. 209; 2 Tyr. 280.

A newspaper cannot be assumed, of necessity, to have circulation beyond the county where it is published, and therefore the venue may be changed in an action for a libel in a county newspaper, as it seems, even on the common affidavit, that the cause of action arose in that county and not elsewhere. *Robson v. Blackwell*, 3 Law J. (N.S.) Exch. 218.

Where a newspaper contained the report of a trial against another newspaper for a libel, and set out the charge complained of, and the evidence which was adduced in support of a plea of justification, but added the verdict whereby the plaintiff recovered substantial damages; an action of libel being brought by the same plaintiff for that report, to which the plea of not guilty only was pleaded—Held, that the Judge was right in directing the jury to take the whole report together, and say whether, from the whole, it was made in such a manner as to shew that the publication proceeded from malicious motives; if so, they were to find for the plaintiff—if not, for the defendant. *Chalmers v. Payne*, 4 Law J. (N.S.) Exch. 151, s. c. 2 C. M. & R. 156.

In order to obtain an extent under 11 Geo. 4. & 1 Will. 4, c. 73, s. 3, against the principals and sureties in a recognizance entered into by the editor of a newspaper, the plaintiff must shew that he has used due diligence, and has not been able to procure satisfaction by writ of execution against the goods and chattels of the defendant. *Pennell v. Thompson*, 1 C. & M. 857, s. c. 3 Tyr. 823.

The rule established at Nisi Prius in prosecutions for libels in a newspaper, viz., that after production of the Stamp Office affidavit, a paper corresponding with it in title, printer's and publisher's name, and place of publication, may be put in and read as published by the parties therein named, without other proof on this point, applies equally on motions for criminal information. *Re v. Donnison*, 4 B. & Ad. 698.

#### NEXT-OF-KIN.

Where the words "next-of-kin" are used *simpliciter* in a gift over, and without any explanatory context shewing a different intention on the part of the testator, they must be taken to mean next-of-kin according to the Statute of Distributions. *Hinckley v. Maclarens*, 1 M. & K. 27.

Bequest to trustees, to pay interest to testator's mother for life, and, after her decease, to pay principal as she should direct; and if she died without a will, then to such person or persons as would be entitled under the Statute of Distributions. She died without exercising the power. At testator's decease, she was his sole next-of-kin; but, putting her out of the question, other persons were testator's next-of-kin, both at his death and at hers:—Held, that the bequest over, did not apply to her, and therefore, her representative was not entitled. *Briden*

*v. Hewlett*, 1 Law J. (N.S.) Chanc. 114, s. c. 2 M. & K. 90.

Where a residue, subject to previous life-estates, is given to the next-of-kin by words importing a future period, it must depend on the intention to be gathered from the whole will, whether the next-of-kin at the death of the testator, or at the determination of the prior estates, will be entitled.

A testator gives the interest of his residuary personal estate to his wife for her life, and, after her death, gives the principal among his children in equal proportions, to sons at twenty-one, and to daughters for their respective lives for their separate use, and after their respective deceases to their children as therein mentioned; and if there should be no children of his daughters, or, being such, they should die under twenty-one if sons, and under twenty-one and unmarried, if daughters, "then in trust for such person or persons as should be his next-of-kin:"—Held, that on the death of one of the daughters without issue, her share went to the persons being the testator's next-of-kin at the death of the daughter, and not to the next-of-kin at the testator's death. *Butler v. Bushnell*, 3 Law J. (N.S.) Chanc. 139, s. c. 3 M. & K. 232.

#### NOLLE PROSEQUI.

The plaintiff, in a popular action, in his declaration, which consisted only of one count, claimed damages for the *detention* of the penalty, to which, in such action, he is not by law entitled. Upon special demurrer for such, (amongst other causes) he entered a *nolle prosequi* as to the damages, and joined in demurrer as to the residue of the declaration:—Held, that he could not, in such case, enter a *nolle prosequi*, and that a Judge's order for striking it out was correct, and ought not to be rescinded.

Unnecessary prolixity, such as the setting out of public acts of parliament, which must be judicially noticed, will be visited with the censure and reprobation of the Court. *Butler v. Map*, 3 Law J. (N.S.) C.P. 186, s. c. 10 Bing. 391; 4 Mo. & Sc. 258.

Practice as to the entry of a *nolle prosequi* by the defendant in a writ of intrusion. See *Williams dem., Harris ten.*, 4 Mo. & Sc. 358.

#### NONSUIT.

[See BANKRUPT, Evidence.]

Where a plaintiff was nonsuited through the neglect of the attorney's clerk to attend in court, the Court refused to set aside the nonsuit, except upon the terms of the plaintiff's attorney paying the costs occasioned by the defendant's attending to try. *White v. Sandell*, 3 Dowl. P.C. 798.

The Court have no authority to direct a nonsuit to be entered, unless leave has been reserved to the defendant to make a motion for that purpose at the time of the trial. *Morgan v. Harris*, 1 Law J. (N.S.) Exch. 143, s. c. 2 C. & J. 461; 2 Tyr. 385; 1 Dowl. P.C. 570.

On setting aside a nonsuit, occasioned by the neglect of an attorney to deliver briefs to counsel, and to procure the attendance of witnesses, the Court will not require the attorney to pay costs as

between attorney and client, if satisfied that he had reasonable ground to suppose that the cause would not be called on so early. *Proudstone v. Twemlow*, 1 Law J. (N.S.) Exch. 175.

At the close of the plaintiff's case, the Judge being pressed to nonsuit, although he had a strong impression that there was no evidence for the jury, refused; but reserved leave to the defendant to move to enter a nonsuit. The case afterwards went to the jury, and after consulting several hours, they came into court and said they could not agree; upon which his Lordship, acting upon his first impression, that there was no evidence to go to the jury, directed the plaintiff to be called, and nonsuited him:—Held, that the Judge had no power to nonsuit the plaintiff.

Held, secondly, on a motion for a new trial, that as the plaintiff gave his consent to be nonsuited, if the Court should be of opinion that there was no evidence to go to the jury, *conditionally*, that he had the chance of a verdict of the jury in his favour; and as, by what took place, he was deprived of that chance, the plaintiff was not in the same situation as if a verdict had passed for him, with leave to the defendant to move to enter a nonsuit; and it was not open to the defendant to contend, that there was no evidence to go to the jury. *Dewar v. Purday*, 4 Law J. (N.S.) K.B. 164, s.c. 4 N. & M. 633; 3 Ad. & E. 166.

#### NORFOLK.

[See ASSIZES.]

#### NORFOLK ISLAND.

Provisions for the effectual administration of jus ice in. 4 & 5 Will. 4, c. 65; 12 Law J. Stat. 134.

#### NOTARIES PUBLIC.

Amendment of 41 Geo. 3, c. 79, for the regulation of. 3 & 4 Will. 4, c. 70; 11 Law J. Stat. 121.

#### NOTICE OF ACTION.

[See CONSTABLE—JUSTICE.]

By 57 Geo. 3, c. 99, s. 40, a notice of action, for penalties under that act, must have been left at the registry of the bishop, &c. by the party or his agent who sues, for one month. Service with the deputy registrar at his own house is not sufficient, although it appear that the notice afterwards got to the registry, and that the bishop knew of it. *Faux v. Vollans*, 2 Law J. (N.S.) K.B. 87, s.c. 1 N. & M. 307; 4 B. & Ad. 525.

An officer honestly, though erroneously, supposing that he is acting in pursuance of a certain statute, is entitled to the notice prescribed by such statute, if an action be brought against him for the irregularity which he has involuntarily committed. Therefore, a defendant intending *bond fide* to execute a warrant under the Southwark Court of Requests Act, 46 Geo. 3, c. 87, s. 21, and who, with such intention, enters the house of a third person, to arrest a party not in the house at the time, is en-

titled to the fourteen days' notice in writing required by the 21st section of the statute. *Cook v. Clark*, 2 Law J. (N.S.) C.P. 167, s.c. 10 Bing. 19; 3 Mo. & Sc. 371.

#### NOTICE TO PRODUCE.

[See EVIDENCE.]

#### NUISANCE.

[See INJUNCTION—WATER-COURSE.]

If a party having a house in a street, exhibit effigies at his windows, and thereby attract a crowd to look at them, which causes the footway to be obstructed, so that the public cannot pass as they ought to do, this is an indictable nuisance, and it is not at all essential that the effigies should be libellous; and, *semble*, that it is not necessary to shew that the crowd consisted of idle, disorderly, and dissolute persons. *Rex v. Carlisle*, 6 C. & P. 636.

An act of parliament prohibited the erection or continuance of any building within ten feet of the road, and declared that the footpaths should be subject to the act, and be part of the road. It further enacted, that if any such building should be erected or continued contrary to the act, it should be deemed a common nuisance. By another clause two Magistrates were empowered to convict the proprietor and occupier of such building, and to make an order for the removal thereof:—Held, that notwithstanding the latter clause, the party who erected or continued a building contrary to the act, might be indicted for a nuisance.

Held, also, that an open shop, having its front built on the foundation of an old wall, immediately adjoining the footpath, and connected by a roof with the front of a house, which was more than ten feet from the road, was a building within the meaning of the act. *Rex v. Gregory*, 3 Law J. (N.S.) M.C. 25, s.c. 5 B. & Ad. 555; 2 N. & M. 478.

A person kept an inclosed ground (near several inhabited houses) for profit, in causing it to be used by others for amusement, in firing at a target and shooting pigeons. This practice collected a number of vagabonds outside, who resorted thither for the purpose of firing at such birds as were missed, or only partially wounded by those who fired in the inclosure. These latter persons fired near the highway in all directions; and, most of them being unskilful, they caused much danger to the passengers and the inhabitants of the adjoining houses:—Held, that the person who kept the inclosed ground was liable to be indicted for a nuisance, although the persons without had collected against his will; their collecting being a natural, if not an inevitable consequence of his act for his own profit. *Rex v. Moore*, 1 Law J. (N.S.) M.C. 30, s.c. 3 B. & Ad. 184.

Where a power is given by the statute to do an act which appears, in the contemplation of the legislature, to be for the public benefit, and no condition or qualification is imposed as to the exercise of the power,—*semble*, that those who do the act are not liable to be indicted for a nuisance in so doing, although the act done may work a particular

local inconvenience, which (except for the power given by the act of parliament) would be a nuisance at common law. *Res v. Pease*, 2 Law J. (N.S.) M.C. 26, s. c. 4 B. & Ad. 30.

If a owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being continued or created during the term.

So he is, if he let a building which requires particular care to prevent the occupation from being a nuisance, and the nuisance occur for want of such care on the part of the tenant.

If a party buy the reversion during a tenancy, and the tenant afterwards, during his term, erect a nuisance, the reversioner is not liable for it, but if such reversioner re-let, or, having an appointment to determine the tenancy, omit to do so, allowing the nuisance to continue, he is liable for such continuance. [Per Littledale, J.]—And such purchaser is liable to be indicted for the continuance of the nuisance, if the original reversioner would have been liable, though the purchaser has had no opportunity of putting an end to the tenant's interest, or abating the nuisance. *Res v. Pedley*, 3 Law J. (N.S.) M.C. 119, s. c. 1 Ad. & E. 822; 3 N. & M. 627.

In an indictment against a gas company for a nuisance, in conveying the refuse of gas into a great public river, whereby the fish are destroyed, and the water is rendered unfit for drink, &c. the question for the jury is, whether the special acts of the particular company complained of amount to a nuisance.

The circumstance, that, by the diminution of fish, a considerable number of fishermen are thrown out of employ, is not sufficient ground to sustain such an indictment.

The directors are answerable for an act done by their superintendent and engineer, under a general authority to manage the works, though they are personally ignorant of the particular plan adopted, and though such plan be a departure from the original and understood method, which the directors had no reason to suppose was discontinued. *Res v. Medley*, 6 C. & P. 292. [Denman]

Trespass brought by order of the Court of Chancery, to try whether a bank erected by the plaintiff was a nuisance to the harbour of Wells. The jury found for the defendants, and accompanied the verdict with the following observations, which were indorsed on the *postea*. "The jury also find, that they all agree that the continuance of the bank is some injury to the harbour, but are not all agreed as to its being a material injury. That it did not appear to the jury, that any legal proceedings were had within the space of twenty years from the time of the erection of the bank."—Held, that this finding was no ground for setting aside the verdict, either as shewing that the nuisance was immaterial, or that the possession of the bank by the plaintiff for twenty years was a bar. *Folkes v. Chadd*, 3 Doug. 340.

The Court ordered the prosecutor of an indictment for a nuisance, to give the defendant a notice of the nuisances intended to be proved. A rule for this purpose may be granted without affidavit, upon reading the indictment only. *Res v. Curwood*, 5 N. & M. 369, s. c. 3 Ad. & E. 815.

In an action for a nuisance, where the defendant pleads not guilty, the plaintiff must not only prove the existence of the nuisance, but that the defendant was the person who caused it. *Dawson v. Moore*, 7 C. & P. 25. [Abinger]

To case for a noisy nuisance near plaintiff's dwelling-house, which he was possessed of for a term of years, plea, that defendant had been possessed of certain workshops, in which the noise was made ten years before the plaintiff was possessed of the term in his house, and that they had always during that time made the noise in question, which was necessary for carrying on their trade:—Held, ill. *Elliotson v. Feetham*, 2 Bing. N.C. 134, s. c. 2 Sc. 174.

On a trial of an action for a nuisance, a witness for the plaintiff may be asked, whether he has not heard the plaintiff say, that he had preferred eight indictments against the proprietors of the works, which in the present action were charged to be a nuisance. *David v. Grenfell*, 6 C. & P. 624. [Parke]

#### NUL TIEL RECORD.

Upon an issue of *nul tiel record*, the plaintiff gave notice to the defendant to produce the record, and upon his neglect to do so moved for judgment. The Court held the notice to be irregular, and refused the rule. *Begbie v. Grenville*, 3 Dowl. P.C. 502.

Rule Hil. 4 Will. 4, No. 6, which takes away the motion for a *concilium* on demurrers, special cases, and special verdicts, does not supersede the necessity of giving a four-day rule to produce the record on an issue on *nul tiel record*. *Begbie v. Grenville*, 4 Law J. (N.S.) Exch. 177, s. c. 5 Tyr. 485; 3 Dowl. P.C. 502.

#### OATHS.

[See UNLAWFUL COMBINATION.]

Abolition of oaths, affirmations, and affidavits, in certain cases. 5 Will. 4, c. 8; 13 Law J. Stat. 6.

Repeal of 5 Will. 4, c. 8, relating to suppression of voluntary and extra-judicial oaths and affidavits, and substitution of other provisions. 5 & 6 Will. 4, c. 62; 13 Law J. Stat. 134.

Every person who engages in an association, the members of which, in consequence of being so, take any oath not required by law, is guilty of an offence within the stat. 57 Geo. 3, c. 19, s. 25. *Res v. Dixon*, 6 C. & P. 601. [Bosanquet]

The provisions of stat. 37 Geo. 3, c. 123, which make it a felony to administer an unlawful oath, are not confined to oaths administered with either a mutinous or a seditious object. *Res v. Brodribb*, 6 C. & P. 571. [Holroyd]

The administering an oath or engagement to any person not to reveal the secrets of any association, is an offence within those statutes. *Res v. Ball*, 6 C. & P. 563. [Williams]

A party of sixteen persons were going out armed, for the purpose of poaching; before they went out, the prisoner swore them all to secrecy:—Held, a felony within the statute. *Res v. Brodribb*, 6 C. & P. 571. [Holroyd]

Where an oath was administered, that the party taking it should not make buttons upon certain

stated prices, and should keep all the secrets of the lodge:—Held, to be an administering of an unlawful oath within the statutes. *Rez v. Ball*, 6 C. & P. 563. [Williams]

Where sixteen persons took the same unlawful oath, two or three at a time, all being present,—Held, that the person who administered it might be convicted on an indictment for administering "a certain oath to A, B, C, D," &c. (naming the whole sixteen persons.) *Rez v. Brodrick*, 6 C. & P. 571. [Holroyd]

An oath administered in an illegal society, by which the members of it are sworn to secrecy, is an unlawful oath, within the stat. 37 Geo. 3, c. 123, which is not confined to oaths administered for the purposes of either sedition or mutiny. *Rez v. Loveless*, 6 C. & P. 596. [Williams]

If the oath administered was intended to make the parties to whom it was administered believe themselves under an engagement, it is equally within the statute, whether the book on which they were sworn was a Testament or not.

If the indictment state the oath to have been not to inform or give evidence against any person belonging to a confederacy of persons associated together "to do a certain illegal act," this is sufficient, without its being stated what the illegal act was. *Rez v. Brodrick*, 6 C. & P. 571. [Holroyd]

#### OATH OF PARTY,—IN SCOTLAND.

J R being the drawer, and A R the acceptor of a bill of exchange, upon which the money due was paid by M, and the bill assigned to him, an action having been brought by him against A R, the acceptor, to recover the amount paid, and A R having proposed a reference to the oath of J R as a party, to prove that no consideration was given for the bill:—Held, that the Court of Session, under the circumstances, having a discretion, properly refused to permit such reference. If J R had been the plaintiff in the action, *semble* that he might have been examined at the instance of the defendant. *Ritchie v. Mackay*, 4 Bligh, N.S. 537.

#### OBLETTERATION.

*Semble*—that an obliteration on the face of a written instrument may be looked at for the purpose of construing the instrument.

Thus, where the printed form of an agreement for the letting of a farm contained covenants applicable to a tenancy for one year, and also for a longer period, and the habendum, as it originally stood, was "for the term of one whole year fully to be complete and ended, and so on from year to year until either party give six months' notice determining the tenancy;" but the words "and so on," &c. were struck out before the agreement was executed, leaving the words "for the term of one whole year fully to be complete and ended:"—Held, that the intention of the parties might be collected from this obliteration, and that the agreement created a tenancy for one year only; that the stipulations intended to apply to a longer term, might be treated as having been virtually expunged, or only as applicable in case the tenancy continued longer than a year; and, therefore, that to

entitle the landlord to possession at the end of the year, no notice to quit was necessary. *Strickland v. Maxwell*, 3 Law J. (N.S.) Exch. 161, s.c. 4 Tyr. 346.

#### OCCASIONALITY.

[See PARLIAMENT.]

#### OCCUPATION.

Circumstantial proof of. See *New Sarum case (Brown)*, P. & K. 260, s.c. C. & R. 324.

#### OFFENCES,—IN IRELAND.

Provisions for the more impartial trial of, in Ireland. 3 & 4 Will. 4, c. 79; 11 Law J. Stat. 151.

Provisions for the more speedy prevention and punishment of, endangering the public peace. 5 & 6 Will. 4, c. 48; 13 Law J. Stat. 80.

#### OFFICE.

[See BELLMAN—EXCHEQUER BILLS.]

Offices, connected with fines and recoveries, and certain others in the superior courts of common law, abolished. 5 & 6 Will. 4, c. 82; 13 Law J. Stat. 175.

A fine of 300*l.*, for not serving an office, is excessive, where the highest previous fine was 100*l.*, and was found sufficient to produce an acceptance of the office. So, although since the last refusal the office has become more burdensome, and the number of persons qualified to serve has much diminished.

A man may be liable to serve the office of constable in several constabewicks, but if chosen in two constabewicks for the same year, acceptance of the first appointment will excuse his non-acceptance of the second—*semble*.

A person who occupies and is rated for a warehouse, and occupies lodgings, in which he sleeps four or five nights in every week, within the same constabewick, is liable to be chosen constable of such constabewick—*semble*. *Rez v. Mosley*, 5 N. & M. 261.

The office of Paymaster of Exchequer Bills is an office during pleasure only, and not during good behaviour, under the provisions of 48 Geo. 3, c. 1. The appointment of paymaster in the room of another is, of itself, a revocation of the first appointment. Such former appointment may be so revoked, although the writing inferring that appointment contained no power of revocation. *Smyth v. Latham*, 2 Law J. (N.S.) Exch. 241, s.c. 9 Bing. 692; 4 Mo. & Sc. 251.

A condition to assign all offices is a valid condition, and will be taken to apply to such offices as are by law assignable. *Harrington v. Klossroge*, 4 Doug. 5.

A clerk to Justices in petty sessions has no legal hold upon his office, nor will the Court of King's Bench interfere, if he is dismissed summarily, and without cause assigned. *Ex parte Sandys*, 4 B. & Ad. 863, s.c. 1 N. & M. 591.

The ground upon which it has been held, that the acceptance of a second office, incompatible

with one already held, vacates the first, is an implied surrender on the part of the appointee, and an acceptance by the person or body appointing, of such surrender. An officer, therefore, cannot avoid his office, by accepting another incompatible with it, unless his office be such as he could determine by his own acts simply; or (if the concurrence of another is required) unless that authority which had the power to accept the surrender or remove from the old office, concur in the new appointment. The defendant (an alderman and Justice of the Peace, by virtue of his office, of the city of Norwich and county of the same city) was appointed by the mayor and aldermen, in sessions assembled, to be treasurer of the city and county thereof: by the 12 Geo. 2, c. 29, and the 55 Geo. 3, c. 51, the treasurer is to give security to the Justices at sessions, who are to fix his salary, to admit, to allow, and to pass his accounts; and the offices were admitted to be incompatible:—Held, first, that as the mayor and aldermen, when they appointed him treasurer, were acting as Justices, and not in their corporate capacity, the defendant did not, by accepting the office of treasurer, vacate that of alderman; although, if he fill the former office in conjunction with the latter—*quære*, if it would not be ground of amotion. Secondly, the appointment is complete, before the security required by the statute has been entered into. Thirdly, the defendant was incapable of being appointed: and *semble*, no Justice of Peace is capable within his district. *Rex v. John Patteson*, 2 Law J. (N.S.) K.B. 33, s. c. 1 N. & M. 612; 4 B. & Ad. 9.

#### OFFICER.

[See ASSAULT—PRACTICE, in *Eq.*, Cross Bill.]

A public officer is indictable for misbehaviour in his office. *Rex v. Bembridge*, 3 Doug. 327.

In an action against the plaintiff for the extortion of his officer, the officer undertook by a written memorandum, in consideration of a sum of money being accepted, and proceedings stayed, to pay the sum of money, with costs, in seven days, and, on default thereof, that the plea should be withdrawn, and that the plaintiff should have judgment. The undertaking not being complied with, the Court refused a rule *nisi* to compel the officer to perform his undertaking, he not being an officer of the court. *Brown v. Gerard*, 1 C. M. & R. 595, s. c. 5 Tyr. 220.

#### OPENING BIDDINGS.

[See VENDOR AND PURCHASER.]

#### ORDER.

[See CONVICTION—JUSTICES.]

#### ORDINARY.

[See CHURCH.]

#### ORDNANCE.

Extension of acts relating to estates vested in principal officers of, and facilitation of business in the department of. 2 Will. 4, c. 25; 10 Law J. Stat. 39.

#### OUTLAW.

[See ARREST, Privilege from.]

#### OUTLAWRY.

- (A) PROCEEDINGS.
- (B) REVERSAL.
- (C) PLEADINGS.

##### (A) PROCEEDINGS.

Outlawry, when an abuse of process. *Pigou v. Drummond*, 1 Bing. N.C. 354, s. c. 1 Sc. 264.

Where one of two defendants is in custody, and the plaintiff is proceeding to outlawry against the other, he must apply to the Court or a Judge for time to declare against the prisoner, until the outlawry of the other defendant is perfected. *Delannoy v. Benton*, 1 Sc. 386.

A *distringas* for proceeding to outlawry may be grantable under circumstances which would not entitle the plaintiff to a *distringas* to compel an appearance.

*Semble*—that a defendant may now be outlawed in the Exchequer. *Jones v. Price*, 2 Dowl. P.C. 42.

Where the sheriff returns to a writ of *capias utlagatum*, that the defendant has no goods nor lay fee within his bailiwick, but is possessed of a rectory, the Court will award a writ of sequestration. *Rex v. Armstrong*, 4 Law J. (N.S.) Exch. 167, s. c. 2 C. M. & R. 205.

##### (B) REVERSAL.

The Court will not set aside an outlawry, merely on the ground of the defendant having constantly appeared in public during the proceedings against him. *Semble*, that the Court would set it aside, if it appeared that the party had notice of them. *Johnson v. Driver*, 1 Dowl. P.C. 127.

If a defendant is discharged from an outlawry, conditionally on his suffering eight months' imprisonment, the Court will not reverse the outlawry until the eight months' imprisonment have been suffered. *Dixon v. Baker*, 2 Dowl. P.C. 517.

The mere fact of a *præcipe* not being to be found, is no ground for setting aside proceedings to outlawry, if it is sworn that a *præcipe* was at one time left in the office.

Where a plaintiff proceeded against a defendant here and in America for the same cause of action, and the defendant was arrested in America, and took the benefit of the Insolvent Act here, the Court would not, on that ground, set aside the proceedings to outlawry which had been taken here, but left the defendant to plead these facts, it being sworn that he went abroad to avoid his creditors. *Probert v. Rogers*, 3 Dowl. P.C. 170.

*Semble*—that the Court will make a conditional order for setting aside an outlawry, in order to prevent an insolvent from remaining in custody

unnecessarily. *Nicholson v. Nichols*, 3 Dowl. P.C. 326.

On a motion to set aside proceedings to outlawry, on the ground that the writ of *capias* varied from the form given by the Uniformity of Process Act, it appeared that the writ was sued out by the plaintiff in person, and that the indorsement on the writ was—"This writ was issued by C L, of No. 6, Bernard Street, Brunswick Square, the plaintiff within named in person;" the form given by the act being, "who resides at," &c. The writ was filed on the 4th of June, and might have been seen by the defendant at any time afterwards in the office:—Held, that it was too late, in Michaelmas term, to take advantage of the objection, even if it were maintainable, though it was positively sworn that the plaintiff never knew of the outlawry till six weeks before.—Held, also, that it was a mere irregularity in the writ, and that the objection ought to have been taken by summons at chambers. In this case, the writ was issued on the 17th of April, and was returned, *non est inventus*, on the 4th of June, the practice being, that it could not be returned within four months, except under a Judge's order:—Held, that it was no objection to the writ, that it was returned before the four months expired, as it was not necessary to state the Judge's order in the writ, and that it must be assumed it was done correctly.—Held, also, that the *exigent* is not a writ within the meaning of the 12th section of the Uniformity of Process Act.

The writ of *exigent* directed the proclamations to be made at the parish church of the parish in which the defendant resided:—Held, that it was sufficient, it not appearing from any affidavit that there was any nearer church or chapel; and that, at all events, it was not necessary to mention that in the *exigent*. *Lewis v. Davison*, 1 C. M. & R. 656, s. c. 5 Tyr. 198.

The Court will not reverse or set aside an outlawry, on the ground that the defendant has taken the benefit of the Insolvent Debtors Act, and has been discharged from the debt, the judgment on which was the foundation of the outlawry. *Dickson v. Baker*, 3 Law J. (N.S.) K.B. 207, s. c. 1 Ad. & E. 853; 3 N. & M. 775.

If the King's warrant, and the Attorney General's consent, for the payment of money in the sheriff's hands under a *capias utlagatum* to the plaintiff, be granted in ignorance of the previous death of the defendant, the Court, on a plea by his representatives, suggesting the death, will postpone making an order for such payment, until the fact of the death is determined, on a confession or denial of the plea.

The proofs required by the Court for the purpose of reversing an outlawry by reason of the death of the defendant, must be regulated by circumstances; and, therefore, where a party died in France, the Court considered an affidavit that the party died on a day named, and that the deponent had seen him in his coffin, sufficient. *Rex v. Buchanan*, 2 Law J. (N.S.) Exch. 12, s. c. 1 C. & M. 125; 3 Tyr. 229.

Where a defendant moved to set aside proceedings to outlawry for irregularity, the last of the proclamations being in August, and the motion being made at the commencement of Michaelmas

term,—Held, too late, it not appearing that the defendant was not apprised of the first commencement of the proceedings, but, on the contrary, there being reason to believe that he was; the onus lying on the defendant to shew that he was ignorant of the proceedings. *Anderson v. Alexander*, 2 Dowl. P.C. 267.

#### (C) PLEADINGS.

The Court will not question the validity of an outlawry, which appears by the record of the Court of King's Bench.

The Court, on the ground that a plea of outlawry was a mere dilatory plea, refused to allow it to stand over to give the plaintiff in equity an opportunity of questioning its validity in the King's Bench. *Dalton v. Richardson*, 4 Law J. (N.S.) Chanc. 87.

The plaintiff being indebted to the defendant, the latter instituted proceedings against him, and when he was abroad continued them to outlawry. The judgment having been reversed, in an action against the defendant for suing out such process maliciously and without probable cause:—Held, that proof of the existence of a debt was sufficient to negative the charge of want of probable cause, and consequently, that the action could not be maintained.

*Quere*—in an action for proceeding to outlawry maliciously, and without probable cause, is it incumbent on the plaintiff to produce a copy of the judgment of outlawry?

*Semble*—that under the plea of Not guilty, the defendant admits the suing out of the outlawry and the reversal, and cannot dispute either, inasmuch as the plea under the new rules merely denies the wrongful act of the defendant, *i. e.* the proceeding with malice, and the want of reasonable and probable cause. *Drummond v. Pigou*, 4 Law J. (N.S.) C.P. 294, s. c. 2 Bing. N.C. 114; 2 Sc. 228.

#### OVERSEER.

[See CHURCHWARDEN AND OVERSEER—MASTER AND SERVANT.]

#### OWNERSHIP.

[See EVIDENCE.]

#### OXFORD.

[See UNIVERSITY.]

#### PAPER BOOKS.

If a plaintiff in error does not deliver his paper-books in due time, and the defendant in error delivers them all, the latter is entitled to judgment. *Best v. Prior*, 2 Dowl. P.C. 189. And see DEMURRER.

#### PARCENER.

[See FEOFFMENT.]

A parcener, previous to any partition made, brought an action for money had and received, against the defendant, collector of certain rents, to



recover his proportion:—Held, that such action did not lie, as the plaintiff could not sue without his co-parceners. *Decharms v. Horwood*, 3 Law J. (n.s.) C.P. 198, s.c. 10 Bing. 526; 4 Mo. & Sc. 400.

### PARDON.

The King's proclamation offering a pardon to accomplices on certain conditions, confers on the party, who performs the conditions, no legal right to a pardon; so that he cannot plead it, either in bar of the indictment, or in bar of execution. But the Court will delay execution, in order to enable the party to make application to the Crown for a pardon. *Rez v. Garside and Moseley*, 4 Law J. (n.s.) M.C. 1, s.c. 2 Ad. & E. 266; 4 N. & M. 33.

### PARENT AND CHILD.

A direction in a will to lay out the shares of the residue given to children, and to pay the interest, dividends and produce of the share of each such child or children respectively during minority to the mothers, or in case of their deaths respectively to the guardians of the children, to be applied in or towards the maintenance and education of such child or children respectively, or otherwise for their benefit:—Held, that the mothers were entitled to the income of their children's shares during their lives. *Berkley v. Swinburne*, 3 Law J. (n.s.) Chanc. 165.

By the law of Holland, the father of the surviving parent enjoys the property of his children until they are eighteen; that law held not to affect children who have never been domiciled out of Great Britain. *Gambier v. Gambier*, 4 Law J. (n.s.) Chanc. 81.

Bequest to a widow for life in support of herself and her three children. One of the children (a daughter) attained twenty-one, and afterwards married:—Held, that the trust for such daughter's support ceased upon her marriage. *Camden v. Benson*, 4 Law J. (n.s.) Chanc. 256.

The Court will remove a child from the custody of the mother to that of the father, although there is no suggestion that the child is subjected to any improper confinement or restraint, nothing being shewn to prove that the custody of the father is improper. *Ex parte M'Clellan*, 1 Dowl. P.C. 81.

To charge a father with the amount of clothes supplied to his son, it is essential that the clothes should have been supplied either with the assent of the father, or by his authority; and the father is the person to judge what is proper for his son. *Rolfe v. Abbott*, 6 C. & P. 286. [Gurney]

### PARISH, AND PARISH CLERK.

[See BRIDGE—CHAPELRY—MANDAMUS.]

Division of parishes. See CHURCHWARDENS AND OVERSEERS, Appointment of.

Provisions for the conveyance of workhouses and other property of parishes or unions. 5 & 6 Will. 4, c. 68; 13 Law J. Stat. 152.

Union of parishes in Ireland. Amendment of an Act in 7 & 8 Geo. 4, relating to. 2 & 3 Will. 4, c. 67; 10 Law J. Stat. 192.

The union of parishes after the great Fire of London, under the 22 Car. 2, c. 11, the Building

Act, does not destroy the special customs by which, previous to such union, the parishes so united managed their affairs. Therefore, if the parishioners of two parishes, previous to their union under the statute, were accustomed to elect the respective parish clerks concurrently with the rectors, such custom exists after the union; and if a person be appointed to the office of clerk by the rector alone, without the concurrence of the majority of the parishioners, such appointment is invalid; and the party occupying a reading desk in the church, for the purpose of performing the duties of the assumed office, may be removed by the churchwardens, so that no unnecessary damage or violence is done. *Hartley v. Cook*, 2 Law J. (n.s.) C.P. 141, s.c. 9 Bing. 728; 3 Mo. & Sc. 230.

After the great Fire of London, 1666, the parish of St. Mary Colechurch, was united with that of St. Mildred the Virgin, by statute 22 Car. 2, c. 11. By custom, in each of the parishes before their union, the right of appointment to the office of parish clerk was in the rector and parishioners. In the year 1831, the parishioners of the united parishes, in vestry assembled, elected a parish clerk; but the rector, at first, refused to sanction the appointment, and himself appointed another person: afterwards, however, he appointed the person elected, with the assent of the parishioners. But the person whom he had previously appointed, one Sunday morning placed himself in the clerk's desk, in the church of the united parishes, and, refusing to retire upon request, was laid hold of by one of the churchwardens and vestry clerk, and an attempt was made to remove him by force, but which was not successful. For the purpose of trying the right to the office, he brought an action of assault against those officers, who pleaded specially two sets of justification; one set alleging the legal appointment of the person elected by the parishioners, to place whom in the desk they sought to remove the plaintiff; and the other set treating the plaintiff himself as an intruder. The jury were of opinion, that the custom was for the rector to appoint with the assent of the parishioners, and found a verdict for the defendants. A rule was afterwards obtained for a new trial, which, after argument, and time taken to consider, was discharged; the Court being of opinion that the plaintiff was not lawful parish clerk, as he was appointed by the rector alone, without the concurrence of either of the parishes; but they did not decide whether the election by the united vestries was right or not, though they said, that it appeared to be the natural mode.

In the course of the trial it was ruled, that old entries in the vestry-books of the parishes were not evidence to shew the right of election, as it did not appear whether the incumbent was present at the meetings they related to; but extracts from the register of the bishop of the diocese were received in evidence to prove the same appointment, as were also several entries of vestry meetings, at which the rector was present. *Hartley v. Cook*, 5 C. & P. 441. [Tindal]

If a parish clerk has been deprived of his office, the mandamus to restore him must be directed to the incumbent, and not to the churchwardens.

To authorize such a mandamus it must clearly appear, that he has been deprived of his office.

*Semble*—that he may be deprived by the incumbent for cause. *Ex parte Clrketi*, 3 Dowl. P.C. 327.

### PARISH OFFICERS.

[See CHURCHWARDENS AND OVERSEERS.]

### PARK.

The servant of the owner of an ancient park may justify shooting a dog that is chasing the deer, although such shooting may not be absolutely necessary for the preservation of the deer; and the servant may justify the shooting, although the dog may not have been chasing deer at the moment when it was shot, if the chasing of the deer and the shooting of the dog were all one and the same transaction. *Protheroe v. Mathews*, 5 C. & P. 581. [Taunton]

### PARLIAMENT.

[See CORPORATE PROPERTY—COSTS, House of Lords, and Committee of House of Commons—EXCISE OFFICER—PRIVILEGE.]

- (A) REVISING.
- (B) ELECTION.
- (C) COMMITTEE.
- (D) PETITION.
- (E) PETITIONER.
- (F) CANDIDATE AND SITTING MEMBER.
- (G) BRIBERY AND TREATING.
- (H) VOTER.
- (I) EVIDENCE.

#### (A) REVISING.

Place of abode of objector not necessary to be inserted in the notice of objection. See, however, the *Bedford case*, *post*. *Petersfield case* (*Cookson*), P. & K. 46, s. c. C. & R. 32.

It is essential to the validity of a notice of objection, that it should contain the objector's place of abode. *Bedford case*, P. & K. 119, s. c. C. & R. 48.

An objection may be made before a revising barrister to a voter, on the ground of his being disqualified from voting as a custom-house officer, under the provisions of the act 22 Geo. 3, c. 41. *Rochester case*, 1 K. & O. 104.

The objection at the registry must be taken in the manner prescribed by the 18th section. *Clonmell case*, P. & K. 427, s. c. C. & R. 454.

The calling on and desiring a witness to attend before a revising barrister, is a sufficient notice to him to attend. *Rochester case*, 1 K. & O. 82.

#### (B) ELECTION.

Rioting during the greater part of an election will not avoid the election, unless it is shewn that the return has been affected by it. *Coventry case*, P. & K. 236, s. c. C. & R. 260.

Although the returning officers do not keep the poll open the number of hours in each day directed by law, yet the election will be held valid, unless it is shewn that the result of it has been affected by such proceedings of the returning officers. *Limerick case*, P. & K. 356.

The poll in counties of cities and of towns in Ireland, ought to be kept open for the number of

hours each day directed by 1 Geo. 4, c. 11, s. 9, as to counties at large. *Ibid*.

### (C) COMMITTEE.

[See, *post*, Voter, throughout.]

Committees have power to question the decision of the barristers on the informality of the notices. *Bedford case* (*Flight*), P. & K. 117, s. c. C. & R. 43.

It is not competent to a committee to enter into an examination of a voter's qualification where his name stands upon the register. *Carlow case* (*Brehan*), P. & K. 394, s. c. C. & R. 439.

Committees are precluded from entering into the question of votes, where the names appear on the register, and they have not been objected to before the barrister. *Bedford case* (*Cogan*), P. & K. 122, s. c. C. & R. 70.

An objection not taken before a barrister, may be raised before a committee. *Ripon case*, P. & K. 205, s. c. C. & R. 292.

A vote, unobjected to at the registry, may be questioned before a committee. *Galway Town*, P. & K. 308, s. c. C. & R. 398.

If the revising barrister decides upon a case, although the notice of objection was defective, a committee will entertain it. *Bedford case* (*Lousson*), P. & K. 137, s. c. C. & R. 83.

Where a notice of claim has been rejected by the barrister for informality, the merits may be discussed before a committee. *New Sarum case* (*Smith*), P. & K. 244, s. c. C. & R. 307.

Committees have the power to inquire into the list of voters admitted by the barrister, which have been *bond fide* challenged before him. *Clonmell case*, P. & K. 426, s. c. C. & R. 454.

Committees are not empowered to enter into any inquiry respecting votes which have not been under the cognizance of the barrister. *Petersfield case* (*Crockford*), P. & K. 51, s. c. C. & R. 35.

When no objection has been made to a claimant in a borough before the revising barrister, a committee will not examine into the validity of his claim. *Rochester case* (*Lock*), 1 K. & O. 121.

A claimant, who has been rejected by the registering barrister, in Ireland, and has tendered his vote at an election, may be placed on the poll by a committee. *Coleraine case*, P. & K. 503.

A loss, previously to the 31st of July, of the qualification, in respect of which the voter's name is entered in the register, is not a valid ground of objection before a committee, unless previously taken before the barrister. *Southampton case* (*Draper*), P. & K. 231, s. c. C. & R. 122.

A claimant may be examined before a committee in support of his vote, where he had presented himself at the barrister's court for examination. *New Sarum case* (*Humby*), P. & K. 253, s. c. C. & R. 317.

No objections permitted to be taken before a committee, which had not been taken before the registering barrister in Ireland. *Monaghan case* (*M'Caffrey*), 1 K. & O. 31.

Evidence permitted to be given before a committee, which had not been given before the registering barrister. *Monaghan case*, 1 K. & O. 32.

The vote of a person not objected to before the revising barrister, cannot be questioned before a committee for a disqualification, which might have

been a ground of objection before the barrister. *Oxford case (Godfrey)*, P. & K. 74, s. c. C. & R. 153.

A witness may be examined to points he was prepared to prove before the barrister, although not examined to them at the time. *Droitwich case*, 1 K. & O. 58.

A committee has jurisdiction in the case of a voter, whose name was inserted in a list made out by a person not authorized by the Reform Act, and produced by him before the revising barrister, if the case was decided upon by the barrister. *Carnarvon case*, P. & K. 457.

A committee will not inquire into the validity of a vote to which only an informal objection has been made at the registration. *Horsham case (Baker)*, 1 K. & O. 272.

A committee has jurisdiction to scrutinize the right of voters, admitted by the registering barrister. *Galway County case, (Darmody)*, P. & K. 512, s. c. C. & R. 463.

A person, who had claimed as "proprietor," and had been rejected by the sheriff, and the court of review, admitted on the poll by the committee, who also inserted his name in the register as "a tenant." *Linlithgowshire case (Robb)*, P. & K. 281, s. c. C. & R. 353.

The case of a person, whose claim had been rejected by the sheriff, and had not appealed from it, refused to be entered into. *Linlithgowshire case (Ritchie)*, P. & K. 296, s. c. C. & R. 365.

A voter, who is on the register, and has not been objected to before the sheriff, cannot be objected to before a committee. *Linlithgowshire case (Rennie)*, P. & K. 299, s. c. C. & R. 368.

A committee will not enter on the case of a voter unobjected to before the sheriff, but rejected by him, and afterwards placed on the register by the Court of Review. *Linlithgowshire case (Tait)*, P. & K. 300, s. c. C. & R. 369.

An objection, not shewn to have been taken before the barrister, may not be raised before a committee. *New Sarum case (Burfoot)*, P. & K. 258, s. c. C. & R. 322.

An objection on the ground of infancy, not taken before the revising barrister, cannot be taken before a committee, (*Davis's*). *New Windsor*, 1 K. & O. 160.

A claimant cannot be examined as to a fact affecting his vote, which could not have been investigated before the barrister. *New Sarum case (Young and Johnson)*, P. & K. 254, s. c. C. & R. 318.

Where a claimant has been rejected by the barrister, in consequence of the omission of the local description of his qualification in the body of his notice, the committee admitted the vote, after proof of qualification. *New Sarum case (Smith)*, P. & K. 247.

No witness can be examined before a committee in cases where the revising barrister had jurisdiction, unless he has been examined before the revising barrister, or having had notice to attend before the revising barrister, has refused to attend, or having been tendered for examination, has been rejected by the revising barrister. *Rochester case*, 1 K. & O. 75.

Committees have the power of examining into the validity of all the votes standing upon the re-

gister. *Longford case*, P. & K. 179, s. c. C. & R. 235.

A committee will not enter into the consideration of the validity of a vote upon the register of an Irish county, except in the three cases of an irregularity in the mode of registration, of an objection having been taken before the barrister at the time of registration, or of an objection having arisen to the vote subsequently to the registration. *Cork case (Barry)*, 1 K. & O. 276.

When no objection has been made to a claimant in a borough before the revising barrister at the preceding registration, a committee will not examine into the validity of his vote, although it had been objected to at a registration two years previously. *Horsham case (Lintot)*, 1 K. & O. 272.

The objection that a voter has been employed in the Customs within twelve months of the election, may be taken before a committee, and, if proved, the voter may be struck off the poll, although no objection was made to him before the revising barrister. *Rochester case*, 1 K. & O. 107.

Evidence admitted to prove that a person, who claimed as a non-resident freeman, was actually a resident freeman, although no attempt to prove his residence had been made before the registering barrister. *Cork case (Becher)*, 1 K. & O. 293.

The circumstance of an objection, which existed before the 31st of July, not being known until after the election, does not enable a committee to enter upon it, as it was not taken before the revising barrister. *Rochester case (Collins)*, 1 K. & O. 121.

The party previously to the 31st of July, by a 10l. householder, with the house, in respect of which his name was inserted in the register, if not objected to before the revising barrister, is not an objection that can be taken before a committee. *New Windsor (Lawson)*, 1 K. & O. 152.

Not usual to summon or swear the revising barrister. *Droitwich case*, 1 K. & O. 60.

Mistake on the poll of a surname, which is *idem sonans* with that on the register, corrected. *Ib.* 69.

Where votes were tendered and rejected, on the ground of the name on the register not being spelt in the same way in which the voter spelt it at the poll, although the name so spelt was *idem sonans* with that on the register; the committee determined that the petitioner was entitled to the return, but leave was obtained for the sitting member petitioned against to question the election by petition within fourteen days. *Canterbury case*, 1 K. & O. 134.

The being inserted in the register by a wrong Christian name, does not destroy the vote. Where a returning officer has refused to receive the vote of a man, on the ground of his not answering the question under the Reform Act, as to his identity, a committee will put him on the poll on its being proved, that he was the person inserted in the register by a wrong Christian name. *New Windsor (Ball)*, 1 K. & O. 168. And see, *post*, Voter, (*Morris and Turner's cases*).

A voter whose name had been inserted in the register for a qualification he did not possess on the 31st of July, but who had a good qualification, for which his name had not been inserted through the misconduct of the assistant overseer, directed to be put on the poll, although his vote had been rejected

by the returning officer. *New Windsor (George)*, 1 K. & O. 163.

A person whose name was in a list affixed by the overseers on the church-doors, but not in a list given by them to the barrister, or in the register, placed on the poll by the committee. *Southampton case (Dawson)*, P. & K. 226, s. c. C. & R. 106.

If a person has had his name affixed on the list on the church-doors, but an unauthenticated copy of the list is produced to the revising barrister, and by him rejected, the committee will place his name on the poll, if his qualification in other respects is proved. *Droitwich case (Gaunt)*, 1 K. & O. 57.

An objection cannot be entered into before a committee to a voter, whose name has been on the register for a Scotch county, and unobjected to for two registrations, although, at a registration three years previously, his claim was objected to, and registered by the sheriff, and afterwards admitted by the court of review on appeal from the sheriff's decision. *Inverness-shire case (Finlay)*, 1 K. & O. 305.

A committee will not proceed in a scrutiny without the production of the register. *Worcester case*, 1 K. & O. 237.

A committee, although no register is produced, may strike off or add names to the poll. *Carnarvon case*, P. & K. 459.

Evidence admitted of a tender not stated on the poll-book. *New Sarum case (Percy)*, P. & K. 282, s. c. C. & R. 327.

From the circumstance of two notices of objection having been withdrawn, on a third having been declared invalid, no presumption of fraud arises so as to give a committee jurisdiction to hear the case. *Bedford case (Eagles)*, P. & K. 138, s. c. C. & R. 93.

A voter who had tendered his vote, and had given a qualified answer to the third question, and had been in consequence rejected by the returning officer, without the question having been again submitted to him, ordered to be placed on the poll, evidence having been adduced that no change of the qualification had taken place since the registry. *New Sarum case (Moody)*, P. & K. 255, s. c. C. & R. 319.

Where the third question, under the Reform Act, had been put at the poll, the committee would not permit evidence of the change of occupation by a voter, between the 31st of July and the poll, to be entered into. *New Windsor case (Davis)*, 1 K. & O. 170.

If a voter contumaciously refuses to answer the third question, and his vote is entered as tendered, the vote will not be put on the poll. *Droitwich case (Harris)*, 1 K. & O. 54.

The question of change of occupation may be entered into by a committee, although the voter, at the poll, may have answered the third question in the affirmative. *Worcester case (Hall)*, 1 K. & O. 239.

An adjournment to admit of the arrival of a material witness allowed, on the terms of the party requiring it paying the costs of the day. *Clonmell case*, P. & K. 432, s. c. C. & R. 458.

An adjournment, to admit of the petitioners producing the town-clerk to prove the poll, refused. *Montgomery case*, P. & K. 469.

Time given to petitioners to produce the poll-books, they having not brought them from Ireland

in consequence of their having relied on the returning officer's certificate, which proved to be informal. *Londonderry case*, P. & K. 275, s. c. C. & R. 251.

An adjournment allowed, to admit of the poll being proved. *Warwick case*, P. & K. 537.

Time granted under the circumstances to the petitioners, to produce witnesses to disprove the qualification of the sitting member. *New Windsor case*, 1 K. & O. 149.

An adjournment refused, which was asked for the purpose of enabling the petitioner to produce the attesting witnesses to some of the deeds produced by the sitting member. *Lincoln case*, P. & K. 378, s. c. C. & R. 375.

A petitioner is not at liberty to divide his case against the sitting member. *Ibid.*

An application, by a sitting member, for a commission to examine witnesses in Ireland, was refused to be granted, when thirteen days had been suffered to elapse without any notice having been served on the petitioners. *Cork case*, 1 K. & O. 288.

A second argument of a point allowed by a committee. *Lincoln case*, P. & K. 382, s. c. C. & R. 378.

Where there are several objections, one of which is, that the voter was not on the register, the parties objecting must bring forward the evidence on all of them together. *Southampton case*, P. & K. 230.

Where there are two persons of the same name, the list must clearly distinguish the person intended to be objected to, or the objection cannot be gone into. *Galway County case (Horan)*, P. & K. 521, s. c. C. & R. 475.

Under allegations in a petition that persons "disqualified by the provisions of the different statutes, made for securing the freedom of election," and "that persons who were disqualified and not entitled voters, had voted," petitioners were allowed to enter into evidence to prove a voter disqualified as a paid agent and flagman, by the 7 & 8 Geo. 4, c. 37, an objection to him on that account having been made to him in their list of objections. *Rochester case (Wilkinson)*, 1 K. & O. 96.

The removal from the house, in respect of which a 10<sup>l</sup>. householder is registered, after the 31st of July, but before the lists are signed by the barrister, is a disqualification to vote. An objection may be taken before a committee to a vote given under such circumstances, although the allegation in the petition only goes to loss of qualification between the period of signing the register by the barrister and the time of election. *Droitwich case (Cotterell)*, 1 K. & O. 48. See, *post*, Voter, *Stock's case*, P. & K. 143, and other cases in the same page.

Under general allegations in a petition, that persons who were "not registered," and others "who were not freemen, or, if freemen, did not reside within the city or the distance prescribed by the act, or electors otherwise qualified of the said city, under the provisions of the said act, who were not entitled to vote," did vote, an objection of personation against a vote allowed to be proved. *Rochester case (Wood)*, 1 K. & O. 115.

An objection on the ground of having laid a wager on the result of the election, may be gone into, although the objection given in the list is, that the voter had been bribed and received promise of reward. *New Windsor case (Hawkins)*, 1 K. & O. 194.

Where tendered votes had been entered in the poll-books, and cast up with the good votes, so as to give a majority to the sitting member, the committee determined, that the petitioner was entitled to the return; but leave was obtained for the sitting member to petition within fourteen days. *Carnarvon case*, P. & K. 108, s.c. C. & R. 127.

In a scrutiny, each case has a separate trial, and cross-examination is not allowed to other matter than that immediately before the committee. *Droitwich case*, 1 K. & O. 55.

An objection cannot be taken before a committee to a registered voter, on the ground that he is in the employment of the post-office. *New Windsor case (Williams)*, 1 K. & O. 178.

#### (D) PETITION.

A petition may be heard, which is signed by freeholders residing at a distance beyond seven miles from the borough. *Carrickfergus case*, P. & K. 530.

An interlined petition allowed to be proceeded with, the interlineation being abandoned. *Portarlington case*, P. & K. 238.

When two petitions are presented on the same day, a committee will hear them in the order in which they stand in the journals, not in which they stand in the votes. *Warwick case*, P. & K. 538.

Held, that additions made by an agent to a petition, after it had been signed by the petitioners, did not vitiate the remainder of the petition; and that the petitioners, having abandoned the charges introduced by such additions, might proceed upon the other charges. *Southampton case*, P. & K. 215, s.c. C. & R. 105.

Petitioners against the return of a member for a town and county of a town, but who only described themselves as electors of the county of the town, on behalf of themselves and others who had a right to vote at the last election for the said place, and also still have a claim to have a right to vote for members for the said town and county of a town, allowed to proceed with their petition. *Drogheda case*, 1 K. & O. 201.

It is not a valid objection to a petition against one of the sitting members, that one of the petitioners has signed the return of both sitting members, and the other has announced the resignation of a third candidate. *Warwick case*, P. & K. 537.

A party opposing a petition, complaining of an undue election, reported to be frivolous or vexatious, is entitled, under 9 Geo. 4, c. 22, to bring an action for costs and expenses thereby incurred against any one of the persons who has signed it. *Gurney v. Gordon*, 1 Law J. (N.S.) Exch. 233, s.c. 2 C. & J. 11; 2 Tyr. 16.

#### (E) PETITIONER.

A petitioner who has proved an election to have been void on account of treating, may go into a scrutiny, with the view of establishing his right to the seat. *Oxford case*, P. & K. 69, s.c. C. & R. 180.

The petitioners against a return for want of a qualification, may enter into evidence to dispute the particular of qualification delivered into the House. *Bath case*, P. & K. 30.

Petitioners who had omitted to state in their petition, that they had a right to vote at the election to which it related, permitted to proceed with it by a committee. *Montgomery case*, P. & K. 162, s.c. C. & R. 331.

An action for costs incurred in opposing a petition against the return of a member of parliament, may be brought against one of several petitioners under 9 Geo. 4, c. 22. *Gurney v. Gordon*, 9 Bing. 37, s.c. 2 Mo. & Sc. 137.

#### (F) CANDIDATE AND SITTING MEMBER.

[See, post, Bribery and Treating.]

In order to convict a person on an indictment for taking a false oath of qualification as a member of parliament for a borough, the jury must be satisfied beyond all doubt, that the property was not worth 300*l.* a year, and also that the defendant well knew that it was not of that value. *Rex v. De Beauvoir*, 7 C. & P. 17. [Denman]

The want of an express allegation of ineligibility, will not prevent inquiry into the qualification of a member. *Coventry case*, P. & K. 345, s.c. C. & R. 281.

A lease, granted to the father of the sitting member, of lands named in the particular of his qualification, and for which he had paid rent, admitted in evidence. *Carlou case*, P. & K. 411.

A qualification alleged to arise from being the eldest son of a person qualified to serve as a knight of the shire, must be disproved by the party disputing it, although no rental or description of the lands from which the father's qualification arises, is given in the particular. *Quare*—whether the possession, by a father, of lands in Ireland, of sufficient value to qualify him to sit in parliament, confers also a derivative qualification to sit for an English borough, on his eldest son and heir apparent. *New Windsor*, 1 K. & O. 140.

Held, that a grant of a rent-charge of 300*l.* "to be from thenceforth payable" by equal half-yearly payments, on the 10th of June, and the 10th of December, which was executed on the 10th of December, and re-executed on the 12th, and the consideration-money for which was subsequently paid in the presence of one witness only, was a sufficient qualification on the 10th (the day of nomination). *Bath case*, P. & K. 23, s.c. C. & R. 1.

In the case of a petition against a member, on the ground of want of qualification, it is incumbent on the petitioner expressly to prove the disqualification in every particular. *Lincoln case*, P. & K. 386.

In the particular of qualification delivered in to the clerk of the House, under the standing order of the 21st of November, 1717, the property was stated to be in the county of the city of Dublin. The evidence went to shew the property to be in the county of Dublin:—Held, a fatal variance. *Drogheda case*, 1 K. & O. 204.

Held, that a withdrawal of the particular of qualification delivered in at the table of the House, and the substitution of a new one, is a waiver of the particular originally delivered in, and that a sitting member cannot substitute a new qualification for that originally given in by him to the Clerk of the House of Commons. *Drogheda case*, 1 K. & O. 207.

A rent-charge issuing out of an estate in Ireland for three lives, renewable for ever, will not confer a qualification to sit in parliament. *Drogheda case*, 1 K. & O. 212.

The election of a member, who had not given the usual notice that he did not intend to defend his seat, and who had stated in the particular of his qualification certain property, which appeared to belong to another individual, and who had polled at the election the votes of many persons, whose freeholds notoriously were without the boundary of the borough, declared to be vexatious. *Mallow case*, P. & K. 267.

A sitting member who had not delivered in a particular of his qualification to the clerk of the House, in compliance with the standing order of 1717, but had furnished to the petitioners a statement of the qualification on which he meant to rely, (differing from that sworn to by him at the election,) within a week previously to the sitting of the committee, and which the petitioners did not enter into evidence to disprove:—Held, to be duly elected.

*Semble*, that in such a case a committee would allow an adjournment, to enable the petitioners to make the necessary inquiries. *Dover case*, P. & K. 413.

Two of the electors of a borough went to a banker there, and said, they wished to draw cheques upon the bank. The bank promised to honour any cheques they might draw. The cheques drawn were signed by one only, but the accounts in the banker's books was opened in the joint names:—Held, that they might maintain a joint action against the candidate, in whose interest they were, if he adopted the payment made. *Bremridge v. Campbell*, 5 C. & P. 186. [Tindal]

#### (G) BRIBERY AND TREATING.

[See the *Hertford case*, P. & K. 541, s. c. 1 C. & R. 184.]

Agency proved before evidence of bribery admitted. *Warwick case*, P. & K. 538.

Agency must be first proved before evidence of the acts or declarations of the alleged agent can be admitted. *Galway County case*, P. & K. 517, s. c. C. & R. 467.

Evidence of an act of bribery admitted, without hearing counsel upon the question, whether there was sufficient proof of the agency to the sitting member of the person committing it. *Dungarvon case*, 1 K. & O. 5.

Evidence of acts of bribery held to be admissible after two arguments, before agency has been established. *Hertford case*, P. & K. 556, s. c. C. & R. 216.

Evidence of general bribery is not admissible until agency has been proved. *Norwich case*, P. & K. 570.

A member of parliament, who admitted that he had employed an agent for the purposes of his election, who had voted for him, was held not to be bound to state, whether he had paid such agent. *New Sarum case (Cooper)*, P. & K. 263, s. c. C. & R. 329.

The employment of one attorney as the general agent of a candidate, is not proof of the agency of his partner. *Norwich case*, P. & K. 565.

A member of a committee is not as such the agent of the candidate. *Oxford case*, P. & K. 60, s. c. C. & R. 148.

Canvassing with the sitting members, is not sufficient proof of agency. *Norwich case*, P. & K. 750.

Letters from a sitting member, whom it is not sought to affect with knowledge of general bribery at an election, are not admissible in evidence. *Carrickfergus case*, P. & K. 532.

The receipt of a sum of money for travelling expenses, and loss of time by a voter after he had voted, but of which he had received no promise before he voted, does not invalidate his vote. (*Clarke's*) *Worcester case*, 1 K. & O. 248.

Where bribery is alleged against a tendered vote, the qualification of the voter to be put on the poll must be proved before the charge of bribery can be entered upon. *Linlithgowshire case (Darge)*, P. & K. 295, s. c. C. & R. 365.

Treating at the previous election, is not admissible in evidence against an unsuccessful candidate at that election, for whom the seat was not then claimed. *Montgomery case*, P. & K. 464.

Canvassing frequently in company with one of the sitting members, and paying a bill for beer drunk by voters at a house in their interest, held to be sufficient proof of agency, but the last fact rejected as proof of treating. *Norwich case*, P. & K. 571.

*Semble*, that, where the same sum is given to every voter coming from the same place to an election, for his travelling expenses, it is bribery; and it is not the less so, though all the candidates agree in the payment of the same amount. But it is for the jury to say, in an action by an agent of the candidate, to recover the amount from his principal, whether the money was *bonâ fide* paid for expenses, and expenses only. *Bremridge v. Campbell*, 5 C. & P. 186. [Tindal]

Payment by a candidate on an election for a member of parliament, of the expenses of taking up the freedom of his voters, is illegal. *Semble*, it is illegal for a candidate to pay the travelling expenses of a voter. *Baynton v. Cattle*, 1 Mo. & Ro. 265. [Alderson]

If a person, who is not himself a candidate, and who is not known to the party who supplies refreshments to be an agent of a candidate, open a public-house at an election, and order supplies for the voters, he is personally liable to pay; and the Treating Act, 7 & 8 Will. 3, c. 4, will afford him no defence if the goods were supplied entirely on his credit. *Thomas v. Harries*, 6 C. & P. 615. [Parke]

Provisions and entertainment given to voters at an election are not within the Treating Act, 7 & 8 Will. 3, c. 4, s. 1, if not supplied by the direction of the candidate or his authorized agents.

Consequently, an innkeeper may maintain an action against parties, not the authorized agents of a candidate, for entertainment and provisions furnished on their credit to voters in the interest of such candidate.

*Semble*—That it is not bribery at common law, nor treating, within the act 7 & 8 Will. 3, c. 4, s. 1, to give moderate refreshments to voters coming from a distance. *Hughes v. Marshall*, 1 Law J. (N.S.) Exch. 16, s. c. 2 C. & J. 118; 2 Tyr. 134.

Where a sum of money is offered by a person to a voter with the view of obtaining his vote at an election, and the money is accepted by the voter with an express or implied promise to vote, the party giving the bribe is guilty of the offence of "corrupting" the voter to vote, within the 7th section of 2 Geo. 2, c. 24, and subjects himself to the penalties of that act.—*Quære*, whether, if the voter had accepted the money under such a promise, and without any intention of performing it, that would have made any difference; *semble*, not—*per* *Patteson, J. Henslow v. Fawcett*, 4 Law J. (N.S.) K.B. 147, s. c. 4 N. & M. 585; 3 Ad. & E. 51.

(H) VOTER.

[See, *ante*, Committee.]

[As to occasionality, see the *Cricketfield cases*, 1 P. & K.]

A person with a wrong christian name on the register, may vote if he states himself to be the person described on the register. *New Sarum case (Morris and Turner)*, P. & K. 261, s. c. C. & R. 327; see, *ante*, Committee, (*Batt's case*, &c.)

A wrong description of himself at the poll by a voter, does not affect his vote if he is on the register. *Bedford case (Gibbon)*, P. & K. 139, s. c. C. & R. 87.

Freemen admitted under the Galway Act, within six months before the election, and shortly before the registry:—held, not entitled to vote. *Galway Town case*, P. & K. 303, s. c. C. & R. 390.

An Irish peer, who has not brought himself within the exception in the standing order of the House, is not entitled to vote, although he has been placed on the register. *Droitwich case (Southwell)*, 1 K. & O. 65.

The warrant of the King, addressed to the Chancellor, directing him to issue a writ of summons to the House of Lords, does not create the person directed to be summoned a peer, so as to prevent him from voting. *Bedford case (Tavistock)*, P. & K. 143, s. c. C. & R. 95.

If an outgoing tenant has, according to the custom of the country, a right to occupy a certain portion of the premises, in respect of which he was registered as a voter, for a period beyond the time of the election, and that portion is of sufficient value, and his occupation continues up to the time of the election, he has a right to vote, within the meaning of the 27th section of the 2 Will. 4, c. 45. *Droitwich case (Wythe)*, 1 K. & O. 53.

Non-resident freemen have no right either to be registered, or to vote for counties or cities in Ireland. *Cork case*, 1 K. & O. 271.

Joint tenants under a lease for more than twenty years, are not entitled to vote for a county in Ireland, unless each individual possesses a qualification under it of more than 10*l.* above the whole rent reserved. *Sed quære. Monaghan case (Casey)*, 1 K. & O. 35.

Lessee for life of town lands in L, under one who held a grant from the Crown of "the town and lands of L" for 1,000 years, is entitled to vote in the absence of other evidence of identity of the parcels. *Longford case (Greene)*, P. & K. 188, s. c. C. & R. 237.

A lessee of a house and shop, who had let off the

house to an under-tenant, to whom he paid a weekly rent for the use of a bed-room:—Held, under the circumstances, to be in the legal occupation of the whole premises. *Ripon case (Mangle)*, P. & K. 211, s. c. C. & R. 300.

An act of parliament, that persons deriving title under a canal company shall not be entitled to vote at elections, and the company having been dissolved, and the property vested in the former shareholders by a subsequent Act, (not containing a similar declaration), incorporating the shareholders into a new company:—Held, that lessees, under a lease dated since the formation of the new company, were entitled to vote. *Longford case*, P. & K. 185, s. c. C. & R. 236.

A freehold or leasehold, which is of the yearly value of 10*l.*, and which yields or is capable of yielding that value to the claimant, over and above all rents and charges, except those mentioned in the 10th section of the Irish Act, will give a right to vote. *Longford case (Farrell)*, P. & K. 189, s. c. C. & R. 238.

Employment as a parish labourer is an acceptance of parochial relief, and disqualifies the person so employed from voting. *Bedford case (Kemp)*, P. & K. 128, s. c. C. & R. 75.

Evidence to shew, that relief in cholera had been received in consequence of a proclamation of the Board of Health that it would not disqualify from voting, refused to be admitted. *Bedford case (Clark)*, P. & K. 132, s. c. C. & R. 80.

The acceptance of parochial relief in cases of cholera disqualifies from voting. *Bedford case (Wilshire)*, P. & K. 130, s. c. C. & R. 79.

The receipt of alms after the registration, but before the day of election, is a disqualification. *Bedford case (Barker)*, P. & K. 123, s. c. C. & R. 71.

Employment by the parish of the children of a voter, at a rate of wages lower than the ordinary scale, is a disqualification. *Bedford case (Hedge)*, P. & K. 130, s. c. C. & R. 77.

Relief by sending to a lunatic asylum at the parish expense, disqualifies from voting. *Bedford case*, P. & K. 129.

The vote of a man whose wife received parochial relief, and who was committed under the Vagrant Act for not maintaining her, but who appealed from that conviction to the Quarter Sessions, and, on their affirmance of it, repaid the parish the amount of relief they had given:—Held, a good vote, although re-payment was not made till after the election. *Rochester case (Norman)*, 1 K. & O. 114.

The occupier of one of the alms-houses belonging to the Bedford charity, is not disqualified from voting. *Bedford case (Cavit)*, P. & K. 133, s. c. C. & R. 84.

The pulling down and entirely rebuilding the house for which the voter was registered, does not destroy the vote. *New Windsor case (Meyrick)*, 1 K. & O. 153.

An inhabitant householder, who leaves his house after registration, and goes into lodgings, loses his vote, although he continues to pay rent to the landlord for the house after he had quitted it. *Bedford case (Stock)*, P. & K. 145, s. c. C. & R. 91.

The parting with the occupation of the house in

respect of which he was registered, and removal out of the borough, is a valid objection against the voter, whether the third question under the Reform Act has or has not been put to him at the poll. *Rochester case (Martin)*, 1 K. & O. 72; and see *ante*, Committee, *Cotterell's case*, 1 K. & O. 48.

A change by a 10l. householder from the occupation of one 10l. house, to that of another of similar value after the 31st of July, disqualifies him from voting until a new register is in force. *Rochester case (Cruttenden)*, 1 K. & O. 109, s.r. *Horsham case (Aldridge)*, 1 K. & O. 271.

The parting with the house in respect of which a voter is registered, after registration, is a valid objection. *Southampton case (Sherry)*, P. & K. 234. s.c. C. & R. 123.

Change of occupation after the 31st of July, from one house to another in the same street, incapacitates a 10l. householder from voting, although the description of his qualification in the register would equally suit both the houses. *Rochester case (Gates)*, 1 K. & O. 112.

A change of occupation by a 10l. householder, whether the house he secondly occupies be of the same, greater, or less value, disqualifies him from voting. *Worcester case (Cook)*, 1 K. & O. 240.

The occupier of a leasehold house does not forfeit his right to vote by bankruptcy, if he remain in the house, and no act is done by the assignees to shew that they have elected to take the lease. *Worcester case (Carter)*, 1 K. & O. 241.

It is no objection to the vote of a registered freeman, that he has ceased, at the period of the election, to reside within seven miles of the place where the poll for a city was taken, previously to the passing of the Reform Act. *Rochester case (Hermistage)*, 1 K. & O. 83.

An inhabitant householder paying scot and lot, leaves his house, and goes into lodgings after he had been registered, but before he voted:—Held, that he had lost his right of voting. *Bedford case (Harper)*, P. & K. 142, s.c. C. & R. 90.

No objection can be made to the vote of an inhabitant paying scot and lot, on the ground that he does not occupy the house for which he is rated. *New Windsor case (Hull)*, 1 K. & O. 158.

An inhabitant paying scot and lot, has no right to vote, unless he has paid up all the rates due from and legally demanded from him. *New Windsor case (Bricknell)*, 1 K. & O. 156.

It is no objection to the vote of a registered freeman, that he has ceased, at the period of the election, to reside within seven miles of the place where the poll for a city was taken, previously to the passing of the Reform Act. *Worcester case (Goodman)*, 1 K. & O. 527.

A wager by a voter with another voter, destroys his own vote. *New Windsor case (Dyson)*, 1 K. & O. 193.

A wager on the result of an election by a voter with a person not a voter, destroys his vote. *New Windsor case (Bragg)*, 1 K. & O. 191.

The insignificance of the amount of a wager by a voter, does not prevent its invalidating his vote. *New Windsor case (Burnham)*, 1 K. & O. 194.

Bets on the success of a candidate made by a

voter, either with another voter, or a person not a voter, invalidate the vote of the person so making them. *Worcester case (Dutton)*, 1 K. & O. 254.

The acceptance of and acting under a retainer at an election, by a solicitor, invalidates his vote, although no payment under it is proved. *New Windsor case (Long)*, 1 K. & O. 175.

The vote of a town clerk, who has been paid for his services during the election, is bad. *New Windsor case (Secker)*, 1 K. & O. 185.

The paid agent of one candidate cannot vote for another candidate. *New Windsor case (Fowles)*, 1 K. & O. 174.

The vote of a city officer who attends an election, and afterwards sends in a bill for his services, and is paid by a candidate, is good. *Worcester case (Barnes)*, 1 K. & O. 247.

The vote of a parish clerk, paid by both parties for pointing out the houses of voters, is bad. *Worcester case (Lloyd)*, 1 K. & O. 246.

The vote of a regular constable of a borough, who is employed at an election to keep the peace, and who refuses to take a sum of money paid to the town clerk, as a remuneration to him, is good, although, before the petition was presented, he expressed his expectation of being paid. *New Windsor case (Lovegrove)*, 1 K. & O. 180.

The vote of a regular constable, for whose services during the election a remuneration has been paid to the town clerk, which he has not received, is good, although he has expressed an intention of receiving that remuneration. *New Windsor case (Morton)*, 1 K. & O. 183.

A check clerk in the employ of one candidate, cannot vote for the opposing candidate. *Bedford case (Wilcox)*, P. & K. 136, s.c. C. & R. 94.

It is not necessary for Roman Catholics in Ireland to take the oath previously to their voting, by the Catholic Relief Act, 10 Geo. 4, c. 7. *Carlow case (Doyle)*, P. & K. 399, s.c. C. & R. 441.

No oath is required to be taken by Roman Catholic voters in Ireland previous to their polling, except those enjoined by the Reform Act. *Cork case (Cogney)*, 1 K. & O. 296.

The owner of a building, for which he was rated as for three distinct tenements, and which, in his purchase, was also described as consisting of three distinct tenements, who had let off two portions of it, (having separate staircases exclusively belonging to them), and had remained in the occupation of the third;—held to be in the legal occupation of the whole, within the meaning of sect. 27 of the Reform Act. *Ripon case (Casey)*, P. & K. 206, s.c. C. & R. 296.

A tenant under a lease, executed at the time of the registry, but dated back, is not entitled to vote, though he has been in the occupation of the land, as sub-tenant to another person, from whom he had a verbal promise of a lease. *Galway County case*, P. & K. 512, s.c. C. & R. 463.

An irregularity in his affidavit of registry will not affect the voter, it being the duty of the barrister to see that the affidavit signed by him is correct. *Carlow case (Byrne)*, P. & K. 398, s.c. C. & R. 439.

If the words by which residence is sworn to, are omitted in the affidavit of a freeman at the registration, his vote is bad, unless it is proved that he



was actually resident, both at the times of the registration and of his voting. *Cork case (Ireland)*, 1 K. & O. 279.

Want of possession of the freehold, coupled with an admission of the voter, at a former election, that his vote was bad,—held sufficient to destroy his vote, although a beneficial interest was not requisite for the right to vote in the borough. *Petersfield case (Cookson)*, P. & K. 49, s. c. C. & R. 34.

Disqualification, at the time of registration, is not a valid objection. *Bedford case (Taylor)*, P. & K. 138, s. c. C. & R. 93.

A tenant under a freehold lease, executed at the time of the registry, but dated nearly twelve months back, held entitled to vote, where he had been in the occupation of the land before the date of the lease, as tenant to the party granting it, with an agreement for a lease entered into more than six months before the registry. *Galway County case (Gavin and Kenny)*, P. & K. 519, s. c. C. & R. 469.

Tender of a tenant under a building lease for ninety-nine years, who had claimed as a proprietor,—held good. *Linlithgowshire case (Cunningham)*, P. & K. 291, s. c. C. & R. 361.

In a notice of claim for a Scotch county, it is not necessary to set out the names of the claimant's tenants. *Linlithgowshire case (Miller)*, P. & K. 298, s. c. C. & R. 367.

Proof of right of voting in the Flint boroughs. *Carnarvon case*, P. & K. 440.

#### (1) EVIDENCE.

What a voter says before a barrister in support of his vote, cannot be given in evidence before a committee. *Bedford case*, P. & K. 137, s. c. C. & R. 83.

Printed copies of the lists produced before the barrister, are admissible in evidence. *Carnarvon case*, P. & K. 469.

The lists signed by the revising barrister, and subsequently numbered, will be received as the register. *Worcester case*, 1 K. & O. 338.

A committee will not receive the notes of a revising barrister, who is not examined before them, as evidence of what passed before him at the registration. *Rochester case (Wilde)*, 1 K. & O. 72.

Where there are two freemen of the same name, and only one registered, the evidence of the town clerk, who made the lists of freemen, received to shew which he intended to put on. *Rochester case*, 1 K. & O. 116.

The evidence of the town clerk, as to the persons he puts on the freemen's lists, not conclusive as to the person on the register. *Rochester case (Moore)*, 1 K. & O. 116.

In order to disprove the identity of the person who polled, with the person whose name is on the register, evidence as to the manner in which the lists have been made out may be adduced. *Southampton case (Pryce)*, P. & K. 221.

Parol evidence may be admitted to explain, not to contradict, the poll. *Droitwich case*, 1 K. & O. 55.

Where a person is placed on the register by a wrong Christian name, evidence may be brought forward to prove that he was the person intended to be registered. *Southampton case (Crouch)*, P. & K. 229, s. c. C. & R. 120.

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A petitioner, who has not entered into recognizances for the costs of the petition, is an admissible witness in support of it. *Dungarvon case*, 1 K. & O. 5.

A poll-book, with an affidavit, in the form prescribed by 1 Geo. 4, c. 11, s. 3, but kept in the custody of the returning officer, after the making of the affidavit, until required to be produced before the committee, is admissible in evidence. *Coleraine case*, P. & K. 507.

A poll-book of a former election, (without the usual affidavit,) which has been received by a previous committee, is admissible in evidence. *Ibid.* 508.

Poll-books kept by the returning officer, beyond the twenty-one days mentioned in the 1 Geo. 4, c. 11, s. 3, and then delivered to the clerk of the peace, who was not the officer entrusted by the act with the custody of them, are admissible. *Clonmell case*, P. & K. 426, s. c. C. & R. 463.

A witness, called to produce the poll, allowed to be cross-examined by the counsel for the sitting members, as to the merits of the case, with this qualification, that the counsel was to bear in mind, that he was substantially examining his own witness. *Coventry case*, P. & K. 352.

An affidavit, by a returning officer, of the identity of the poll-books in an Irish election, is sufficiently proved by the evidence of the handwriting of the Magistrate before whom it was sworn. *Limerick case*, P. & K. 373.

*Semble*, that an account of the number of electors who polled for each candidate at an election for an Irish county of a city, which was indorsed on the back of the writ by the returning officer, is not a sufficient certificate under the 4 Geo. 4, c. 55, s. 71, to dispense with the production of the poll. *Ibid.* 374.

Poll-books, which have been verified by the affidavit of the returning officer, on delivering them to the clerk of the peace, though the affidavit is not annexed, and the poll is not summed up, are admissible in evidence. *Galway County case*, P. & K. 512, s. c. C. & R. 463.

An account of the number of electors who polled for each candidate at an Irish county of a city, which was indorsed on the back of a return, but not in the handwriting of, or signed by the returning officer,—Held, not to be a valid certificate, to dispense with the production of the poll. *Londonderry case*, P. & K. 273, s. c. C. & R. 250.

Poll-books from the custody of the seneschal (the returning officer), are admissible in evidence. *Dungarvon case*, 1 K. & O. 4.

Poll-books received from the custody of the town clerk, in whose care they had been ever since the close of the second day's poll. *New Windsor*, 1 K. & O. 150.

Poll-books received, which had for a short time been in the custody of a clerk of the agent of the sitting member, that clerk having proved that they had not been altered while in his custody. *Inverness-shire case*, 1 K. & O. 300.

The whole of the proof of the due custody of the poll-books must be given at once. See *Roscommon case*, 1 K. & O. 269; *Inverness-shire case*, 1 K. & O. 301.

A joint affidavit by two sheriffs, the jurat of which does not contain their names, admitted as evidence

to verify the poll in an election for an Irish county of a city, under 4 Geo. 4, c. 55, s. 76. *Cork case*, 1 K. & O. 274.

Poll-books of an Irish county election, refused to be received in evidence. *Roscommon case*, 1 K. & O. 259.

The declarations before the revising barrister of certain persons, that they attended as the agents of the sitting members, are admissible as evidence of the subsequent agency of such persons. *Hertford case*, P. & K. 553, s. c. C. & R. 215.

Declarations of petitioners against the character of their own witnesses, may be given in evidence, without calling the petitioners themselves. *London-derry case*, P. & K. 276, s. c. C. & R. 253.

Evidence not admissible to shew that deeds not marked by the sheriff were produced before him. *Linlithgowshire case*, P. & K. 298, s. c. C. & R. 368.

Held, that deeds not marked by the sheriff, could not be produced as evidence before a committee. *Linlithgowshire case*, P. & K. 292, s. c. C. & R. 363.

Parol evidence, not received to prove the tenure of lands held under deeds which the committee had refused to admit as evidence. *Linlithgowshire case*, P. & K. 294, s. c. C. & R. 364.

A member of Parliament, who had been in the committee-room after he had been informed that he would be called as a witness, may be examined. *Galway County case*, P. & K. 523, s. c. C. & R. 473.

A witness, who has remained in the committee-room, with the view of excluding his own testimony, may be examined. *Oxford case*, P. & K. 104, s. c. C. & R. 168.

A person who has been in the room, cannot be examined as a witness. *New Windsor case*, 1 K. & O. 167.

A person who has been in the room, may be examined to prove that another person has been so. *Ibid.*

A member of the House will not be obliged to answer whether, or not, he employed a certain person as his agent. *New Windsor case (Barton)*, 1 K. & O. 180.

The acts of a society not to affect the sitting members, until their connexion with it is distinctly proved; but evidence of those acts is admissible, with a view to enable the committee to make a special report. *Bristol case*, P. & K. 577.

The counsel for the petitioners, suggesting that he might be enabled to connect the sitting members with a society, by adoption of the acts of that body, is at liberty to proceed with the whole case. *Bristol case*, P. & K. 580.

Evidence, not before the barrister, decided to be not admissible, unless the party was precluded from giving it, by the decision or conduct of the barrister. *Clonmel case*, P. & K. 429, s. c. C. & R. 455.

Declarations of a voter against his vote, after he has polled, are admissible in evidence. *Southampton case (Hagood)*, P. & K. 223.

The evidence of a voter cannot be received to support his own vote, against an objection arising subsequently to the 31st of July. *New Windsor case (Lawrence)*, 1 K. & O. 164.

A voter may be called as a witness, in support of an objection against his own vote, but he need not answer any question which he thinks may tend to invalidate it. *Worcester case (Prosser)*, 1 K. & O. 244.

A voter cannot be called as a witness in support of his own vote. *Rochester case (Prawl)*, 1 K. & O. 118.

Declarations of a voter being an agent, received when the validity of his vote is in question. *Droitwich case (Lawrence)*, 1 K. & O. 64.

Declarations of a voter, that he was to be paid for his services, and proof of subsequent canvassing, held sufficient proof of employment under 7 & 8 Geo. 4. c. 37, to invalidate his vote. *New Windsor case (Hodge)*, 1 K. & O. 173.

A voter may be examined, in order to prove that he had no right to vote. *Southampton case*, P. & K. 225.

Evidence in destruction of his vote may be given by a witness, where it is not sought to impeach his title. *Oxford case (Tubb)*, P. & K. 102.

Declarations of a voter against his vote, received in evidence. *Ripon case (Cundale)*, P. & K. 210, s. c. C. & R. 301.

A voter's evidence that he was a paid agent, allowed to be read against his vote. *Galway County case (Flynn)*, P. & K. 526.

Evidence given on the discussion of other votes of the same class, cannot be read against the person whose vote is under consideration. *Galway County case*, P. & K. 521, s. c. C. & R. 475.

Declarations of a voter are not admissible in evidence, which have been made after the committee has been balloted for. *Southampton case (Primmer)*, P. & K. 223, s. c. C. & R. 114.

A witness may be called to prove that he voted in the name of another person, but he need not answer, unless he chooses, any question tending to criminate himself. *Worcester case (Reynolds)*, 1 K. & O. 242.

Evidence may be given of declarations of a person after he has voted, although they may tend to affect him with penal consequences. *Southampton case (Saunders)*, P. & K. 222, s. c. C. & R. 113.

A witness must answer a relevant question, though the answer may affect his title to property. *Galway County case*, P. & K. 524.

On the proof of a tender, previous declarations of the person tendering as to whom he intended to give his vote for, not permitted to be given in evidence. *Droitwich case*, 1 K. & O. 56.

A lease, referring to a plan, admitted in proof, without production of the plan. *Linlithgowshire case (Mair)*, P. & K. 291, s. c. C. & R. 362.

Memorials of annuities admitted in proof, that annuities had been granted. *Carlow case*, P. & K. 411, s. c. C. & R. 450.

An account, opened by a sitting member with the Bank of Ireland, may be given in evidence, notwithstanding objections are made by the managers to the disclosure. *Galway Town case*, P. & K. 313, s. c. C. & R. 414.

Proof of notice to produce having been served on the voter, and six of the directors of a company, in respect of a share in whose property the right to vote was claimed, is sufficient to let in secondary evidence of the deed constituting the company. *Petersfield case*, P. & K. 35, s. c. C. & R. 22.

Where the production of the documents of a private society is desired, a warrant served on one member of the committee, is sufficient. *Carrickfergus case*, P. & K. 534.

Service of a notice to produce a lease on the wife

of a voter at his house, held insufficient to let in secondary evidence. *Monaghan case (Agnew)*, 1 K. & O. 30.

Notice to produce his lease, served on the voter on the day before the ballot for the committee, held sufficient to let in secondary evidence. *Galway County case (Mannion)*, P. & K. 521, s. c. C. & R. 475.

Service on a voter's son, the voter being absent, and no proof of his return being offered, held insufficient to let in secondary evidence. *Galway County case (Soughlehan)*, P. & K. 522, s. c. C. & R. 475.

Deeds produced by a sitting member, without notice, must be proved in the regular way by a petitioner, before they can be admitted in evidence. *Lincoln case*, P. & K. 378, s. c. C. & R. 375.

The production of letters respecting an election, written by a candidate to a friend, may be compelled; but secondary evidence cannot be given of a letter from a third person, to which reference is made in one of them. *Carrickfergus case*, P. & K. 533.

Where a witness has been contradicted, it is not competent to the party calling him, after the defence has closed, to produce evidence in support of his testimony in a collateral matter. *Hertford case*, P. & K. 562, s. c. C. & R. 222.

Counsel allowed to examine as to a conversation between a party who paid a voter after voting, and a third person before the vote was given, it being understood that the communication thus made would be brought home to the voter. *Galway County case, (Earl)*, P. & K. 527, s. c. C. & R. 472.

In support of the general charge of intimidation, the acts of a person not shewn to be connected with the sitting members, may be given in evidence. *Coventry case*, P. & K. 354, s. c. C. & R. 288.

The presumption is in favour of a voter being the person who was registered. *Bedford case (Chowne)*, P. & K. 141.

An officer whose signature is affixed to a document, directed to be filed and kept among the records of a county, may be examined to disprove the date apparent on the face of the document. *Longford case*, P. & K. 178, s. c. C. & R. 232.

A person who is summoned as a witness before a committee, is entitled to payment or tender of his expenses, before he can be required to give evidence. *Hertford case*, P. & K. 561.

A witness summoned on a Speaker's warrant can only require, previously to giving evidence, payment of the expenses necessary to enable him to appear before the committee, all other expenses being the subject of taxation afterwards. *Norwich case*, P. & K. 573.

It is no objection to the reception of a witness's evidence, that he has subscribed to the expense of prosecuting the petition. *Southampton case (Butt)*, P. & K. 220, s. c. C. & R. 112. And see *Coventry case*, P. & K. 343.

Parol evidence may be given of a document which is capable of being produced, though it may have influenced the witness's conduct in a transaction, as to which he had been examined. *Bristol case*, P. & K. 582.

The proceedings of a club, with reference to the election, may be given in evidence. *Ib.* 576.

The rate-book is conclusive evidence on the

question of whether rated or not. *Ripon case*, P. & K. 205, s. c. C. & R. 295.

When a party had been actively engaged in distributing gifts to voters previously to an election, and there appeared in the banking accounts of the agents for the sitting members (who were also solicitors of the party,) payments to him of different sums of money, which the agent stated to have been advances on a mortgage, further inquiry into the transaction was not permitted. *Hertford case*, P. & K. 561.

The seat not being claimed by the petitioners, the cross-examination of a witness as to an act of one of the petitioners, is admissible, for the purpose of discrediting the witness, but not with the view of affecting the petitioner. *Hertford case*, P. & K. 554, s. c. C. & R. 220.

A Judge's certificate, stating the opinion of the twelve Judges, on a question of law submitted to them for their opinion by that Judge, not allowed to be given in evidence, the question having been tried *ex parte* before the single Judge. *Coleraine case*, P. & K. 509.

Examined copies of judgments, the originals of which had been read by the officer of the court to the examinant, admitted. *Carlow case*, P. & K. 411, s. c. C. & R. 451.

A list of freemen prepared by a former chamberlain, in obedience to an order of the House, but not returned to the House, and a return to the House of the names of the freemen, with the dates of their admission, made by the present Chamberlain from information derived from the corporation-books, held to be inadmissible. *Coleraine case*, P. & K. 509.

Parol evidence is admissible to prove, that, in substance, the standing order has been complied with. *Coventry case*, P. & K. 348, s. c. C. & R. 283.

## PARTICULARS OF DEMAND.

[See PRACTICE.]

## PARTIES TO SUITS AND ACTIONS.

[See NEW TRIAL—PLEADING—TRUST AND TRUSTEE.]

Bankruptcy of,—See DISCONTINUANCE.

Death of,—See PRACTICE.

Oath of, in Scotland,—See OATH.

Objection for want of, *Mullins v. Townsend*, 2 Law J. Dig. 296, s. c. 2 D. & Cl. 430; 5 Bligh, n.s. 567.

Party grieved,—See APPEAL—CERTIORARI, Costs.

Post-nuptial settlement, by which all the property a wife should acquire is assigned to A and B upon certain trusts. A makes a will, giving certain property to the wife, and appoints B and C executors; C dies, having duly accounted. Bill filed by wife against B and her husband, praying the establishment of the settlement, or the execution of a settlement out of the property. Demurrer by husband, that there were separate titles, and that the representative of C ought to have been a party—overruled. *Holloway v. Holloway*, 1 Law J. (n.s.) Chanc. 128.

*Semble*—that, in a bill to redeem, the Court will in its discretion, dispense with subsequent incumbrancers being made parties, where it is impracticable to make them so; and that the Court will pursue the decision in *Ross v. Payne*, by dispensing with prior incumbrancers, as parties in a suit for foreclosure. *Briscoe v. Kenrick*, 1 Law J. (N.S.) Chanc. 116.

Bill by a trustee of a sum secured by a policy of assurance, to compel the person, on whose life the assurance was effected, to replace the sum assured, which he had lost by fraudulently surrendering the policy for value to the assurance society:—Demurrer, because the *cestuis que trust* were not parties, allowed without costs. *Fortescue v. Barnett*, 2 Law J. (N.S.) Chanc. 98.

Where a bill for the transfer of stock was filed by A, a legatee of the stock, against the defendants, in whose names it was standing, and the bill alleged, that the executor had assented to the bequest, a demurrer that the executor was not a party, was overruled. *Smith v. Brooksbank*, 3 Law J. (N.S.) Chanc. 226.

In a suit for an account of the assets of a deceased person, the personal representative of his former representative is properly joined as a co-defendant with his continuing or present personal representative. *Holland v. Prior*, 1 M. & K. 237.

A, having a general power of appointment over an estate, in the event of his surviving his father, joined with B and C, his sureties, in a covenant to pay an annuity to the plaintiff; and A covenanted, that, if he should survive his father, he would create a term in the estate for securing the annuity. A's father died, and A granted other annuities to the plaintiff, but did not create the term. He afterwards vested the estate in trustees for the benefit of such of his creditors as should execute the conveyance. Several of the creditors executed it, and one of them, on behalf of himself and others, filed a bill to have the trusts of the deed carried into execution. After a decree had been made in that suit, the plaintiff filed his bill against A, the trustees, and the plaintiff in that suit, praying for an account of what was due to him in respect of his securities, that the priorities of himself and the other incumbrancers might be declared, that he might redeem the securities which should appear to be prior to his own, and might have the benefit of the decree as to that part of his demand for which he should not be entitled to priority over the trust-deed:—Held, on demurrer, that the sureties were not, but that all the creditors, who had executed the deed, were necessary parties; and that as the bill alleged that the trust-deed had been executed by several of the creditors, the objection was properly made by demurrer. *Newton v. Earl of Egmont*, 4 Sim. 574.

Where estates have been conveyed to trustees in trust for such of the creditors of the grantor as should execute the conveyance, and a bill is filed by an incumbrancer, (some of whose securities are prior, and others subsequent to the trust-deed,) praying, that his rights and interests, under his securities, may be established, and the priorities of himself and the other incumbrancers declared, all the creditors, who have executed the conveyance, however numerous they may be, must be made

parties to the suit. *Newton v. the Earl of Egmont*, 5 Sim. 130.

Defendant, in his answer, insisted, that he was entitled to be reimbursed by A what he might be decreed to pay to the plaintiff; and, therefore, that A was a necessary party; and, accordingly, the Court, at the hearing, ordered the cause to stand over, with liberty to amend. Plaintiff did not amend, but filed a supplemental bill against A alone, praying the same relief as in the original bill. The two causes were heard together, when it was objected, that the plaintiff ought to have amended the original bill, or made the original defendant a defendant to the supplemental bill; but the objection was overruled. *Greenwood v. Atkinson*, 6 Sim. 419.

Upon a bill filed by trustees for the directions of the Court in execution of the trusts of a will, if the trustees have notice of any doubt as to the title of the testator to part of the estate devised, the person who may be benefited by that doubt is properly made a defendant to the suit, and the Court will not proceed to the execution of the trusts of the will until that doubt is removed, either by a proceeding at law, or by such other course of inquiry as the Court may think proper to direct. *Talbot v. Lord Radnor*, 3 M. & K. 252.

Where a Scotch sequestration had issued against a testator's heir, and it was necessary in a suit to have the testator's real representative before the Court, the trustee, under the sequestration, who was named as a defendant to the suit, and stated to be out of the jurisdiction, was held to be a sufficient representative of the testator's real estate. *Wilson v. Moore*, 1 M. & K. 126.

Where a contract is entered into by a person as agent for another, and a suit is instituted respecting that contract, those persons who are interested in the question must, in a court of equity, be parties to the record.

Where the parties plaintiffs to a suit are so numerous as to render it inconvenient or impracticable that they should be parties to the record, if they have all one common interest, a few may sue, on behalf of themselves and of all the other members of the association.

Thus, where a contract had been entered into by three persons, partners of a firm, not in their partnership character, or as representing the firm, but in their individual and personal characters, and whom the vendor refused to treat with as (but who were in fact,) agents for the company:—Held, that a bill filed to rescind such contract was properly filed in the names of such agents and the other partners.—Held, also, that a bill filed to rescind such contract might be filed by fifteen persons, part of the partnership firm, consisting of five hundred and seventy-one partners, on behalf of themselves and the remaining parties, they all having one common interest in the rescinding of such contract. *Small v. Attwood*, 2 Law J. (N.S.) Exch. Eq. 1.

Where the party principally to be affected by the decree is out of the jurisdiction, the Court will not proceed in his absence. *Lyde v. Hale*, 4 Law J. (N.S.) Chanc. 180.

The settlement of matters between a mortgagor and mortgagee referred by order of Nisi Prius to

arbitration. The award directs a sale of the property; and by agreement between these parties, and a third party, who was a mortgagee of other property belonging to the mortgagor, the award also directed that the surplus produce of the sale, after satisfying the former mortgagee, should be paid over to the latter:—Held, that this latter mortgagee was a necessary party to a suit to set aside the sale and for redemption, unless it could be shown, that he had been satisfied *absolue*. *Parnell v. Tyler*, 2 Law J. (N.S.) Chanc. 195.

A father being indebted to his children, assigned property to a trustee to pay them: the children were not parties to the deed, but were cognizant thereof:—Held, that in a suit by the creditors to set aside the deed, the children were necessary parties, and that the cause could not proceed without them. *Trenchard v. Finch*, 4 Law J. (N.S.) Chanc. 177.

A, one of the executors of the will of B, who died in India, proved the will, and possessed the testator's assets in India. The widow and executrix of A proved her husband's will, and possessed his assets in India; and having afterwards come to England, she was made a party to a suit for the administration of B's estate:—Held, that it was not necessary that an administrator of A's estate in England should be also a party to this suit. *Anderson v. Custer*, 2 M. & K. 763.

The affairs of an insurance company not incorporated were regulated by the trusts of a deed, which declared that the money of the company should be lodged at a banker's in the names of the trustees, who should issue policies, and transact various other affairs described in the deed. The trustees issued a life policy under seal. The party who was beneficially entitled, received the money by a cheque on the bankers in the name of the trustees, and gave a receipt, treating the money as received from the trustees. In an action afterwards brought to recover back the money had and received,—Held, that the action was well brought in the names of those trustees; and that there was no necessity to join the other members of the company as plaintiffs. *Lefevre v. Boyle*, 1 Law J. (N.S.) K.B. 199, s.c. 3 B. & Ad. 877.

## PARTITION.

[See JURISDICTION, Commissions of Partition.]

On a bill for partition of estates which were partly freehold and partly copyhold, the Court will not decree a partition of the copyholds, but order the whole of the copyhold estate to be allotted to one of the parties in severalty. *Dillon v. Coppin*, 3 Law J. (N.S.) Chanc. 201.

## PARTNERS.

[See BANKRUPT, Partners, (throughout)—GUARANTIE—STAMP, Award.]

### (A) PARTNERSHIP.

- (a) *How constituted.*
- (b) *Construction and Operation of Agreement.*
- (c) *Property.*
- (d) *Dissolution.*
- (e) *Valid or Illegal.*

### B' PARTNERS.

- (a) *Rights and Interests.*
- (b) *Liabilities.*

### (C) ACTIONS AND SUITS.

- (a) *In general.*
- (i) *Enumerator.*

### (A) PARTNERSHIP.

[See ACCOUNT—PLEADING, in Equity.]

#### (a) *How constituted.*

A mere shareholder in an inclosed joint stock company, who does not interfere with the management of the company, and has not signed any deed, or in any way held himself out as a partner in the concern, is not liable to be sued for debts contracted by the company. *Far v. Crompton*, 1 Law J. (N.S.) C.P. 180, s.c. 9 Bing. 115; 2 M. & Sc. 146.

By the terms of the contracts entered into between the Post Office and the coach proprietors, for the conveyance of the mails, it is amongst other things stipulated, that in case any of the persons signing those agreements shall become bankrupt or insolvent, or by breach of contract, or neglect of duty, induce the Postmaster General to dismiss him, the other parties to such contracts shall work the ground of the party so dismissed, or admit some other person, to be approved by the Postmaster General, to work the ground; and the contracts authorize the Postmaster General to pay one of such contracting parties for the use of himself and the others, quarterly, the mileage of twopence halfpenny per mile.

Where a party to one of these contracts has been dismissed, and another person has been introduced, and the other parties to the original contracts have not the offer of working the ground first made to them, and refuse to acknowledge as a partner the person introduced by the Post Office, no partnership is created between them, and the party so introduced cannot call for accounts against the old partners. *Loegee v. Nelson*, 3 Law J. (N.S.) Chanc. 108, s.c. 3 M. & K. 1.

It was agreed between the plaintiff and defendant, that the plaintiff should horse the mail from N to B and back again, and be paid for such performance at the rate of 9*l.* per mile per annum, to be paid quarterly, provided that the said agreement on that and every subsequent article should be properly fulfilled. It was further agreed, that the plaintiff should pay for one cart then in use, the sum of 18*l.* to the defendant; and that he would pay for, in a fair proportion with the defendant, all repairs of carts, so long as the agreement should be in force. It was also agreed, that the monies received for the conveyance of all parcels should be fairly and equally divided between the two parties, each bearing an equal portion of the loss, if any, occasioned by the loss or damage of any such parcels:—Held, that this agreement amounted to a contract of partnership, and therefore that no action was maintainable at law upon it. *Green v. Beesby*, 4 Law J. (N.S.) C.P. 299, s.c. 2 Bing. N.C. 108; 2 Sc. 164.

Where the plaintiff made a contract with Brown, who contracted in the name of Brown & Co., and Brown, at plaintiff's request, wrote down the names

of the two defendants as partners with him, and on an application to one of the defendants, he admitted that that was correct:—Held, that such defendant was not estopped thereby from shewing at the trial, that he had no interest in the subject-matter of the contract:—and having appeared constantly at Brown's manufactory, and having examined and inquired frequently about the works performed for the plaintiff—held, that the Judge had done right in directing the jury to consider, whether those acts were referable to a limited or general interest in the concern, and was not bound to leave it to them to determine, whether or not the defendant had held himself out to the world as a general partner, it not appearing that the plaintiff had entered into the contract on the faith of his being a partner. *Ridgeway v. Philip*, 4 Law J. (N.s.) Exch. 14, s. c. 1 C. M. & R. 415; 5 Tyr. 131.

(b) *Construction and Operation of Agreement.*

R T and A T having carried on business in partnership in equal moieties, the former retired, leaving large sums due to the partnership from its customers, and debts also owing from the partnership. A T entered immediately into partnership in the same business with C; and it was agreed between them, but not in writing, that, upon A T bringing into the new partnership 40,000*l.* of good debts, owing from customers of the then late partnership, for the purpose of meeting claims of debts from that partnership, transferred to the accounts of the new partnership, A T should be entitled to two-thirds of the new partnership, and C to one third. This partnership business was carried on for fourteen years without any settlement of accounts, or any entry in the books, declaring the terms of the partnership. It appeared, within the first five or six years, 40,000*l.* were received from the debtors of the former partnership; but not so much, if the advances to them, by the new firm, were deducted from their payments:—Held, that 40,000*l.* of good debts were brought in, according to the intent and spirit of the agreement. *Toulmin v. Copeland*, 2 C. & F. 681.

By articles of partnership it was covenanted, that the trade (of a brewer) should be continued for eleven years, with a proviso, that if either of the parties should be so minded, on giving six months' notice to the other, he should be at liberty to quit the trade and mystery of a brewer, and the other party should be at liberty to continue the trade on his own account:—Held, that the party giving notice could not carry on the trade on his own account. *Cooper v. Watson*, 3 Doug. 314.

An action will lie upon an agreement by one of several partners to admit a stranger into the firm, although the agreement be entered into without the knowledge of the other partners, and, in an action on such agreement, it is a sufficient consideration for the defendant's promise, that the plaintiff will become a partner. *McNeill v. Reid*, 1 Law J. (N.s.) C.P. 162, s. c. 9 Bing. 68; 2 Mo. & Sc. 89.

(c) *Property.*

A salary awarded under 1 & 2 Will. 4, to R, who was a sworn clerk in the Court of Exchequer, and in partnership with C & M:—Held, not to be

partnership property. The policy of that act was not to abolish any office, but merely to regulate the payment of the officers.

Emoluments derived from an office held by one partner not to be considered partnership property, unless expressly mentioned in the partnership articles.

*Semble*—that the fees arising from the office of sworn clerk could not be matter of assignment. *Clark v. Richards*, 4 Law J. (N.s.) Exch. Eq. 49, s. c. 1 Y. & C. 351.

Two tenants in common of lands descended to them, agreed to farm them together; they afterwards, for a few years, carried on, in partnership, the trade of malting and biscuit-baking; during this period they purchased real estates with their profits, and continued to farm them together:—Held, that the purchased lands were not impressed with the character of personal estate. *Randall v. Randall*, 4 Law J. (N.s.) Chanc. 187.

(d) *Dissolution.*

A bill cannot be filed by partners on behalf of themselves and all other partners who are not defendants, against the remaining partners, for a dissolution. The names of those who wish the dissolution must be set forth. *Wilson v. Chester*, 1 Law J. (N.s.) Chanc. 126.

Insanity is a ground of dissolution of partnership; but there is not any actual dissolution until application made to a court of equity, and a decree for dissolution obtained. If a sane partner, instead of applying for a decree, continues to carry on the business, the presumption is, that he intends to continue the partnership, in hopes of the recovery of the insane partner. *Jones v. Noy*, 3 Law J. (N.s.) Chanc. 114, s. c. 2 M. & K. 125.

(e) *Valid or Illegal.*

An agreement of partnership was made between two solicitors, one of whom could only practise in a superior, the other only in an inferior court. Both undertook to divide the profits of their general business, and each stipulated to recommend the other to his clients, and to keep the partnership a secret from all the world:—Held, that such an agreement is void, for a Court cannot suffer statements to be made, and papers presented to it, by parties who are neither parties to the cause nor their lawfully authorized agents, and who are, consequently, not properly responsible to the Court for their conduct. *Macfellan v. Henderson*, 2 C. & F. 1.

A contract made by two or more persons to enter into a partnership in contravention of the law, is void, and confers no rights upon either party.

A & B carried on the business of a pawnbroker in partnership under a deed. The business was conducted solely by A, and his name alone appeared over the shop door and upon the printed tickets and duplicates used by persons in that trade; and the licence contained the name of A only.—*Semble*, that although the parties might, by this contract, have rendered themselves liable to penalties imposed by the statute 39 & 40 Geo. 3, c. 99; yet, that there being no actual agreement for an infraction of the law, the contract was not void. *Armstrong v. Lewis*, 4 Law J. (N.s.) Exch. 358, s. c. 4 Mo. & Sc. 1; 2 C. & M. 274. And see *post*, PAWNROKER.

## (B) PARTNERS.

(a) *Rights and Interests.*

[See GUARANTEE, Rights and Liabilities.]

Two solicitors in partnership had a bill of costs and disbursements against a client; one of the partners, after the dissolution of partnership, continued to be the solicitor of the client, and received his rents, out of which he retained the amount of the partnership debt; and he stated that he did so on the understanding that the debtor should have credit for the sum so retained, and that he considered that debt to have been satisfied by the monies retained; but no account had been settled between him and the debtor, nor had he specific directions to appropriate the monies retained to the payment of the partnership debt:—Held, that, as against the other partner, the debt to the partnership was not to be considered as satisfied. *Notidge v. Prichard*, 2 C. & F. 379, s.c. 8 Bligh, n.s. 493.

Where there are partners, and on a particular adventure notice is given by a party to his agent, that another person is jointly interested with him in it, this, *prima facie*, imposes on the agent the necessity of accounting with such other party for his share; but not so, if it appears that it was the intention that the agents should solely account with the party originally interested in the adventure. *Killock v. Grey*, 1 Law J. (n.s.) Chanc. 208.

One of two partners, after he has committed an act of bankruptcy, has no right, without the knowledge or consent of the other solvent partner, to appropriate the partnership property in discharge of a partnership debt.

Thus, where one of two partners, after committing an act of bankruptcy, handed over a bank post bill to meet an acceptance of the partnership then becoming due, which was not known to or ratified by the other partners, and, shortly after, the other partner committed an act of bankruptcy,—it was held, that trover was maintainable by the assignees of both partners. *Burt v. Moul*, 2 Law J. (n.s.) Exch. 227, s.c. 1 C. & M. 525; 3 Tyr. 564.

One partner may maintain an action against another on a separate transaction, in respect of partnership property, before a final adjustment of the accounts.

Accordingly, at the termination of a partnership in a coal-mine, but before the accounts were finally balanced, the plaintiff and the defendant agreed to divide the utensils and materials, each taking one half in value, article by article, according to a valuation to be made, and after the valuation, as the defendant was about to work another coal-mine, it was agreed that he should have the whole at the value fixed. He accordingly took possession thereof:—Held, that the plaintiff had an immediate right of action for a moiety of the value of the materials and utensils.

Held, also, that the valuation was merely for the information of the parties, and, therefore, did not require a stamp. *Jackson v. Stopherd*, 3 Law J. (n.s.) Exch. 95, s.c. 2 C. & M. 361; 4 Tyr. 330.

Where there is no express contract between partners, it is not, according to the law of Scotland, a

necessary presumption of law that the profits are to be divided in equal shares. But it is a question for a jury, upon evidence of all the circumstances (as good-will, skill, capital, labour, &c.), what the proportion of interest in the loss and profit should be. As to English law—*quare*. *Thompson v. Williamson*, 7 Bligh, n.s. 432.

Where partnership accounts were submitted to arbitration, by parol, and the arbitrator made an award,—it was held, that the sum so awarded was not evidence on the account stated, the submission not being proved to be by all the partners; and the debt, on which the account arose, being barred by the Statute of Limitations.

One of several partners has no implied authority to bind his co-partners by a submission of partnership matters to arbitration, whether they be partners generally or only in particular transactions. *Adams v. Bankart*, 4 Law J. (n.s.) Exch. 69, s.c. 1 C. M. & R. 681; 5 Tyr. 425.

(b) *Liabilities.*

[See MONEY HAD AND RECEIVED.]

A had a claim on B, C & D. Several months afterwards, B signed a cheque for a larger sum, in the name of himself and C & D, as his partners, which was proved to have passed through the hands of A, and to have been appropriated by him to his own purposes. A died:—Held, in an action by his executors against the three partners for the original claim, that the cheque, *prima facie*, was evidence of payment; but, there being other circumstances from which a loan of its amount might be inferred, it was left to the jury to say, whether it was a loan by B alone, or by the partnership, although no memorandum or acknowledgment of any kind was produced by which the executors could ascertain whether it was a loan. *Boswell v. Smith*, 6 C. & P. 60. [Tindal]

A dormant partner's liability, upon a bill or note drawn or made in the name of a firm, arises from the relationship subsisting between him and his co-partners. Therefore, where it was agreed between a dormant partner and his co-partner, that the settlement of the co-partnership concerns, and the mode and time of dissolving the partnership, should be referred, and the fixtures, &c. should be the property of the highest bidder; and it appeared afterwards, that the acting partner was the highest bidder, and carried on the business for his own exclusive benefit:—Held, that a note made by him in the name of the firm, bearing date after the time when he so carried on the business alone, did not bind the dormant partner; although no evidence was given of the award of the arbitrator, before that time. *Heath v. Sansom*, 2 Law J. (n.s.) K.B. 25, s.c. 1 N. & M. 104; 4 B. & Ad. 172.

Creditors of a firm are at liberty to go against the estate of a deceased partner in the first instance, instead of proceeding against the surviving partner. *Wilkinson v. Henderson*, 2 Law J. (n.s.) Chanc. 191, s.c. 1 M. & K. 582.

A and B were interested as partners in a certain voyage, upon the completion of which, and the final adjustment of the partnership accounts, a larger sum than that to which B was entitled was awarded to him, in consequence of his undertaking to

pay a certain debt due to the partners. Upon non payment by B, and A being compelled to discharge the amount,—Held, that A had a right of action against B for the sum which the latter, by his agreement, was bound to pay. *Wilkinson v. Cutting*, 3 Law J. (N.S.) C.P. 190, s. c. 10 Bing. 439; 4 Mo. & Sc. 268.

To discharge a retiring partner from liability, where the business is continued under the same name, but a new partner introduced for a debt due from the old firm, it is not enough that the creditor's balance has been transferred, that he has received payments, and that accounts have been rendered to him; but it is also necessary, that both the creditor and the new member introduced into the firm should have consented to the transfer of the debt.

*Semble*—that a retiring partner may be discharged by an agreement of the creditor to substitute the continuing partners as his debtors, as such agreement cannot be deemed to be without consideration.

Accordingly, C, M, and N, who carried on business under the name of J K & Sons, being indebted to A, C retired from the partnership, and M and N agreed to liquidate the concerns. Afterwards, M also retired, and advertisements of the dissolutions of both partnerships were, at the same time, inserted in the Gazette. N then took in a new partner, and the business was carried on in the original name of J K & Sons. A's account was transferred to the new firm, and he received accounts and payments from them; but it did not appear that he ever saw the Gazette, or that either he or the new partner consented to the substitution of the responsibility of the new firm:—Held, that the retired partners were not released from their liability. *Kirwan v. Kirwan*, 3 Law J. (N.S.) Exch. 187, s. c. 2 C. & M. 617; 4 Tyr. 491.

Where, upon an action against three partners for repairs to the premises in which the partnership business was carried on, the plaintiff recovered, and, upon the judgment, arrested one of the partners, who paid the whole debt and costs:—Held, that he could not maintain an action for contribution against his co-partners. *Sadler v. Hinzman* (or *Nixon*), 3 Law J. (N.S.) K.B. 101, s. c. 3 N. & M. 258; 6 B. & Ad. 936.

Injunction granted to restrain the goods of a partnership from being taken in execution for a debt due from one of the partners, who died before the writ was delivered to the sheriff. *Newell v. Townsend*, 6 Sim. 419.

Fauntleroy, a partner in a banking-house, transferred bank stock, belonging to a customer, by a forged power of attorney; the proceeds were paid to the account of the partnership, and afterwards appropriated by Fauntleroy, who was subsequently executed for other forgeries. The other partners were ignorant of the transaction, but with common diligence would have known of it:—Held, that the customer could maintain an action against the partners for money had and received. *Keating v. Marsh*, 1 M. & A. 582.

A recovers against B, C, & D, partners in trade, upon their joint contract, and takes in execution B only, who thereupon pays the whole sum recovered. B cannot recover in a court of law against

his co-defendants for contribution. The remedy is in equity, as in cases of voluntary payment by one partner of a debt due from himself and his co-partners, upon their joint contract. *Sadler v. Hickson*, 3 N. & M. 258.

Where one of two partners, having authority to bind the other by drawing or indorsing bills of exchange, raised money by bills in fictitious names, indorsed by him in the name of the partnership firm, and the money was afterwards applied to the partnership purposes:—Held, that the other partner was liable to the persons from whom the money was so obtained. *Thicknesse v. Bromilow*, 2 C. & J. 425.

A clerk in a house lent money to the partnership composing it—two of them signed an acknowledgment for it, agreeing to pay 5l. per cent. interest. Various changes took place in the house, in the course of which, one of the parties who signed the acknowledgment retired from it. The interest was paid from time to time by the different firms, till the last became bankrupt. The clerk continued to serve all the different firms, and was cognizant of the different changes:—Held, that he might, notwithstanding, recover the money he had advanced from the two persons who signed the acknowledgment. *Blew v. Wyatt*, 5 C. & P. 397. [Lyndhurst]

In July 1820, W advanced to S & S, then carrying on business in partnership as brewers, the sum of 24,000l., and all three executed a deed, by the express terms whereof a partnership stock was created, in which they had all a joint property. W, however, was not to have any definite aliquot proportion of the profits, but was to have an account of the profits as between themselves, so as to get 2,000l. or 2,400l. a year, as the case might be, out of the clear profits. W's name never appeared to the world as a partner,—Held, that W was a partner; and the new firm having become bankrupt in 1826,—Held, that the creditors of the old firm and the creditors of the new firm were both entitled to prove against the property of the new firm. *Ex parte Chuck in re Starkey*, 8 Bing. 469, s. c. Mont. 364, 457; 1 Mo. & Sc. 615.

If a firm of three be dissolved by the retirement of one, and after the dissolution a creditor of the three draw on the three, and the two accept in the style of the three, the two are liable. *Ex parte Liddiard*, 2 M. & A. 87, s. c. 4 D. & Ch. 603.

J and C P were in partnership; C P retires from the firm, and notice is put into the Gazette of the dissolution of the partnership, and that J P would continue to carry on the business, and receive and pay all debts of the firm: the plaintiffs, who were creditors of the firm, afterwards applied to J P for the sum due to them for goods sold to the firm, upon which occasion they were told, that C P had retired from the business, and J P was alone responsible. The plaintiffs afterwards drew a bill for the amount of the sum due to them upon J P alone:—Held, that this operated in satisfaction of the joint debt, and amounted to a discharge of C P, if the jury should think that the plaintiffs agreed to accept J P as their sole debtor.

*Quare*—whether the assent of C P to such arrangement was necessary. *Thompson v. Percival*, 3 Law J. (N.S.) K.B. 98, s. c. 5 B. & Ad. 925; 3 N. & M. 167.



## (C) ACTIONS AND SUITS.

(a) *In general.*

A bill to have the accounts of a partnership taken, without praying for a dissolution, is demurrable. *Lecombe v. Russell*, 4 Sim. 8.

An agreement for a loan of money with a member of a partnership, may be treated by him, if there be no express stipulation to the contrary, either as a private or partnership transaction; and if the money be lent from the funds of the firm, a joint action may be maintained by all the partners.

Thus, where a shareholder in a company applied to the treasurer, who was also a partner in a bank, to advance money for the payment of instalments on his shares, and the money was advanced by crediting the company in their accounts with the bank, to the amount of such instalments,—it was held, that the action for money lent was properly brought against the borrower, in the names of the partners. *Alexander v. Barker*, 1 Law J. (N.S.) Exch. 40, s. c. 2 C. & J. 133; 2 Tyr. 140.

*Quere*—whether a surviving partner can maintain an action in respect of the use of the name of his late firm. *Lewis v. Langdon*, 4 Law J. (N.S.) Chanc. 258.

By articles of partnership it was agreed, that just and true accounts should be made out half-yearly, and signed by the partners; and that such accounts should not afterwards be called in question, except for errors discovered in the lifetime of all the partners. The accounts were made out by one of the partners; and after the death of two of the other partners, it was discovered that the accounts were fraudulent:—Held, that the fourth partner was entitled to have the accounts of the partnership taken from the date of the articles. *Oldaker v. Lander*, 6 Sim. 239.

By articles of partnership made in 1802, between R & A, it was agreed, that a mercantile house should be established, and carried on for the sale of West India produce, on commission, and the supply of stores to planters, &c.; that R should be interested for profit and loss in three-fourths, and A in one-fourth; and that the partnership should not advance money on loan to any person without the previous particular consent of all the partners. B was privy to this deed; and, by other articles of even date, it was agreed that B should be a partner in the concern, under R, and should be interested for one-fourth, to be deducted out of the share of R; and it was provided, in case of the death of A, that his share should be divided so as to give to R two-thirds and to B one-third of the whole business.

By a deed executed in March 1804, it was agreed, that the partnership should be dissolved as to A, and, in consideration of his retiring, that R and B should pay for his use 2,668*l.* and 2,600*l.*, for which acceptances of the firm had been given, and that all the property of the partnership should become the absolute property of R & B; and accordingly, the partnership property was, by the deed, assigned to R & B generally, without specification as to the proportion of their shares and interests in the property so assigned. The bills accepted by the firm, as the consideration for this

assignment, were afterwards paid out of the funds of the continuing partnership.

By a deed executed in June 1804, to which R & B were parties, a debt of 95,511*l.* 1*s.* 6*d.*, secured by mortgage upon a West India estate, was purchased by, and, with the securities, assigned to R & B, in consideration of a sum of 69,511*l.* 1*s.* 6*d.* By another deed, of even date, reciting that the purchase-money was to be paid by bills which had been drawn upon the firm of R & B by the assignor of the mortgage, the estate was charged with the payment of the bills, and R & B also covenanted to provide for the bills when due.

After this purchase, various deeds were executed by the mortgagor, giving further interest to the firm of R & B in the estate on which the mortgage money was secured, and other plantations. The consignments from these plantations were made to the firm of R & B, and the transactions relating to the mortgage were entered into the partnership books without any remark. In 1814, in a deed by which R for himself, and as attorney for B, granted an annuity, charged upon one of the estates called H, it was recited, that the plantation had vested in R, in trust for himself and B, as tenants in common in fee simple. But the bills of costs for business done in respect of the mortgage transaction were charged against the firm, were so entered in the partnership books, and were paid out of the joint funds. R died in 1821. In March 1823 B filed a bill against the personal representatives of R, stating, that he and R, as partners, became mortgagors, and afterwards owners, of the estates before mentioned; and that, as to the plantation H, it was purchased with funds supplied by him (B), on account of the partnership, and that it was always treated as the property of the partnership. This suit was not prosecuted; but, in May 1823, a bill against B was filed by the representatives of R, and in 1827, a cross bill by B, raising the question as to the share of B; and it was held, upon appeal, reversing the decree of the Court below, that B was not entitled to a moiety of the funds upon the mortgage transactions, and the retirement of A, but to the same share and proportion as under the provisions of the original articles of partnership. *Robley v. Brooke*, 7 Bligh, N.S. 90.

Where one member of a partnership becomes bankrupt, the solvent partner may use the names of the assignees of the bankrupt in bringing actions against the debtors of the firm; but the assignees are entitled to an indemnity against the costs when they apply for it. *Whitehead v. Hughes*, 2 Cr. & M. 318, s. c. 4 Tyr. 92.

(b) *Evidence.*

A, at the suggestion of B, by letter, orders a cargo of timber of C. The invoice is made out in the name of A, and a bill of exchange is drawn by B on A for the amount of the freight, which is paid by A. In an action brought by C against A & B for the price of the goods, it is competent to C to shew that A & B were jointly interested in the purchase. *Ruppell v. Roberts*, 4 N. & M. 31.

## PARTY WALL.

[See BUILDING ACT.]

## PASSENGERS.

Carriage of, in merchant vessels to America; repeal of provisions in 9 Geo. 4, c. 21, relating to, and substitution of other provisions. 5 & 6 Will. 4, c. 53; 13 Law J. Stat. 114.

## PATENT.

[See INJUNCTION.]

Amendment of the law relating to. 5 & 6 Will. 4, c. 83; 13 Law J. Stat. 178.

*Semble*—that a combination of two things which in themselves are not new, and which by the combination produce a new thing, will not support a patent, unless the new thing will produce a new result: its being a means of producing a result, which, by other means, could have been before produced, will not be sufficient. *Saunders v. Aston*, 1 Law J. (N.S.) K.B. 265, s. c. 3 B. & Ad. 881.

Where a patentee stated in his specification that his "invention consisted in the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight in the seat acts as a counterbalance to the pressure against the back of such chair as above described," having previously described the nature of such leverage, and how it was to be applied:—Held, that it was not a claim for a mere principle, but for a combination carrying that principle into effect, and, therefore, that the patent was valid. *Minter v. Wells*, 4 Law J. (N.S.) Exch. 2, s. c. 1 C. M. & R. 505; 5 Tyr. 163.

A patent claimed the invention of manufacturing tubes by drawing them through rollers, using a maundril in the course of the operation. A later patent claimed the invention of manufacturing tubes by drawing them through fixed dies or holes, but the specification was silent as to the use of the maundril:—Held, that the Court, taking the whole of the latter specification together, would infer that the maundril was not to be used, and that the latter patent was good. *Russell v. Cowley*, 1 C. M. & R. 864.

A patent recited in its title, that the patentee was the first and true inventor of certain improvements in extracting sugar and syrup from cane-juice and other substances containing sugar, and in refining sugar and syrups. The specification stated a method of depriving syrups of every description of colour, by filtering them through charcoal produced by the distillation of bituminous schistus, and used alone, or mixed with animal charcoal, or even through animal charcoal alone, when placed in thick beds. In an action for infringing the patent, it was pleaded, that the patentee did not, by any instrument in writing, particularly describe and ascertain the nature of his invention, and in what manner the same was to be, and might be performed. On an allegation that the title had claimed a larger invention than was disclosed by the specification, it was held, first, that the specification sufficiently described both branches of the invention recited in the title of the patent; viz.

the refining of sugar by melting it after it had granulated, and applying the patent process to it, after having thus brought it into the state of syrup; and also to extract syrup from the cane-juice before it had been so far subject to the action of fire as to granulate and become sugar; and secondly, that the word "improvements" being in the plural, was of no consequence, as every part of the process might be treated as an improvement. It appeared that iron was combined with the bituminous schistus found in this country, and it was doubtful whether the charcoal produced by the schistus was not only disadvantageous, but injurious to the matter going through the process. The charcoal sworn to have answered the purpose of the patent, was received from the plaintiff at Paris, where it had been made, and was declared by him to be the residuum of bituminous schistus, from which the iron had been extracted. But no means existed of ascertaining, in this country, of what substance it actually was the residuum; nor did the specification mention any process for extracting the iron from the bituminous schistus:—Held, that whether the latter omission avoided the patent or not, the patentee ought to prove, either that the presence of iron in the bituminous schistus used in the process of filtering, was not absolutely disadvantageous to the matter going through that process, or that the method of extracting the iron from it was so simple and known, that a person practically acquainted with the subject could accomplish it with ease, or that bituminous schistus, as known in England, could be used in this process with advantage; and a verdict having been found for the plaintiff, the Court set it aside on terms, and granted a new trial. *De Roome v. Fairrie*, 5 Tyr. 393, s. c. 2 C. M. & R. 476.

In an action against the defendant for an invasion of the patent for certain machinery adapted to facilitate the operation of drying calicoes, muslins, &c., the jury, without going the whole length of the plaintiff's claim, found that the invention was new, and useful on the whole; but that the machine was not useful in some cases for taking up cloths, &c.:—Held, that such finding did not vitiate the patent.

The patentee, also, in his specification, made mention of certain staves or rollers by which his invention was to be carried into effect, without stating precisely their mode of formation, their strength, or number, &c.:—Held, that such non-statement was unimportant, as the patentee referred to such staves or rollers merely as well known component parts of the machinery, and did not claim them, or the materials of which they were to be composed, or the position in which they were to be placed, as his invention.

If a writ of *scire facias* is sued out (but not served) for the purpose of repealing a patent, after a rule *nisi* is obtained for a new trial, or entering a nonsuit in an action for the infringement of the patent, the Court will not enlarge the time of shewing cause, until after the trial of the action of *scire facias*. *Haworth v. Hardcastle*, 3 Law J. (N.S.) C.P. 311, s. c. 1 Bing. N.C. 182; 4 Mo. & Sc. 448.

Although a patent has expired, the Court will grant an injunction to restrain the sale of articles manufactured in fraud of that patent previous to its

expiration. *Crossley v. the Derby Gas Light Company*, 4 Law J. (N.S.) Chanc. 25.

The specification of an invention being in doubtful terms, a demurrer to a bill for the infringement of the patent, ordered to stand over till an action should have been brought to try the validity of the patent. *Kay v. Marshall*, 4 Law J. (N.S.) Chanc. 258.

## PAUPER.

[See POOR.]

Admission of a party to sue in *forma pauperis* does not discharge him from costs incurred prior to such admission. *Nash v. Yorston*, 4 Law J. (N.S.) Chanc. 86.

The inability to pay 20s. in the pound is not sufficient ground for supporting an order to sue in *forma pauperis*: an order to that effect being obtained *ex parte*, was set aside, because the pauper was carrying on a business, though his affidavit stated that his capital was a borrowed capital. *Waters v. Margetts*, 2 Law J. (N.S.) Chanc. 124.

On the trial of an action brought in *forma pauperis*, a King's counsel or serjeant may appear for the plaintiff alone, without a junior.

Where a plaintiff, suing in *forma pauperis*, has a verdict in his favour for 5l. or more:—*Semble*, that the officers of the court are entitled to their fees. *James v. Harris*, 7 C. & P. 257. [Williams]

A rule requiring a pauper to pay the costs of the day, for not proceeding to trial, is *nisi* in the first instance. *Doe d. Lindsey v. Edwards*, 2 Dowl. P.C. 468.

Where a plaintiff suing in *forma pauperis* will be absent from England eighteen months, the Court will compel him to give security for his costs, or stay his proceedings until his return. *Foss v. Wagner*, 2 Dowl. P.C. 499.

The Court will not allow a party to prosecute in the King's Bench in *forma pauperis*, on the common affidavit of poverty, but special grounds must be laid for such an application. *Rex v. Wilkins*, 1 Dowl. P.C. 536.

A defendant in an Excise information, may defend in *forma pauperis*, on an affidavit that he is not worth 5l. over and above his apparel, and without certificate by counsel, that he has merits. But such a defendant is not entitled to a copy of the information, and can only have it read over to him by the officer, in order to his pleading then or at a future day. *Attorney General v. Duffy*, 4 Tyr. 284; s. c. as *Attorney General v. Dummie*, 3 Law J. (N.S.) Exch. 86.

To an indictment in the King's Bench, a defendant will be allowed to plead in *forma pauperis*, on making an affidavit that he is not worth 5l. &c. *Rex v. Page*, 1 Dowl. P.C. 507.

## PAVING AND LIGHTING.

[See RATE.]

## PAWNBROKER.

[See PARTNERSHIP.]

*Semble*, that an express agreement for a secret partnership in the trade of a pawnbroker, is void,

and that neither party can maintain an action on a contract of partnership, containing such a stipulation.

But where the deed of partnership, under which two persons have carried on that business, contains no express agreement to act contrary to the statutes regulating the trade of a pawnbroker, although the business is so carried on; *e. g.* where one partner is licensed, and conducts the business in his own name, which, alone, is painted over the door, and printed on the tickets and duplicates; the contract is not void, but confers a right of action. *Armstrong v. Lewis*, 3 Law J. (N.S.) Exch. 359, s. c. 2 C. & M. 274; 4 Mo. & Sc. 1.

There cannot be a secret partnership in a pawnbroker's business. The Pawnbrokers' Act, 39 & 40 Geo. 3, c. 99, is not merely an act making certain fiscal regulations, but is an act for the benefit and protection of the public; and, therefore, where there is an agreement for a partnership between pawnbrokers, though on the face of it there is nothing appearing to make it invalid,—yet, if there be from extrinsic circumstances an intention manifest, that the name of either partner should be concealed, that will vitiate the agreement as between the parties. *Armstrong v. Armstrong, Lewis v. Armstrong*, 3 Law J. (N.S.) Chanc. 101, s. c. 8 M. & K. 45.

A Justice of the Peace has no power to proceed against a pawnbroker under the 39 & 40 Geo. 3, c. 99, in a case where the goods pawned have been accidentally destroyed by fire.

*Quare*, whether the pawner has any remedy at common law.

*Semble*—that a Justice has no power to proceed under the above act in any case in which the goods have been lost, unless they have been lost through the default of the pawnbroker. *Rex v. Cording*, 2 Law J. (N.S.) M.C. 9.

The Pawnbrokers' Act, 39 & 40 Geo. 3, c. 99, s. 24, enables Justices, in case it shall be proved before them that any goods pawned have been sold contrary to the act, or have been embezzled or lost, or are become or have been rendered of less value than at the time of pawning, through the default, neglect, or wilful misbehaviour of the person with whom the same were pawned, to award satisfaction to the owner, as there specified:—Held, that Justices have no power, in the above case, to commit, in default of such satisfaction being made.

*Quare*, whether a pawnbroker is answerable for pledges destroyed by accidental fire, as goods "lost" within the above clause. *Semble*, that the words "through the default," &c., apply to all the cases previously mentioned, and not only to that of the goods pawned having become of less value. *Ex parte Cording*, 4 B. & Ad. 198, s. c. 1 N. & M. 35.

A having deposited with B certain goods as a security, a dispute arises concerning the goods, upon which B obtains from C, a Police Magistrate, a summons, requiring A's appearance before C; B makes oath to a written information, that he believes the goods to have been illegally pawned or disposed of by A; C gives a further day to the parties, when, after evidence being gone into, C commits A for re-examination, on a charge of suspicion of having unlawfully disposed of the goods of B:—Held, that the charge was not sufficiently

made, so as to give the Magistrate jurisdiction over the matter, under the 8th section of the Pawn-brokers' Act, 39 & 40 Geo. 3, c. 99. Whether in a case upon this statute, properly brought before a Magistrate, the party may be committed for re-examination, *quærs.* *Tate v. Chambers*, 3 N. & M. 523.

### PAYMASTER

[Of Exchequer Bills, see OFFICE.]

Paymaster General, Treasurer of Chelsea Hospital, of the Navy, and of the Ordnance; consolidation of the offices of. 5 & 6 Will. 4, c. 35; 13 Law J. Stat. 65.

### PAYMENT.

[See COGNOVIT—PLEADING, Replication.]

- (A) IN GENERAL.
- (B) UNDER LEGAL PROCESS.
- (C) OF MONEY INTO AND OUT OF COURT.
  - (a) *In Equity.*
  - (b) *At Law.*
- (D) PLEA OF.
- (E) APPROPRIATION.

#### (A) IN GENERAL.

[See GUARANTIE, Rights and Liabilities—PARTNERS—*Nottidge v. Pritchard*, 2 C. & F. 379.]

Although a payment to an apprentice at the counting-house of his master in the ordinary course of business, may be good payment to the master, yet it seems that it is not, if made upon a collateral transaction.

*Seem*, therefore, that the payment of a deposit by a stakeholder to the apprentice of the party who has made the deposit, at his counting-house, is not a good payment. *Sanderson v. Bell*, 3 Law J. (N.S.) Exch. 66, s. c. 2 C. & M. 304; 4 Tyr. 244.

Judgment on a bill of exchange without satisfaction, is no proof of payment. *Tarleton v. Althousson*, 4 Law J. (N.S.) K.B. 17, s. c. 2 Ad. & E. 32.

The acceptance, by a creditor, of a cheque in his favour, drawn by his debtor, operates as payment, unless dishonoured. *Pearce v. Davis*, 1 M. & R. 365. [Patteson]

#### (B) UNDER LEGAL PROCESS.

[See ARREST, Irregularities—MONEY HAD AND RECEIVED.]

Where a party arrested whilst privileged from arrest, pays money into court by permission of a Judge, in order to obtain his discharge, he is entitled, upon application to the Court, to have the money restored to him. But such application must be made within a reasonable time after the arrest, or the delay must be satisfactorily accounted for.

The pendency of a motion to set aside the proceedings for irregularity, was held to be a satisfactory reason for having deferred the application for several terms. *Pitt v. Coombes*, 4 Law J. (N.S.) K.B. 83, s. c. 4 N. & M. 585.

If money be paid after judgment signed, it cannot be considered as a voluntary payment. *Garratt v. Hooper*, 1 Dowl. P.C. 28.

#### (C) OF MONEY INTO AND OUT OF COURT.

##### (a) *In Equity.*

Shares in an assurance company were decreed to be transferred to the assignees of a bankrupt, as having been fraudulently obtained from the bankrupt; motion for detaining them in court pending an appeal, refused. *Smith v. Biggs*, 2 Law J. (N.S.) Chanc. 161.

Where, on a petition for payment of money in court belonging a married woman to her husband, it appears that there is any settlement, the settlement ought to be produced and inspected; and it is not sufficient to produce an affidavit, that the settlement does not comprise the property in question. *Anonymous*, 3 Law J. (N.S.) Chanc. 184.

K M, who was the foreign agent of a mercantile house in London, trading with Africa, became executor of L, a merchant residing at Sierra Leone, and was directed by the will to sell L's property and invest the proceeds in the Bank of England. K M advised his principals, in London, of consignments of L's property, and desired the proceeds to be placed to his credit as executor of L, which (the consignments having been received,) was done. Upon a motion in a suit for an account commenced against the principals, by the representatives of L, the Court directed the money arising from the sale of the consignments to be paid into court, as the consignments were specific, and not general.

Trust money in the hands of a person who cannot shew a *prima facie* title to hold it, will be directed to be paid into court. *Leigh v. Macaulay*, 4 Law J. (N.S.) Exch. Eq. 37, s. c. 1 Y. & C. 260.

Where an executor admits that he has received a certain sum belonging to the testator's estate, but adds that he has made payments, the amount of which he does not specify; the Court will allow him to verify the amount of his payments, by affidavit, and order him, on motion, to pay the balance into court. *Anonymous*, 4 Sim. 359.

##### (b) *At Law.*

[See BANKRUPT, Payments by, to, and on account of—COSTS, Suggestion to deprive of—INSURANCE, Actions—TENDER.]

[See 3 & 4 Will. 4, c. 42, s. 21; 11 Law J. Stat. 98.]

The payment of money into court, upon the count on an account stated, is merely an admission by the defendant, that upon one occasion of accounting, so much was found due. The plaintiff cannot use such an admission in aid of other sums, which he proves to be due, but to which the form of his declaration is not applicable. *Kennedy v. Withers*, 1 Law J. (N.S.) K.B. 260, s. c. 3 B. & Ad. 767.

The defendant will not be allowed to pay money into court, unless the sum sought to be recovered is certain, or such as can be ascertained by mere computation. When the demand is in the nature of unliquidated damages, such payment will not be permitted. *Hodges v. the Earl of Lichfield*, 2 Law J. (N.S.) C.P. 133, s. c. 9 Bing. 713; 3 Mo. & Sc. 201.

Assumpsit—Plea, non-assumpsit, except as to one guinea, and as to that a tender. Payment of one guinea into court, generally—Held, an admission of the cause of action, declared upon specially. *Bulwer v. Horne*, 2 Law J. (N.S.) K.B. 11, s. c. 1 N. & M. 117; 4 B. & Ad. 132.

Payment of money into court on a special count admits the contract stated in that count. If it be paid in on the general counts, it admits a liability to the extent of the sum paid in, and to that extent only.

Where, therefore, in an action for work and labour, the defendant paid money into court to the amount of 10*l.*, and the defendant, if liable at all, was only so on a contract entered into by a third person, the defendant, by that, admitted, that such third person was his authorized agent to make a contract to the amount of 10*l.*; but it was competent for him to shew that the authority given by him to such third person did not extend beyond that sum.

The rule which requires the bill of particulars to be annexed to the record, does not make them part of the record, so as that payment of money into court on a count for work and labour, would be an admission of something being done on the account mentioned in the particulars; and the defendant may notwithstanding shew that he is liable only to the amount paid in upon a different account of the same description. *Meager v. Smith*, 3 Law J. (N.S.) K.B. 108, s. c. 1 N. & M. 449; 4 B. & Ad. 678.

Payment of money into court on a special count, alleging a promise to pay the defendant's proportion of a debt, and averring the amount of such proportion, under a *videlicet*, does not admit the amount, or preclude the defendant from disputing it. *Lechmere v. Fletcher*, 2 Law J. (N.S.) Exch. 219, s. c. 1 Cr. & M. 623; 3 Tyr. 450.

To a declaration for money had and received, the defendant pleaded as to 25*l.*, parcel of the monies in the declaration mentioned, payment of that sum into court, and that the plaintiff had not sustained damages beyond it in respect of that sum of 25*l.*: as to the residue, non assumpsit:—Held, that the plea was bad—first, because it ought to have been pleaded generally, and not to the 25*l.* only; secondly, because there was no prayer of judgment. *Sharman v. Stevenson*, 4 Law J. (N.S.) Exch. 166, s. c. 2 C. M. & R. 76; 5 Tyr. 664.

Payment of money into court, upon an action on a policy, admits that something is due to the plaintiff on the policy at the time of the action brought, and is a waiver of the objection that the action is brought too soon. *Harrison v. Douglas*, 3 Ad & E. 396, s. c. 5 N. & M. 180.

Payment of money into court in *indebitatus assumpsit*, if there be only one contract to which the payment is referable, admits the contract, and the defendant can only dispute the amount due. *Ravencroft v. Wise*, 3 Law J. (N.S.) Exch. 319, s. c. 1 C. M. & R. 203; 4 Tyr. 741.

Where a defendant pays money into court, such payment must, in all cases, be pleaded. If the money be paid into court without being thus pleaded, the defendant will not be entitled to the costs. *Adlard v. Booth*, 4 Law J. (N.S.) C.P. 203, s. c. 1 Bing. N.C. 698; 1 Sc. 644.

A defendant who has paid money into court, in lieu of special bail, and entered an appearance, under 7 & 8 Geo. 4, c. 71, s. 2, cannot afterwards obtain the money out of court, by reason of a defect in the affidavit of debt, although at the time of lodging the money he objected to the affidavit, and made the payment under protest. *Green v. Glass-*

*brook*, 4 Law J. (N.S.) C.P. 188, s. c. 1 Bing. N.C. 516; 1 Sc. 402.

The plaintiff in an action against his lessee for breaches of covenant, claimed by his particulars of demand a specific sum for dilapidations:—Held, that the defendant might have that part of the demand struck out of the declaration, on payment of the sum claimed and costs. *Smith v. King*, 3 Mo. & Sc. 799.

Money deposited in court, in lieu of bail, cannot be transferred to the account of a payment into court, on a plea of tender. *Stults v. Hensage*, 10 Bing. 561, s. c. 4 Mo. & Sc. 472.

In assumpsit for breach of an agreement to keep premises in repair, the Court will not allow defendant to pay money into court as compensation, under statute 3 & 4 Will. 4, c. 42, s. 21, upon pleas of payment into court, and of tender. *Dearle v. Barrett*, 2 Ad. & E. 82.

In an action against a coach-owner for losing a trunk, the defendant was allowed to pay into court the amount of the sum to which he had, by notice, limited his responsibility. *Hutton v. Bolton*, 3 Doug. 59.

Payment of money into court, on a count on a promissory note, payable by instalments, is only an admission, by the defendant, that money to the amount paid in was due on the promissory note; it does not bar the Statute of Limitations, as to a further sum claimed to be due on the same note. *Reid v. Dickens*, 5 B. & Ad. 499, s. c. 2 N. & M. 860.

Payment of money into court, in assumpsit, on the common counts for work and labour, is an admission that the contract was with the party suing, where it appears that there was, in fact, only one contract. *Walker v. Rawson*, 5 C. & P. 466, s. c. 1 M. & R. 250. [Tindal]

If, instead of putting in bail, a defendant deposits the amount of the debt, with 10*l.* for costs, pursuant to the 43 Geo. 3, c. 46, s. 2, he is not bound to pay in the additional 10*l.*, pursuant to the 7 & 8 Geo. 4, c. 71, s. 2, until the last day for perfecting bail. *Straford v. Love*, 3 Dowl. P.C. 593.

Where a defendant took out a summons to stay proceedings on payment of a certain sum with costs, and the plaintiff refused to accept it, but afterwards, when the money was paid in under a rule of court, took it out and discontinued:—Held, that the plaintiff was only entitled to costs up to the time of the first offer, though he stated as a reason for not proceeding, that he could not find a material witness. *Hale v. Baker*, 2 Dowl. P.C. 125.

Payment of money into court on a declaration in assumpsit, containing special and common counts founded on a variety of dealings between the parties, cannot be applied by the plaintiff to any particular count only; but the defendant may so apply it to the damage therein stated to have been incurred.

Where payment into court was made generally on a declaration, containing one count charging the defendant for the produce of sales as factor, or a *del credere* commission, and another charging him with having negligently sold plaintiff's flour to an insolvent person; the defendant, in order to shew the transaction in question to be one, which was not admitted by the payment into court on the first

count, gave a letter in evidence to shew, that the plaintiff had admitted the sale in question to be his own affair, and not guaranteed by the defendant. The jury found a verdict for the defendant, and the Court did not disturb it, on the ground that this evidence was improperly received. *Drake v. Lewin*, 4 Tyr. 730.

Where a defendant was sued at law for a sum of money, and the Court allowed him to pay it into court to abide the event of an application by him to the Court of Chancery for an injunction, which was accordingly made in January 1834, but the plaintiff having absconded without entering an appearance, the defendant was unable to get an injunction on the merits, though he had got the common injunction,—the Court refused to make an order that the defendant might receive the money out of court, though a considerable time had elapsed since the bill was filed. *Best v. Argles*, 3 Dowl. P.C. 701.

A declaration in *assumpsit* contained a count on a bill, and the "common counts," provided by Reg. Gen. Trin. 1 Will. 4, claiming 100*l.* as due to plaintiff for money paid, 100*l.* for money lent, 100*l.* for goods sold, and 100*l.* on account stated. Pleas: first, as to the first count, and as to 12*l.* 2*s.* parcel of the sum of 100*l.* in the second count of the declaration, alleged to be due from the defendant to plaintiff for goods sold, and as to the 100*l.* in the second count alleged to be found due from defendant to plaintiff on an account stated, that the plaintiff paid into court 51*l.* 9*s.* 7*d.*, and that the plaintiff hath not sustained damages to a greater amount than that sum, in respect of so much of the cause of action in the declaration mentioned, as was before specified in the plea. There was a second plea of non-*assumpsit* as to the residue. *Quære*, if the special plea was bad on special demurrer, for not shewing distinctly, what part of the 51*l.* 9*s.* 7*d.* paid into court, was to be applied to satisfy the bill of exchange. *Jourdain v. Johnson*, 5 Law J. (N.S.) Exch. 49, s. c. 5 Tyr. 524.

If a defendant deposits money in the hands of the sheriff, pursuant to the 43 Geo. 3, c. 46, s. 2, which is paid into court, the defendant will not be allowed to take it out, unless he has put in bail according to the exigency of the *capias*, although such a deposit is not mentioned in the warning attached to the writ.

If, however, bail has been perfected, but not in due time before the plaintiff takes the money out, he must make his election as to which security he will take. *Geach v. Coppin*, 3 Dowl. P.C. 74.

#### (D) PLEA OF.

[See PLEADING, Plea—USE AND OCCUPATION, Pleading and Evidence.]

In order to entitle the defendant to a verdict on an entire plea of payment, to an *indebitatus* count in debt on simple contract, payment of the sum specified in the plea, though laid under a *videlicet*, must be proved. But either plea may be taken distributively, so as to find the issue for the defendant as to the sum, whatever it may be, that is proved to have been paid, and for the plaintiff as to the rest. The like law seems to apply to the plea of set-off. *Semble*, what is matter for a plea of payment will not sustain a plea of set-off. *Cousens v. Puddon*, 6 Law J. (N.S.) Exch. 49, s. c. 5 Tyr. 535.

#### (E) APPROPRIATION.

A person sold property, subject to different interests, but on account of one person only. He introduced all the sales into one account with that person; he had made payments sufficient to satisfy the interest of that one with whom he made the account; but a general balance remained in his hands:—Held, that that general balance was not liable to be cut down by an apportionment of the different interests of the parties; but that the earlier payments must be taken against the earlier items, according to the general rule. *Solarte v. Mass Hilbers*, 1 Law J. (N.S.) K.B. 196.

A general payment of money on account should be appropriated to the discharge of the earliest legal claim. *Goddard v. Hodges*, 2 Law J. (N.S.) Exch. 20, s. c. 1 C. & M. 33; 3 Tyr. 209.

Two partners dissolve their partnership; previous to the dissolution, the firm is indebted to a third party, to whom, at a subsequent period, one of the late partners makes remittances without any specific appropriation:—such remittances go to the discharge of the partnership account, and not of the individual account of the party by whom such remittances are made. *Smith v. Wigley*, 2 Law J. (N.S.) C.P. 118, s. c. 3 Mo. & Sc. 174.

Where there was a running cash and bill account between the bankrupt, and a banking company, who were under considerable advances to him, but part of these advances arose out of illegal transactions; and the bankrupt from time to time deposited bills, and made payments, without any specific appropriation, or any settled account between him and the bankers:—Held, that the payments must be appropriated in reduction of the earlier items of the account, and of the legal part of the demand. *Ex parte Randleson*, 2 D. & Ch. 534.

Monies paid by debtors, without specifically appropriating them, are to be applied in discharge of their oldest debts. *Toulmin v. Copeland*, 2 C. & F. 681.

Where a sum of money was paid generally on account, by the defendant, and some items for which the action was brought, were for spirituous liquors, which, by 24 Geo. 2, could not be recovered:—Held, that the plaintiff was at liberty at any time to appropriate the sum paid on account to those items; and that, although no such appropriation was made before the trial, he was entitled to recover, minus the sum paid on account. *Philpott v. Jones*, 4 Law J. (N.S.) K.B. 65, s. c. 2 Ad. & E. 41; 4 N. & M. 14.

A, a solicitor in the country, received from a client, a sum of money, which was to be paid by him into the Court of Chancery, on the client's account. A obtained a bill for the sum paid from a country banker, and remitted it to his bankers in London, without stating the reasons for which the amount had been paid to him. At the same time he was indebted to his bankers, in 450*l.*, for which they held securities, and as to which they kept an account separate from his general account. A died, and a few days afterwards the bill became due, and was paid, and the bankers carried the amount to A's general account. The bankers, for some time after they had received notice from the client, of the circumstances under which the amount of the

bill had been paid to A, continued to keep accounts separate, but ultimately they deducted the 450*l.* from the proceeds of the bill, and paid the balance to his executrix:—Held, that, as there was no agreement binding the bankers to keep separate accounts as to the 450*l.*, and the amount of the bill, and as they had no notice till after the amount was received, of the purpose for which it was intended to be applied, the client was not entitled to recover from them any part of the proceeds of the bill. *Gregg v. Cocks*, 4 Sim. 438.

If a debtor pays money generally to his creditor, without any directions as to its specific appropriation, the creditor may apply it in liquidation either of a judgment or simple contract debt. If the creditor under such circumstances, make no specific appropriation, the money shall be applied to one or the other account, according to the presumed intention of the parties, to be collected from all the facts. *Chitty v. Naish*, 2 Dowl. P.C. 511.

### PEACE.

Amendment of the laws relating to the preservation of, in Ireland, and appointment of special constables. 2 & 3 Will. 4, c. 108; 10 Law J. Stat. 275.

### PEDIGREE.

[See BASTARD—EVIDENCE, Reputation.]

### PEER.

[See COSTS, Security for.]

*The Earl of Devon's case*, 2 D. & Cl. 200; 2 Law J. Dig. 212, s. c. 5 Bligh, n.s. 220.

*Semble*—that the Court will not take judicial notice of a plaintiff being an Irish peer. *Lord Nugent v. Harcourt*, 2 Dowl. P.C. 578.

Service of a subpoena to appear, and of an order for a sequestration, *nisi*, upon a peer, at a time when he was beyond the jurisdiction, by leaving them at the peer's town residence:—Held, under the circumstances, to be good service. *Thomas v. Earl of Jersey*, 2 M. & K. 398.

The defendant having pleaded his peerage in abatement, but not alleged that he was a peer at the time of suing out the writ, the Court awarded a judgment of *respondet ouster*. The defendant then pleaded the general issue, and at the trial the plaintiff obtained a verdict on which judgment was entered up, and a *ca. sa.* sued out. The Court refused to set aside the execution. *Digby v. the Earl of Stirling*, 2 Mo. & Sc. 581.

If the plaintiff declare as the Right Honourable the Earl of S—, and the defendant plead in abatement that the plaintiff is not the Earl of S—, the dignity claimed will be intended to be an English dignity, and the plaintiff in his replication must set forth in what manner it was acquired. *Earl of Stirling v. Clayton*, 2 Law J. (n.s.) Exch. 43, s. c. 1 C. & M. 241; 3 Tyr. 154.

### PENALTY AND PENAL ACTION.

[See BRIBERY — GAME — NOLLE PROSEQUI — SHERIFF.]

In a *qui tam* action for penalties, where a bill of particulars had stated the action to be brought to recover one penalty only, the Court refused an application (made by the defendant before appearance entered,) to stay proceedings on payment of that penalty demanded, and costs; thinking that, by the 18 Eliz. c. 5, they had no power to interfere. *Williams v. Wright*, 2 Law J. (n.s.) K.B. 27.

The 10th section of 44 Geo. 3, c. 98, by which it is enacted, "That no person shall commence an action for the recovery of a penalty made by that or any other act of parliament relating to His Majesty's stamp duties, except the same be commenced in the name of His Majesty's Attorney General," &c., does not apply to actions brought for the recovery of penalties imposed by sections of the 38 Geo. 3, c. 78, which do not relate to the stamps, although that act does contain other sections which impose penalties that do relate to the stamp duties. The provision of the 44 Geo. 3. is confined to actions brought for the recovery of penalties incurred under the provisions of those latter clauses. *Smith v. Gillett*, 4 Law J. (n.s.) K.B. 32, s. c. 2 Ad. & E. 361; 4 N. & M. 225.

### PENANCE.

[See ECCLESIASTICAL COURTS.]

Remission of, for ill-health. *Chick v. Ramsdale*, 1 Curt. 34.

### PENSIONS.

Provisions with respect to the payment of, for service in the Royal Artillery, Engineers, and other corps under controul of the Ordnance. 3 & 4 Will. 4, c. 29; 11 Law J. Stat. 82.

Pensions to civil officers, amendment of laws regulating. 4 & 5 Will. 4, c. 24; 12 Law J. Stat. 36;—4 & 5 Will. 4, c. 45; ib. 76.

### PEREMPTORY.

[See JUDGMENT OF NON PROS.]

### PEREMPTORY PAPER.

[See PRACTICE, Motions, Rules, and Orders.]

### PEREMPTORY UNDERTAKING.

[See JUDGMENT AS IN CASE OF A NONSUIT—STET PROCESSUS.]

It is no excuse for not proceeding to trial pursuant to a second peremptory undertaking, that the plaintiff was advised that the declaration required amendment, and that a proposal was made to refer. *Haines v. Taylor*, 3 Law J. (n.s.) Exch. 174.

## PERJURY.

Where a true bill for perjury had been found against two of several witnesses, upon whose evidence a verdict had been obtained, the Court refused to grant a new trial.

Before a new trial can be granted, a probable ground must be laid to shew, that the verdict was obtained by perjury. *Benfeld v. Petrie*, 3 Doug. 24.

A witness committed perjury at the Worcester county Quarter Sessions, which are held in the Guildhall of Worcester, which is situate in the county of the city of Worcester:—Held, that the indictment for this perjury might be preferred in the county of the city of Worcester. *Rex v. Jones*, 6 C. & P. 137. [Tindal]

On the trial of an indictment for perjury, where the perjury was alleged to have been committed before a Magistrate, the written deposition of the defendant taken down by the Magistrate, was put in to prove what he then swore. After this, it was proposed to call the attorney for the prosecution, to prove some other matters that the defendant then swore, which were not mentioned in the deposition:—Held, that this could not be done. *Rex v. Wyde*, 6 C. & P. 380. [Park] See EVIDENCE, Depositions and Confession: *Venafra v. Johnson*, *Rex v. Harris*.

If an indictment for perjury contain several assignments for perjury, on one of which no evidence is given on the part of the prosecution, the defendant cannot go into proof, to shew that the evidence, charged by that assignment of perjury to be false, was in reality true. A witness for the defence cannot be asked, whether he has heard a witness for the prosecution commit perjury on the trial of a cause; and in stating whether he would believe that witness on his oath, he must do so from his knowledge of the witness's general character, and not from having heard him give particular evidence on a particular trial.

On the trial of an indictment for perjury, the witnesses to character were asked, "What is the character of the defendant for veracity and honour?" and "Do you consider him a man likely to commit perjury?" *Rex v. Hemp*, 5 C. & P. 468. [Denman]

On an indictment for perjury committed on the trial of a cause, it is sufficient to go the jury, if a witness states from recollection the evidence the defendant gave, though he did not take it down in writing, and cannot say with certainty that it was all the evidence the defendant gave, if he can say with certainty that it was all he gave on that point, and that he said nothing to qualify it. *Rex v. Rowley*, 1 R. & M. C.C. 111.

To prove perjury, it is sufficient if the matter alleged to have been falsely sworn, be disproved by one witness, if in addition to the evidence of that witness, there be proof of an account, or a letter written by the defendant contradicting his statement on oath. *Rex v. Mayhew*, 6 C. & P. 315. [Denman]

If in an indictment for perjury against C D, it is averred, that a cause was depending between A B and C D, a notice of set-off, intituled in a cause, A B against C D, and signed by the attorney of C D, is not sufficient evidence to support the allegation. *Rex v. Stoveld*, 6 C. & P. 489. [Denman]

In an indictment for perjury, a suit in the Eccle-

siastical Court was stated to have been depending between W P and R M: the proceedings of the suit were between W P, and R M the elder:—Held, no variance. *Rex v. Bailey*, 7 C. & P. 264. [Williams]

A was indicted under s. 58 of the Parliamentary Reform Act, 2 Will. 4, c. 45, for giving a false answer to the question, whether he had the same qualification to vote as that for which he was registered. A had occupied a house at the time of the registration, for which he was on the register as a voter, but he had left it before the election, and the landlord's agent had, before the election, given the key of it to B, who had put horses into the stable, and beer into the cellar, but B's rent did not commence till after the election:—Held, that in the absence of evidence of the determination of the tenancy of A, the indictment could not be supported. *Rex v. Harris*, 7 C. & P. 258. [Denman]

An indictment for perjury will not lie under the 71st sect. of 7 Geo. 4, c. 57, against an insolvent debtor for omissions of property in his schedule, such offence being made liable to certain punishment under the 70th section, as a substantive misdemeanor. *Rex v. Mudie*, 1 M. & R. 128, s. c. 5 C. & P. 23. [Tenterden]

## PERMITS

For removal of wine, discontinued. 5 & 6 Will. 4, c. 39; 13 Law J. Stat. 70.

## PERPETUATING TESTIMONY.

[See PRACTICE, *In Equity*.]

## PERPETUITY.

[See DEVISE—LEGACY.]

## PETITION OF APPEAL.

A motion to take off the file for irregularity, a petition of appeal against two decrees in the same suit—one an order allowing a demurrer, and the other a decree upon the merits—refused, under the circumstances. *Robertson v. the Marquis of Londonderry*, 3 Law J. (N.S.) Chanc. 20.

Leave to appeal from a decision of a Court, confirming a rate for the relief of the poor granted to rate-payers, the assessments on whom, separately and collectively, were less than the sum fixed by the orders of council regulating appeals from the inland. *In re Tupper*, 2 Kn. 201.

## PEW.

[See CHURCH.]

## PIERS AND QUAYS,—IN IRELAND.

[See JURY.]

## PILOT AND PILOTAGE.

[See SHIP AND SHIPPING.]

## PIN-MONEY.

[See BARON AND FEME, Property of the Wife.]



## PIRACY.

Bounties for the capture of pirates, made by boats detached from a king's ship, at a distance of some miles from the ship, but not out of signal distance, are distributable among the whole ship's company. *Two Piratical Gun-boats*, 2 Hag. 407.

## PLAN.

*Scmble*—that a plan of the premises referred to in the deed of conveyance, cannot be resorted to, for the purpose of explaining the intention of the parties. *Barlow v. Rhodes*, 2 Law J. (n.s.) Exch. 91, a. c. 1 C. & M. 439; 3 Tyr. 280.

## PLEADING.

## 1. AT LAW.

- (A) DECLARATION.
- (B) PLEAS.
- (C) REPLICATION.
- (D) REJOINDER.
- (E) IMMATERIAL ISSUE.
- (F) AVERMENT.
- (G) CONFESSION AND AVOIDANCE.
- (H) TRAVERSE.

## 2. IN EQUITY.

- (A) BILL.
- (B) INFORMATION.
- (C) ANSWER.
- (D) PLEA.
- (E) DEMURRER.
- (F) IMPERTINENCE AND SCANDAL.

## 3. IN THE ECCLESIASTICAL COURTS.

## 4. CRIMINAL.

## 1. AT LAW.

Judges empowered to make alterations in the mode of pleading, in the superior courts. 3 & 4 Will. 4, c. 42, s. 1; 13 Law J. Stat. 98.

## (A) DECLARATION.

[See AMENDMENT.]

It is not always sufficient to allege a contract in the very terms of it; the statement must lead the defendant to know what the plaintiff seeks to recover. *Combe v. Woolf*, 1 Law J. (n.s.) C.P. 51, a. c. 8 Bing. 156; 1 Mo. & Sc. 241.

The description of the *locus in quo*, in trespass against several defendants, whose names were set out in the commencement of the declaration, but who were afterwards styled, "the said defendants," stated the abuttal to be on the close of "the said defendant:"—Held, that this did not necessarily refer to the last-named defendant; and therefore did not amount to a variance, but to an ambiguity, which could only be taken advantage of on special demurrer. *Walford v. Anthony*, 1 Law J. (n.s.) C.P. 44, a. c. 8 Bing. 75; 1 Mo. & Sc. 126.

A declaration in debt in the Exchequer, omitting to conclude with the *quo minus* clause, was bad on special demurrer. *Miklin v. Dickens*, 1 Law J. (n.s.) Exch. 269, a. c. 2 C. & J. 622.

The declaration stated, that, in consideration that one R C should have credit in his accounts with

the plaintiff to the amount of 150*l.*, and that one T E W should stand in his place to that amount, and that the plaintiff should not personally dispute T E W's deducting that sum from certain balances due to R C, defendant undertook to procure T E W to execute a promissory note to plaintiff for 150*l.*:—Held, that a sufficient consideration for the promise was disclosed in the declaration. *Pears v. Dickinson*, 4 Law J. (n.s.) Exch. 28, a. c. 1 C. M. & R. 422; 5 Tyr. 116.

The West India Dock Company are, by act of parliament, to sue and be sued in the name of their treasurer. On action of assumpsit brought against the treasurer, the declaration set out the contract, as being made with "the directors of the company;" and it appeared that the contract had been made with them on behalf of the company. After verdict for the plaintiff—held, that the contract was properly set out, and the action well brought.

The defendant had pleaded to such declaration, that "the company did not undertake," &c.—Held, that this would have sufficed to aid the declaration, had it been defective. *Souleby v. Smith*, 1 Law J. (n.s.) K.B. 222, a. c. 3 B. & Ad. 929.

The declaration stated, that divers, to wit, ten iron-foundries, machinery, apparatus, &c. ten messuages, &c., were in the possession of one William Bailey, as tenant thereof to the said plaintiff (the reversion thereof then and there belonging to the plaintiff); yet the defendant, well knowing this, &c., but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff in his reversionary estate and interest in the said iron-foundries, &c., broke and entered the said iron-foundries, machinery, apparatus and furniture, with the appurtenances, cranes, &c., and tore up, broke down, pulled to pieces, prostrated and destroyed the same, and afterwards converted the said machinery, apparatus, &c., to his own use; and the said goods and chattels and things which were affixed to the reversionary estate and interest of the plaintiff in the iron-foundry, machinery, apparatus, &c. and other goods and chattels, scattered and spread the same over with mortar, &c., and continued the same so scattered and spread over, greatly injuring the reversionary estate of the plaintiff therein, &c.

Held, that the several allegations might be taken disjunctively; that the declaration might be read as if it had simply stated that the plaintiff was entitled to the reversionary interest in the iron-foundry, and the defendant wrongfully entered that iron-foundry, and pulled down and destroyed part of it; and, that the plaintiff was entitled, under that count, to recover damages for the excess, and the unnecessary damage done by the defendant in removing his fixtures. *Hare v. Horton*, 3 Law J. (n.s.) K.B. 41, a. c. 5 B. & Ad. 715; 2 N. & M. 428.

Declaration stated that the defendant, maliciously and without reasonable or probable cause, charged plaintiff before a Magistrate with having stolen goods on his premises, and upon such charge obtained a search-warrant, and maliciously and without reasonable or probable cause, caused and procured his dwelling-house to be searched and rummaged for the said goods, and the door of the house to be broken, &c.—Held, upon general demurrer, that, looking at the whole declaration, what followed the

making of the charge and obtaining the warrant, was attributable to that charge and done under the warrant, and was therefore the subject-matter of an action upon the case; and, although it might be bad on special demurrer for informality in not alleging more particularly that it was done under the warrant, it was no misjoinder of case and trespass. *Littledale, J. dubitante.*

Misjoinder of causes of action in a cause for general demurrer. *Hansworth v. Fowkes*, 2 Law J. (N.s.) K.B. 72, s.c. 1 N. & M. 321; 4 B. & Ad. 449.

Where the plaintiffs in two actions declared upon personal contracts made with themselves, but entitled themselves, one "the assignee of the sheriff," and the other the executor of a person deceased, it was held, that such description was surplusage, and the declaration was good. *Reynolds v. Welsh*, 4 Law J. (N.s.) Exch. 40, s.c. 1 C. M. & R. 580; 5 Tyr. 202; and s. *P. Hargreaves v. Holden*, ib.

In a declaration by an administratrix, profert was made of letters of administration duly granted by the Consistory Court of St. Asaph, but no date was mentioned:—Held, on special demurrer, that the omission of the date was immaterial, but that, as there was no averment that the Consistory Court was empowered to grant letters of administration, the declaration was bad. *Hughes v. Williams*, 4 Law J. (N.s.) Exch. 233, s.c. 2 C. M. & R. 331.

The mis-statement of the form of action at the commencement of a declaration, is an irregularity only, and not fatal on special demurrer. *Anderson v. Thomas*, 9 Bing. 678.

Declaration on a bail-bond stated the defendant was arrested by virtue of a writ, "before then, to wit, on the 2nd of November, issued out of the Court of our Lord the King, before the King himself, the said Court then and there being held at Westminster":—Held bad on special demurrer. A variance between the sum in the special original, and the sum in the condition of the bail-bond, is immaterial. *Atkinson v. Saunderson*, 4 Doug. 252.

A declaration alleging, that, by indenture purporting to be made between plaintiff and defendant, it was witnessed that the defendant covenanted:—Held, after plea, sufficiently certain. *Baynon v. Batley*, 1 Law J. (N.s.) C.P. 75, s.c. 8 Bing. 256; 1 Mo. & Sc. 339.

Declaration by husband and wife stated, that by agreement between the plaintiffs and defendant, reciting, that one J L had been arrested at the suit of the plaintiffs; that the defendant had become bail to the sheriff; that the bail had been forfeited, and that J L had given a cognovit for the debt and costs,—it was understood and agreed between the plaintiffs and defendant; and the defendant undertook and promised, in consideration that the plaintiffs would not enter up judgment, or sue out execution against J L until a certain day, that he, the defendant, would render J L on that day, or, in default, pay the debt and costs.

Averment, that the plaintiff had not entered up judgment, or sued out execution against J L before the day. Breach, that the defendant did not render J L on the day, or pay the debt and costs:—Held, on motion in arrest of judgment, after verdict for the plaintiffs, 1st, that, as the agreement was stated to be with the plaintiffs, the promise must be taken, after verdict, to have been made to them. 2ndly,

that it sufficiently appeared that the wife had a joint interest, because the recital in the agreement of a cognovit by J L to all the plaintiffs, was an admission by the defendant of such joint interest. 3rdly, that, though the agreement by the wife was void, it might be rejected as surplusage, and that the count would then be good, as stating a promise to pay the debt and costs to the plaintiffs, in consideration that they would not enter up judgment, or sue out execution until a given day. *Nurse v. Wills*, 4 B. & Ad. 739, s.c. 1 N. & M. 765.

Where the first count of a declaration is against the defendant, as acceptor of a bill of exchange, stating a promise to pay the bill without any breach, and is followed by a count for money lent, money paid, &c., with a promise to pay limited to the latter sums, the breach is good if it goes on to state, that he has disregarded his promises, and hath not paid the said monies to the said plaintiff. *Turner v. Denman*, 4 Tyr. 313.

Where a declaration alleged the defendant to be indebted to the plaintiff in a certain sum for work and labour, without laying any promise to pay it; and then under a "whereas also," proceeded to state him to be indebted to plaintiff in several other sums for goods sold and delivered, &c., concluding that the defendant had promised to pay the said last-mentioned several monies respectively to the plaintiff on request:—Held bad, on demurrer, for want of a promise, in the first count, which was not referred to by the words "last-mentioned" in the second count. *Harding v. Hibel*, 4 Tyr. 314.

#### (B) PLEAS.

Declaration for goods sold and delivered. Plea, coverture of the defendant in abatement. Replication, that, at the time of the making the promises, defendant was living separate and apart from her husband in adultery, and that she made the promises on her own credit, and for her own separate use, &c. Demurrer:—Held, that the plea was bad in abatement, as not giving a better writ. *Turtle v. Lady Worsley*, 3 Doug. 290.

In an action on a charter-party, by which the defendants covenanted to unload and receive the cargo at Charlestown, and then and there put on board 100 tons of goods, &c., the plaintiffs assigned as a breach that no goods were put on board. The defendants, after oyer of the charter-party, in which there was a proviso that the freight of the homeward cargo should be paid on delivery at London, pleaded that the vessel never arrived in London on the homeward voyage, but was lost. On demurrer the plea was held bad. *Stephenson v. Price*, 3 Doug. 353.

Covenant in a charter-party, that if a vessel should be captured, a sum of 975*l.* should be paid for the vessel, according to an appraisalment annexed. Plea, that, by the appraisalment, the tackle, &c. were valued at 313*l.* 15*s.*, and that, before the capture, by tempestuous weather, &c., the tackle, &c. had been damaged to the amount of 300*l.*; and as to the residue, plea of payment. On demurrer the plea was held bad.

To a declaration containing the common counts, the defendant pleaded as to part, that he was not indebted; and as to the residue, that he paid it before the commencement of the action, and concluded to the country; upon special demurrer to the

latter plea — Held bad. *Mack v. Rust*, 4 Dowl. P.C. 206.

Debt on bond conditioned to pay 50*l*. in case the defendant should not procure J H, then impressed, to appear, and declare himself whenever he should be called upon. 1st plea, that J H was not called upon, &c. 2nd plea, that J H was unlawfully impressed, and that it was unlawfully agreed between the plaintiff and J H, that the plaintiff should discharge J H, who should pay as a gratuity, &c.; and that defendant, at the request of J H, became bound for the payment. Replication to 1st plea, that the plaintiff called upon and required the defendant to procure J H to appear. Special demurrer thereto, and general demurrer to 2nd plea:—Held, that both the 1st and 2nd pleas were good. *Pole v. Horrobin*, 3 Doug. 91.

Debt on bond conditioned for the payment of 5,000*l*. at certain times, and performance of covenants in an indenture. Plea, stating the payment of the money at the times, and performance of the covenants. Replication, that the defendant did not pay the money *modo et forma*, and concluding to the country. Special demurrer, on the ground that the replication ought to have concluded with a verification:—Held, that the conclusion to the country was good. *Bush v. Leake*, 3 Doug. 255.

If defendant relies on illegality of consideration, as a bar to the action, he must put such plea on the record; he cannot give it in evidence under the plea of *non assumpsit*. *Potts v. Sparrow*, 4 Law J. (n.s.) C.P. 201, s.c. 1 Bing. N.C. 594; 1 Sc. 578.

In *assumpsit* for goods sold and delivered, under the plea of *non assumpsit*, the defendant cannot, since the new rules, give in evidence, that the assignment of the goods, for which the action was brought, was not in conformity with the statutes 8 Ann. c. 19, and 3 & 4 Will. 4, c. 15. Such defence should be put upon the record. *Barnett v. Glossop*, 4 Law J. (n.s.) C.P. 174, s.c. 1 Bing. N.C. 633; 1 Sc. 621.

Want of consideration cannot be given in evidence under a plea of *non assumpsit* to a declaration on a special contract; it must be pleaded specially. *Passenger v. Brooks*, 4 Law J. (n.s.) C.P. 195, s.c. 1 Bing. N.C. 587; 1 Sc. 560.

The general rule, which says, that it shall not be necessary to use the allegations of *actio non* and *procludi non* in pleadings intended to be pleaded in bar of the whole action, means the whole cause of action in the count or plea. *Bird v. Higginson*, 4 Law J. (n.s.) K.B. 124, s.c. 2 Ad. & E. 696; 4 N. & M. 505.

If a plea, professing to answer the whole of a count, leave a good part of the count unanswered, the plaintiff is entitled to judgment on a general demurrer. *Crump v. Adney*, 2 Law J. (n.s.) Exch. 150, s.c. 1 C. & M. 355; 3 Tyr. 270.

In an action for breach of parol contract, the defendant pleaded that she had no notice that the plaintiffs had any interest or title in the premises; that they were let by one J C and his wife, who appeared and represented themselves to have full power to let the same; and that the plaintiffs suffered and permitted the said J C and wife to be and appear the owners, &c., and that the defendant treated them as such; that certain disputes were depending between her and the said J C and his wife,

concerning these identical breaches, which were referred, and a certain sum awarded to be paid by the defendant to the said J C and wife, on account thereof; that afterwards, J C was outlawed, and the defendant had notice that the sum so awarded would be claimed by the Crown; that, before the commencement of this suit, and before the taking of the inquisition, under the writ of *cap. utlag.*, she gave notice to the plaintiffs that they might put in their claim; that the sum so awarded was afterwards seized under such inquisition:—Held, upon demurrer, that the defendant, by her plea, admitted that she knew of the plaintiffs' claim before the inquisition; that the plea was no answer, therefore, to the plaintiff's action. *Quere*—would the plea have been good, had it stated that the defendant had no notice of the plaintiffs' claim before the inquisition was taken? *Beavan v. Hurst*, 1 Law J. (n.s.) K.B. 174.

It is no ground for a plea in abatement, that a defendant, sued as a Scotch peer, is also described as having privilege of parliament. *Cantwell v. Earl of Stirling*, 1 Law J. (n.s.) C.P. 76, s.c. 8 Bing. 174; 1 Mo. & Sc. 297, 365.

In an action on the case, for indicting the defendant without reasonable or probable cause, the general issue puts in issue the fact of the defendant having indicted the plaintiff, and the want of reasonable or probable cause for such indictment; and the Court struck out a plea, stating that the defendant had reasonable or probable cause. *Cotton v. Brown*, 4 Law J. (n.s.) K.B. 184, s.c. 4 N. & M. 831; 3 Ad. & E. 312.

The plaintiff declared on a bond conditioned to secure a loan of money, which was to be paid on a certain day, with interest. He assigned, as a breach, the non-payment of the principal on that day. Plea, that the defendant paid the principal, *with interest*, on that day, and concluding to the country:—Held, (Lord Abinger, C.B. *dissentiente*) that the plea was bad on special demurrer, as tendering too large an issue. *Bishton v. Evans*, 4 Law J. (n.s.) Exch. 142, s.c. 2 C. M. & R. 12; 3 Dowl. P.C. 735.

No affidavit of debt "*filed*" of the original cause of action, is not a good plea in an action of debt by the assignee of a bail-bond.

The rules of Hil. term, 4 Will. 4, do not render a conclusion of a plea either to the country or with a verification unnecessary;—a plea without any conclusion is, therefore, bad. *Knowles v. Stevens*, 3 Law J. (n.s.) Exch. 313, s.c. 1 C. M. & R. 26; 4 Tyr. 1016.

The defendant pleaded to an action of *assumpsit*, as to all, except 20*l*. 9*s.*, *non assumpsit*; and as to that sum, that the defendant being in embarrassed circumstances, the plaintiff and other creditors agreed to take 5*s.* in the pound, and that the defendant was ready and willing to pay the amount of the composition; but the plaintiff refused to receive it, and discharge the defendant from tendering or paying the composition:—Held, that the plea was no answer as to the sum agreed to be taken for composition, as no consideration was stated for the plaintiff discharging the defendant from the payment of it. *Cooper v. Phillips*, 1 C. M. & R. 649, s.c. 5 Tyr. 166.

Trespass for breaking and entering two closes of the plaintiff. Plea, that the said closes, in which,

&c. were from time immemorial parcels of a waste, and that the defendant had a prescriptive right of common in the waste, and entered at the times when, &c. to use his right of common thereon; and, because the closes in which, &c. were wrongfully separated from the residue of the waste, he broke down the gates. Replication, that the said closes in which, &c. at the said times, were not wrongfully separated from the residue of the waste, but continually for twenty years and more, and before the first time when, &c. had been and were separated, and divided, and inclosed from the residue of the waste; and occupied and enjoyed during that time in severalty. Rejoinder traversed this averment, and issue was joined thereon:—Held, that the allegation in the replication, that "the said closes, in which, &c. for twenty years and more, had been inclosed from the residue of the waste, and enjoyed in severalty," was divisible, and satisfied by proof, that any part of the closes, in which the trespasses were committed, had been so inclosed for that period. *Tapley v. Wainwright*, 5 B. & Ad. 395, s. c. 2 N. & M. 697.

In assumpsit on an agreement, want of consideration for the promise must be specially pleaded. *Passenger v. Brooks*, 7 C. & P. 110. [Tindal]

The declaration alleged that the plaintiff was lawfully possessed of a water griet mill, and by reason thereof ought to have had the benefit of a certain stream or watercourse; and that the defendant "wrongfully" diverted the stream. Plea, general issue. The jury found the right of the plaintiff to exist in respect of land of which he was in possession, but not in respect of the mill; and that the defendant had diverted the stream:—Held, that the plaintiff was entitled to a verdict on that issue, without damages; and that the word "wrongfully," in the declaration, did not make it necessary for him, on that issue, to prove that he was entitled to the water by reason of the possession of the mill. *Frankum v. Earl of Palmouth*, 4 Law J. (N.S.) K.B. 90, s. c. 2 Ad. & E. 452; 6 C. & P. 534.

Whether a plea, directly and expressly denying the facts alleged in one count of the declaration, and wholly inapplicable to the other causes of action stated in the declaration, but without any introductory statement professedly limiting its application to the first count, is to be considered as a plea to that count only, or as an informal answer to the whole declaration—*quære*. *Worley v. Harrison*, 4 Law J. (N.S.) K.B. 268, s. c. 5 N. & M. 173.

Covenant on an indenture of demise by the administrator of the lessor against A, B, and C, the lessees, for not leaving and yielding up to the plaintiff at the expiration of the term "machinery," &c. of a value equal to the value of the machinery, &c. on the premises at the time of the demise. Plea by A and B, that the plaintiff's intestate held the premises, &c. merely as trustee for C, that C had become bankrupt, and that the defendants had left and yielded up, &c. to the assignees of C, machinery, &c. of equal value, &c. On demurrer, held, that the plea was bad, as being no answer at law, but disclosing matter of equity only. *Britten v. Perrott*, 3 Law J. (N.S.) Exch. 181, s. c. as *Britten v. Britten*, 2 C. & M. 597.

Plaintiff declared in debt for goods sold, to be paid for on request. Defendant pleaded, that he

never was indebted as in the declaration was alleged:—Held, that, since the new rules of pleading, he could not, under this plea, give evidence that the goods were sold on a credit not yet expired. *Edmunds v. Harris*, 2 Ad. & E. 414, s. c. 4 N. & M. 182; 6 C. & P. 547.

*Indebitatus assumpsit* on promise to pay on request. Plea, as to part, that defendant has paid the same, and in the same plea, non assumpsit to the residue, the whole concluding to the country:—Held, on special demurrer, that the plea was bad, for not concluding with a verification. *Semble*, the plea was double, and that its subject-matter should have been divided into two pleas, the first concluding with a verification, the last to the country. *Ansell v. Smith*, 5 Tyr. 141.

### (C) REPLICATION.

[See ASSIGNMENT OF DEBT—TRESPASS, Pleading.]

If, in an action on a bill of exchange, where there is a plea that there was no consideration, it appear at the trial that the plaintiff has not put any replication on the record, the Judge will not allow a replication to be added at the assizes, without the consent of the defendant, but will order the case to be struck out of the list. *Rowlinson v. Roantre*, 6 C. & P. 551. [Alderson]

If a replication conclude to the country with an '&c.' and no *similiter* be added, the Judge will try the cause, as the '&c.' is sufficient. *Clark v. Nicholson*, 6 C. & P. 712. [Parke]

To a plea of payment of 3*l.* 8*s.* 2*d.* in satisfaction and discharge of defendant's promise, replication, that defendant did not pay it in satisfaction and discharge, nor did plaintiff receive it in satisfaction and discharge:—Held, on demurrer, unobjectionable. *Webb v. Weatherby*, 1 Bing. N.C. 502, s. c. 1 Sc. 477.

*De injuriis et propriis*, &c. is a good plea to an avowry in replevin, that the plaintiff was an inhabitant of the parish in which, &c., and chargeable and rateable to the relief of the poor, in respect of his occupation of a tenement within the parish; that a rate was duly made, allowed, given notice of, and published; and that, by the said rate, the plaintiff was, in respect of such occupation and inhabitancy, duly rated at a certain sum; that the defendant, as collector, gave due notice to the plaintiff and demanded payment, but the plaintiff refused to pay; that a summons was issued, on which the plaintiff appeared and shewed no cause against paying it, whereupon a warrant was issued against the goods and chattels of the plaintiff directed and delivered to the defendant, by virtue of which he took the goods as a distress. *Bardous v. Selby*, 2 Law J. (N.S.) Exch. 200, s. c. 1 C. & M. 500; 3 Tyr. 430; 9 Bing. 756; 3 Mo. & Sc. 280; s. c. in K.B. 1 Law J. (N.S.) K.B. 128; 3 B. & Ad. 2.

To a plea of *liberum tenementum* in certain persons, the plaintiff replied soil and freehold in the same persons as trustees of a charitable fund, and in no other right whatsoever; and that the premises had been used by those persons, and their predecessors, as such trustees, for a school-house, and for the residence of the schoolmaster; and that the plaintiff was duly appointed schoolmaster of the said school-house, by the then trustees of the said charitable fund, not naming nor stating a seisin

in fee in the trustees who had appointed, nor any power by which the appointment was made, nor the trusts of the charitable fund, nor the deed by which they were created:—Held, that there was no ground for arrest of judgment. *Wilkinson v. Mahin*, 1 Law J. (N.S.) Exch. 234, s.c. 2 C. & J. 636; 2 Tyr. 544.

Money had and received to the plaintiffs' use, to the amount of 5,000*l*. Plea, as to the sum of 5,000*l*. in the declaration mentioned, alleged to have been had and received to the plaintiffs' use, that it was the proceeds of certain goods consigned to defendant by Messrs. P & C, as their own goods, with the plaintiffs' knowledge and assent, (though, in fact, the goods of the plaintiffs and Messrs. P & C jointly,) as a security for money to be advanced to Messrs. P & C by the defendant; that he had advanced more than 5,000*l*. on them, and he offered to set off his debt against the damages claimed by the plaintiffs, in respect of the money in the declaration. The plaintiffs replied *de injuriâ*, and new assigned, that the action was brought not only for the proceeds of the goods mentioned in the plea, but also for the proceeds of certain other goods deposited by the plaintiffs with the defendant:—Held, that the plea was bad, as amounting to the general issue, and also that the replication *de injuriâ* could not be supported in this case.

*Quære*—whether, the general replication *de injuriâ*, if allowable at all in assumpsit, can be joined with a new assignment. *Solly v. Neish*, 4 Law J. (N.S.) Exch. 230, s.c. 2 C. M. & R. 355.

To a declaration in assumpsit on a promissory note, the defendant pleaded, that after the accruing of the debt, in respect of the note, the plaintiff drew a bill of exchange on the defendant, which he accepted and delivered to the plaintiff, who took it for and on account of the promissory note; that the plaintiff indorsed it to a person unknown to the defendant, who was the holder of it at the time of the commencement of the present suit. Replication, *de injuriâ*:—Held, on demurrer to the replication, that the plea was bad, as it did not expressly state that the bill was given as well as taken in satisfaction of the note.

*Quære*—whether the replication was good. *Simble*—per Parke, B. it was not. *Crisp v. Griffiths*, 4 Law J. (N.S.) Exch. 199, s.c. 2 C. M. & R. 159.

Action on a promissory note made in favour of J M. Plea, the Statute of Usury. Replication, protesting the corrupt agreement between defendant and J M, states, that defendant did not, in pursuance of any such corrupt agreement, nor for any such purposes as are in the plea mentioned, make the note, and concluding to the country. Special demurrer, on the ground that the replication should have concluded with a verification; and so held. *Mulliner v. Wilkes*, 3 Doug. 118.

#### (D) REJOINDER.

"Rejoining gratis" does not extend to joining in demurrer. *Jones v. Key*, 3 Law J. (N.S.) Exch. 64, s.c. 2 C. & M. 340; 4 Tyr. 238.

#### (E) IMMATERIAL ISSUE.

[See ASSIGNMENT, Of Goods and Chattels.]

Trover by assignees of a bankrupt for certain goods, &c., in the possession of the bankrupt as

his property at the time of the bankruptcy, and converted by the defendants since the bankruptcy. Plea, that, before the bankruptcy, the bankrupt assigned and conveyed the goods to the defendants by deed; and that, before the bankruptcy, they took possession thereof, and kept and retained such possession. Replication, that the defendants did not take possession of the goods before the bankruptcy; on which issue was joined. After a verdict found for the plaintiffs on that issue,—Held, that the issue was an immaterial one; and that the assignment, being transfer of personal property, was sufficient of itself to convey it without possession, the want of which only amounted to evidence of fraud. *Carr v. Burdiss*, 4 Law J. (N.S.) Exch. 60, s.c. 1 C. M. & R. 782; 5 Tyr. 309.

#### (F) AVERMENT.

Where a party pleads upon a record a taking from Martinmas, he cannot shew by extrinsic evidence that he meant Martinmas Old Style; and subsequent words, to wit, "the 23rd of November," will not be held as explaining that Martinmas Old Style was intended. *Smith v. Walton*, 2 Law J. (N.S.) C.P. 85, s.c. 8 Bing. 285; 1 Mo. & Sc. 380.

The plaintiff, the obligee in a bond, given by two joint obligors, executed a release to one, and, having brought an action on the bond against the defendant, the co-obligor, he pleaded such release in bar; the plaintiff replied that the release was given with an undertaking on the part of the defendant, that such release should not operate in his discharge: and, on demurrer, held, that the plaintiff could not by a parol averment vary the instrument under seal, which being the release of an entire demand, would operate as a release to the defendant. *Cocks v. Nash*, 2 Law J. (N.S.) C.P. 17, s.c. 9 Bing. 341; 2 Mo. & Sc. 434.

General averment of performance, good on general demurrer: the defendant, if he wants a more specific averment, must demur specially. *Farley v. Manton*, 2 Law J. (N.S.) C.P. 28, s.c. 9 Bing. 363; 2 Mo. & Sc. 484.

By the terms of a charter-party it was stipulated, that the freight should be paid "one-third in cash on arrival, and the remainder on delivery by good and approved bills, on or payable in London at four months' date." In the declaration thereon, the breach was stated generally, that the defendant had not paid the freight "according to the terms of the charter-party":—Held, sufficient on special demurrer. *Marshall v. Thomas*, 3 Mo. & Sc. 98.

In a plea of justification, grounded on a custom in a manor for the leet jury to break and destroy measures found by them to be false, it is enough to say that the measures were found by the jury to be false, without alleging that they were so. *Willcock v. Windsor*, 3 B. & Ad. 43.

Averment, that the defendant, who had made a note promising to pay plaintiff 1*l*. fourteen days after date, and had delivered it to plaintiff, promised, when it was due, to pay plaintiff according to the tenor and effect thereof:—Held, sufficient on special demurrer. *Buncks v. Cump*, 9 Bing. 604, s.c. 1 Mo. & Sc. 734.

In an action of debt for a penalty under 2 Geo. 3, c. 20, s. 16, for acting as a major of militia without being duly qualified, it is sufficient to aver, that the defendant acted as such major, "not being in man-

ner qualified by the laws and statutes of the realm." *Roberts, qui tam, v. Irvine*, 3 Doug. 194.

#### (G) CONFESSION AND AVOIDANCE.

An admission of the causes of action, "if any," in a plea in confession and avoidance, is insufficient; and, therefore, on special demurrer, a plea that the defendant was discharged under the Insolvent Debtors Act from the causes of action in the declaration (if any), held bad. *Gould v. Lasbury*, 3 Law J. (N.S.) Exch. 299, s.c. 1 C. M. & R. 254; 4 Tyr. 863; 2 Dowl. P.C. 707.

#### (H) TRAVERSE.

A *virtute cuius* is traversable, if it involve matter of fact. *Lucas v. Nockells*, 10 Bing. 157, s.c. 8 Mo. & Sc. 627.

To a plea by an executor of a judgment, for a debt recovered against the testator, and *plene administravit preter*, a small sum not sufficient to satisfy the judgment, if the plaintiff reply, that the testator paid a large sum of money, to wit, &c. in full satisfaction and discharge of the debt recovered, and of the judgment; and that the defendant deceitfully, and with the intention to defraud and deceive the plaintiff of his damages, defers procuring acknowledgment of satisfaction to be entered of the said debt, or to be released therefrom, and still permits the judgment to remain in full force and vigour, the defendant must traverse the fraud, and not the payment and satisfaction. *Jones v. Roberts*, 3 Law J. (N.S.) Exch. 46, s.c. 2 C. & M. 219; 4 Tyr. 48; 2 Dowl. P.C. 374.

In an action on an attorney's bill, where the defendant pleads that the action is for business done "at law and in equity," and was commenced before the expiration of one month after the delivery of the bill, a replication denying, in the words of the plea, that the action is for business done "in law and in equity," is bad on special demurrer, as the traverse, being in the conjunctive, is too large. *Moore v. Boulcott*, 4 Law J. (N.S.) C.P. 21, s.c. 1 Bing. N.C. 323; 1 Sc. 122.

In an action for goods sold and delivered, work and labour, &c., the defendant pleaded that the work, &c. was not to be paid for until approved of by defendant or his surveyor, and that the work had not been approved of by him or his surveyor. In his replication, the plaintiff alleged that the work was done to the satisfaction of the defendant and his surveyor; and added the special traverse in the words of the plea, *absque hoc*, that the work was not done to the satisfaction of the defendant or his surveyor. Upon verdict for plaintiff,—Held, that proof of the work being approved of by the defendant himself, was sufficient to support the issue in substance.

*Semble*—The defendant should not have joined issue on the replication, but should have demurred specially. *Bradley v. Milnes*, 4 Law J. (N.S.) C.P. 219, s.c. 1 Bing. N.C. 644; 1 Sc. 626.

## 2. IN EQUITY.

### (A) BILL.

[See *BARON AND FEME*.]

A bill of discovery is demurrable, if the words "stand to and abide such order and decree thereon," are inserted in the prayer of process. *James v. Herriott*, 6 Sim. 428.

Statement of a pretence, followed by the charge, "whereas your orator charges the contrary of such pretence to be true," equivalent to an allegation. *Harrison v. Wiltshire*, 4 Law J. (N.S.) Chanc. 260.

500*l.* was placed in the hands of a party to be applied by him in carrying a divorce bill through Parliament; part was paid to the solicitor employed in carrying the bill through Parliament, but before the remainder had been applied, the depositor died; the executrix of the depositor claimed from the depository the whole deposit,—the solicitor claimed the sum remaining in the hands of the depository:—Held, that, under the circumstances, a bill of interpleader could not be sustained. *Moore v. Usher*, 4 Law J. (N.S.) Chanc. 205.

A bill of interpleader is not demurrable, because it does not offer to bring the money claimed into court; but the plaintiff must bring it in, before he takes any step in the cause. *Maux v. Bell*, 6 Sim. 175.

The rule of practice, that the objection to the bill for multifariousness, cannot be made at the hearing, is not a rule to bind the Court, but only applies as between the parties to the suit. *Churhill v. Greenwood*, 2 Law J. (N.S.) Chanc. 146, s.c. 1 M. & K. 546.

A bill was filed against two trustees, alleging that one of them only had acted in the trusts, and seeking to charge that trustee only with a breach of trust. The trustees, in their answer, admitted they had both acted in the trusts. The plaintiffs, however, did not amend their bill:—Held, that they were nevertheless entitled to charge both the trustees with the loss occasioned by the breach of trust. *Taylor v. Tabrum*, 6 Sim. 281.

A being in possession of an estate under a decree in 1783, B filed a bill against him to recover the estate, and brought a writ of right for the same purpose: A then filed a cross-bill against B, seeking for a discovery of matters relating to B's pedigree, and praying that B might elect whether he would proceed at law or in equity; and that, if he elected the latter, that he might be perpetually restrained from proceeding at law, to recover the estate. B demurred, because the bill sought a discovery of matters constituting his case at law, and because the order for putting him to his election ought to be obtained on motion, and not at the hearing. Demurrer overruled. *Lounides v. Davies*, 6 Sim. 468.

A bill was filed against A and others; but before he was served with a subpoena, he went abroad. The bill was then amended, by stating that A was out of the jurisdiction, and a decree was made. A then filed an original bill to impeach the decree, on the ground that he was in England when the former bill was filed, but was not served with process. The defendants demurred, on the ground that the decree could not be impeached, except by a supplemental bill in the first suit. Demurrer overruled. *Waterton v. Croft*, 6 Sim. 431.

A bill of revivor against new parties, ought to state so much of the original bill as shews that the plaintiff is entitled to revive, otherwise it is demurrable. *Phelps v. Sproule*, 4 Sim. 318.

A died intestate, leaving a widow and infant children his next-of-kin. The widow, without taking out administration, possessed his assets, paid his debts, and died, having bequeathed her perso-

nal estates to the children, and appointed B and C her executors. D then took out administration to the intestate, and brought an action as trustee for the children, against B and C, for monies alleged to be due from the testatrix to the intestate's estate. B and C, together with the children, filed a bill against D, praying for all proper accounts of the assets of the intestate and testatrix, possessed by B and C, and by D, and of what, if anything, was due from the testator's estate to the intestate's estate, and for an injunction to restrain the action:—Held, that the bill was not multifarious. *Lewis v. Edmund*, 6 Sim. 251.

## (B) INFORMATION.

Where a gift was made to the Merchant Tailors' Company, upon trust, to lend it out on interest to members of the company, and to pay over the interest to the Mercers' Company; and where seven other gifts were made to the Merchant Tailors' Company by different persons, at different times, upon trust, for the benefit of different members of the company: to an information filed against the Merchant Tailors' Company respecting all these charities, and to which the Mercers' Company were not made parties, a demurrer for multifariousness was overruled, as respected the seven last charities; but, a demurrer for want of parties was allowed as to the first charity. *Attorney General v. the Merchant Tailors' Company*, 2 Law J. (N.S.) Chanc. 22, s.c. 1 M. & K. 189; 5 Sim. 288.

An information, after stating a will, by which property was given to the defendants, for the purpose of making loans to young men free of the company, to assist them in trade and otherwise, alleged that divers other donations and bequests had been made to the company, for the purpose of making loans to young men, for their advancement in business, or in life, and prayed that the principal and all other like gifts to the company, for loans, might be established, &c.:—Held, that the information was multifarious, though the company were the only defendants to it. *Attorney General v. the Goldsmiths' Company*, 4 Law J. (N.S.) Chanc. 22, s.c. 5 Sim. 670.

## (C) ANSWER.

Plaintiff amended his bill; before the amendments were answered, the suit abated. Plaintiff then filed a bill of revivor and supplement, praying that the defendants might answer that bill, together with the amendments. The defendants put in an answer to the bill of revivor and supplement only. Motion to take the answer off the file, for irregularity, refused. *Sayle v. Graham*, 5 Sim. 8.

Defendant pleaded to the whole bill, that he was a purchaser for valuable consideration, without notice, and by answer in support of the plea, denied the charges of notice:—Held, that the answer overruled the plea. *Lord Portarlington v. Soulby*, 6 Sim. 356.

## (D) PLEA.

A gift was made to the Merchant Tailors' Company, on trust, to lend out certain sums of money at a specified rate of interest to members of the company, and pay over the interest to the Mercers' Company. There were seven other gifts to the Merchant Tailors' Company, upon trust, for the

benefit of members of that company exclusively. In the original information the Mercers' Company were not made parties, and a demurrer, on that ground, was allowed; but, a demurrer on the ground of multifariousness was overruled. The information being amended by striking out the first gift, in which the Mercers' Company were jointly interested, the defendants pleaded that gift, and that the Mercers' Company were not made parties to the discovery which the information sought as to other gifts upon like or corresponding trusts:—Held, that, with reference to the state of the record, this gift to the Mercers' Company was not on a like or corresponding trust, and the plea overruled. *Attorney General v. Merchant Tailors' Company*, 2 Law J. (N.S.) Chanc. 193, s.c. 5 Sim. 323. See, ante, Information.

Bill for an account of savings made by a wife, as committee of the person of her husband, a lunatic, out of the allowance made to her as such committee. A plea, that she had duly discharged the duty of committee, overruled. *Stephenson v. Holmes*, 3 Law J. (N.S.) Chanc. 41.

The bill prayed a revivor of the suit, and also that the Master might be at liberty to make his report or certificate *nunc pro tunc*, and date it before the abatement. As to reviving the suit, the defendant pleaded, and answered the rest of the bill:—Held, that the plea was overruled by the answer. *Tucker v. Wilkins*, 4 Law J. (N.S.) Chanc. 158.

No person need be made a party to a suit against whom no relief can be had, unless such a party has a common right with the plaintiff.

A agreed to sell to B an estate, and, before the purchase was completed, B advanced to A the sum of 2,000*l.*, in part of the purchase-money, which it was agreed should be returned, in case a good title should not be made out. To secure this repayment, A, with C as his surety, entered into a joint and several promissory note to B, payable on demand. The contract not being completed, B sued C on the note, on which C filed a bill, alleging that the title was good, &c., and praying an injunction:—Held, that the assignees of A, who had become a bankrupt, were not necessary parties. *Musgrave v. Newton*, 4 Law J. (N.S.) Chanc. 223.

A plea of a settled account and release, and that such account was a fair and true account, is bad in form, if it does not by averment distinctly negative the several matters charged in the bill, for the purpose of impeaching the fairness of the account, although such matters are positively denied by answer in support of the plea.

*Semble*—in pleading a release in bar of an account, it is not necessary, though it is more correct, to state it as being under seal. *Phelps v. Sproule*, 1 M. & K. 231.

To a bill filed by persons claiming title to an estate as co-heirs of A T, *ex parte maternad*, and charging an agreement and a correspondence in which they alleged their title was admitted, the defendant pleaded to the whole bill, that there was in existence an heir of A T, *ex parte maternad*:—Held, that the plea was properly overruled by the Courts below, on the ground that it ought to be accompanied by an answer as to the correspondence, and some of the other charges in the bill. *Harland v. Emerson*, 2 C. & F. 10, s.c. 8 Bligh, N.S. 62.

Bill, by certain persons, on behalf of themselves and the other members of a joint-stock company, to which an answer was put in, and a decree subsequently made, setting aside certain contracts between the plaintiff and the defendants, and directing various accounts and inquiries. A supplemental bill was afterwards filed in the name of the same plaintiff, against the same defendant, seeking, among other things, a specific lien on a part of the purchase-money paid to the defendant. The defendant pleaded, that one of the parties named as a plaintiff in the supplemental bill, had, previously to the filing of it, parted with all his interest in the partnership or company, and had ceased to be any longer a member or proprietor of the company, and that he had not any other interest. The plea was overruled. *Small v. Attwood*, 4 Law J. (N.S.) Exch. Eq. 1, a. c. 1 Y. & C. 39.

In 1800 A, B and C entered into partnership as attorneys, upon certain terms expressed in a memorandum. In 1808 A died, leaving B his executor and residuary legatee, and then B and C formed a partnership, and agreed to share the profits equally. In December 1826 their partnership was dissolved by consent. During the former partnership A and B had made advances, both jointly and severally, for C's private use; and during the latter partnership B made similar advances. In 1827 B became bankrupt. No settlement of accounts having taken place between any of the parties, in July 1831, B's assignees filed a bill, against B and C, for an account of the dealings of both partnerships, and of all the advances made by A and B; C pleaded the Statutes of Limitations (21 Jac. 1, and 9 Geo. 4,) to so much of the bill as related to such advances:—Held, that as the plea extended to the joint advances of A and B during the first partnership, it covered too much, and was, therefore, bad. *Robinson v. Field*, 5 Sim. 14.

A plea of adverse possession must be supported by averments sufficient to enable the plaintiff to know what defence he ought to make, and by distinct denials of facts which would make against the defendant.

Where the bill charges specifically the possession by the defendant of documents shewing the truth of the plaintiff's case, the defendant must support the plea by answer, denying such documents, or he must set them forth. *Hardman v. Ellames*, 3 Law J. (N.S.) Chanc. 74.

To a bill claiming title to an estate, the defendant pleaded that the title of the party through whom the plaintiff claimed, accrued in 1759, and that the possession of the estate had been ever since adverse to the plaintiff, and to persons through whom he claimed. Plea overruled, because it did not state particularly the facts on which the defendant meant to rely, as constituting the adverse possession, and therefore, the plaintiff could not know what case he had to meet. A plea of adverse possession, to a bill charging that the defendant has, in his custody, documents shewing the plaintiff's title, must be accompanied with an answer denying that charge. *Hardman v. Ellames*, 5 Sim. 640.

#### (F) IMPERTINENCE AND SCANDAL.

In a suit for specific performance of an agreement for a lease, the defendant may, by his answer, put in issue any fact tending to shew the insolvency of

the plaintiff, however it may impeach the plaintiff's respectability, but mere imputations on the moral character of the plaintiff are impertinent. *Pearson v. Knapp*, 1 M. & K. 312.

#### 8. IN THE ECCLESIASTICAL COURTS.

[See RATE, Church-rate.]

The plaintiff's allegation must not go beyond the citation. *Watney v. Lambert*, 4 Hag. Ec. 84.

In answer, a party first is bound only to answer to facts, not to his own motives, nor to his belief of the motives of another person; and, secondly, where the plea avers ignorance of the real nature of a transaction by a party to such transaction and to the suit, the other party is, in his answers to such plea, allowed to state facts, inferring full knowledge thereof and acquiescence therein. A party is not bound to answer, when his answer would criminate himself, nor (*comme semble*), when it would tend to degrade him. *Swift v. Swift*, 4 Hag. Ec. 139.

An allegation contradictory to the libel, both in law and in fact, admitted. *Swift v. Swift*, 4 Hag. Ec. 143.

Matter pleadable in the principal cause, cannot be pleaded after publication in exception to evidence. *Kenrick v. Kenrick*, 4 Hag. 127.

#### 4. CRIMINAL.

[See DWELLING-HOUSE—INDICTMENT—LARCENY—MANSLAUGHTER—MURDER—POACHING.]

#### POACHING.

[See GAME.]

#### POISONING.

To constitute the offence of administering poison, or other noxious substance, under 43 Geo. 3, c. 58, s. 1, some of the poison or noxious substance must be taken by, or applied to the person to whom it is administered; merely giving it, if no part is taken or applied, is not sufficient; but if any part is taken, it is not necessary that it should be swallowed. *Rex v. Cadman*, 1 R. & M. C.C. 114.

A sends poison, intending it for B, with intent to kill B, and it comes into the possession of C, who takes it, but does not die: A may be indicted for a capital offence on the statute 9 Geo. 4, c. 31, s. 11. *Rex v. Lewis*, 6 C. & P. 161. [Gurney]

#### POLICE ACT.

[See COSTS, Certificate—METROPOLITAN POLICE.]  
Establishment of police in Scotch burghs. 3 & 4 Will. 4, c. 46; 11 Law J. Stat. 105.

#### POLICE OFFICER.

[See CONSTABLE.]

#### POLL.

Time of taking in boroughs, limited to one day. 5 & 6 Will. 4, c. 36; 13 Law J. Stat. 66.

Poll book, proof of. *Oxford case*, P. & K. 96, a. c. C. & R. 161.



## PONE.

[See REMOVAL OF CAUSES.]

## POOR.

[See CHURCHWARDENS AND OVERSEERS—RATE—SESSIONS.]

Poor Law Amendment Act. 4 &amp; 5 Will. 4, c. 76; 12 Law J. Stat. App. i.

## (A) RELIEF.

## (B) SETTLEMENT.

(a) *By Birth.*(b) *Derivative.*(c) *By Marriage.*(d) *By Hiring and Service.*(1) *Hiring.*(2) *Service.*(3) *Residence.*(e) *By Apprenticeship.*(1) *Binding.*(2) *Stamp.*(3) *Assignment.*(4) *Inhabiting.*(f) *On a Tenement.*(1) *The Tenement.*(2) *The Renting or Settling upon.*(3) *The Occupation.*(4) *The Payment of Rent.*(g) *By Estate.*(h) *By Payment of Taxes.*(i) *By serving an Office.*

## (C) CERTIFICATE.

## (D) REMOVAL.

## (E) EXAMINATION OF PAUPERS.

## (A) RELIEF.

See 4 & 5 Will. 4, c. 76, s. 52, 54, 55, 56, 57, 58, 60, (Poor Law Amendment Act); 12 Law J. Stat. App. i. And as to relief under suspended orders and appeals—see same statute, s. 84.

The parish in which a pauper is settled, is under a legal liability to supply him with medical aid, while residing in another parish, unless his illness arise from accident or some sudden calamity; and the law will raise an implied promise to pay the surgeon's bill by the officers of the pauper's parish, from the time they have notice of the attendance of the surgeon, but not to pay for attendance previous to such notice. *Painter v. Williams*, 2 Law J. (n.s.) M.C. 105, s. c. 1 C. & M. 810; 3 Tyr. 894.

## (B) SETTLEMENT.

(a) *By Birth.*

A woman pregnant with a child likely to be born a bastard, goes, with the consent of the officers of the township where she is settled, to inquire after the father, in order to give intelligence of him to the overseers. On her return she is delivered of a bastard in another township:—Held, that the settlement of the bastard is in the latter township. *Rez v. Astley*, 4 Doug. 388.

Appellants against an order of removal, to establish a birth settlement, proved, first the marriage of the father and mother at K, in April 1749; and, secondly, the baptism at K of their four children,

viz., a daughter M, in May 1751; a son J, in May 1753; a daughter Elizabeth, in January 1755; and another daughter S, in December 1756:—Held, that the Sessions were not bound to infer from this evidence, that Elizabeth was born at K. *Rez v. Lubbenham*, 3 Law J. (n.s.) M.C. 50, s. c. 5 B. & Ad. 968; 3 N. & M. 37.

If an unmarried pregnant woman be removed out of a parish, by or at the instance of its officers, to prevent her being there delivered, the child when born, shall be deemed to have been born in that parish.

But not if the fraudulent removal has been effected without the privity of the parish officers. *Rez v. Mattersey*, 2 Law J. (n.s.) M.C. 16, s. c. 4 B. & Ad. 211.

Where the respondents rely on the birth-place of a legitimate child, as his place of settlement, that may be rebutted by the appellants proving the maiden settlement of the pauper's mother. *Rez v. St. Mary, Leicester*, 4 Law J. (n.s.) M.C. 95, s. c. 5 N. & M. 215; 3 Ad. & E. 644.

(b) *Derivative.*

A boy under twenty-one years of age, is hired out by his father for several years successively, the father receiving his wages, and an allowance for his washing, and the boy returning to his father's during illness. This is no emancipation. *Rez v. Stretton*, 4 Doug. 208.

A girl of ten years of age, who is by accident unable to maintain herself, and whom her father is unable to maintain, is placed in the workhouse, where she is supported and remains:—Held, that this is no emancipation. *Rez v. Broadhembury*, 4 Doug. 241.

A devisee of a copyhold was admitted after he had resided more than forty days on the copyhold. His son became emancipated after the expiration of the forty days, and before the admittance:—Held, by Lord Denman, C. J., Littledale, J., and Patteson, J., (Parke, J. *dissentiente*.) that the father, by such residence, gained a settlement, which was communicated to the son. *Rez v. Thruscross*, 3 Law J. (n.s.) M.C. 83, s. c. 1 Ad. & E. 126; 3 N. & M. 284.

An idiot does not become emancipated by attaining the age of twenty-one; and, consequently, his settlement continues to follow that of his father, gained after he had attained that age; although he was left by his father before he had attained it. *Rez v. Much Cowarne*, 1 Law J. (n.s.) M.C. 4, s. c. 2 B. & Ad. 861.

(c) *By Marriage.*

To render a marriage void for false publication of banns, under the 4 Geo. 4, c. 76, s. 22, it is necessary that both parties should know, at the time of the marriage, that there has been such false publication. *Rez v. Wroston*, 2 Law J. (n.s.) M.C. 64, s. c. 4 B. & Ad. 640; 1 N. & M. 712.

Where, on appeal against an order of removal, it was proved by the respondents, that the pauper was married to J S, on the 11th of April 1828, in answer to which the appellants proved a prior marriage of J S with E, and that E was heard of from Hobart Town, on the 17th of March 1828:—Held, that this was sufficient evidence, from which the Ses-

sions might presume that E was living at the time of the second marriage. *Rez v. Harborne*, 4 Law J. (n.s.) M.C. 49, s.c. 4 N. & M. 341; 2 Ad. & E. 540.

(d) *By Hiring and Service.*

(1) *Hiring.*

No settlement is to be acquired, after the passing of the Poor Law Amendment Act, by hiring and service. 4 & 5 Will. 4, c. 76, s. 64; 12 Law J. Stat. App. xv. And see s. 65, as to settlement incomplete at the time of the passing of the act.

A negress was brought into this country by her master, and continuing to serve him here for a year, does not gain a settlement, for there is no hiring. *Rez v. Thames Ditton*, 4 Doug. 300.

A hiring at weekly wages for so long time as the master wants a servant, is not hiring for a year, and gains no settlement. *Rez v. Elslack*, 4 Doug. 211.

The owners of a colliery entered into a written agreement with certain pitmen, by which the latter agreed to work a colliery, under the direction of the former, upon certain terms, regulated by the quantity of coals produced. There were certain provisions more in detail, including a fine of 1s. a day by the men, if on any day they absented themselves, or did not work a reasonable day's work:—Held, that this was not an exceptive hiring, as it did not appear that the master could not have demanded the service at any time during the twenty-four hours; and, therefore, that a service under this agreement conferred a settlement. *Rez v. St. Helen's Auckland*, 2 Law J. (n.s.) M.C. 58, s.c. 4 B. & Ad. 718; 1 N. & M. 462.

A servant at the time of hiring for a year, told his intended master that he had served in the local militia for the preceding year, and that he expected to be called out again in the year then current. It was therefore agreed that he should allow his master to deduct out of his wages 1s. a day, for as many days as he should be absent on service with the militia. He served his master under this hiring for the year, except fourteen days, during which he served in the militia; and for which a deduction was made as agreed:—Held, that this was a good conditional hiring; and, the Militia Act having declared that service under the act should not be deemed an absence from the service of a master, that there was a year's service, sufficient for the purpose of settlement. *Rez v. Elmley Castle*, 1 Law J. (n.s.) M.C. 78, s.c. 3 B. & Ad. 826.

Pauper, on the 16th of May 1811, being in the local militia, hired himself to the colonel of his regiment, to serve for a year, and served under that contract. On the 4th of May 1812, the regiment was assembled for training, and continued in training till the 19th of May. During that time the pauper was under military control, though he also served the colonel as an in-door servant. While the regiment was assembled, he received pay from the Crown, and also his wages from his master:—Held, that the pauper gained a settlement by hiring and service, the fact of his being a militiaman having been known to the master at the time of the hiring. *Rez v. St. Mary, Colchester*, 3 Law J. (n.s.) M.C. 60, s.c. 5 B. & Ad. 1023; 3 N. & M. 113.

A person who had been enrolled a member of a

volunteer corps, held to have been in the same situation as a militia-man, and incapable, whilst a member of the corps, of entering into a contract of hiring and service, so as to gain a settlement. *Rez v. Witniam*, 4 Law J. (n.s.) M.C. 84, s.c. 4 N. & M. 447; 2 Ad. & E. 648.

A yearly servant, who was about to be committed for not paying a fine before a Justice, was advised by her mistress not to pay it; and was told to return to her service when the term of her imprisonment should have ended. She did so:—Held, that this was a dispensation of the service for the time passed in prison. *Rez v. Coningsby*, 2 Law J. (n.s.) M.C. 8, s.c. 4 B. & Ad. 156; 1 N. & M. 199.

Pauper was hired as a shepherd for a term rather less than a year, ending at Old Michaelmas 1825, when he was to receive 5l. 10s. wages. Upon and for few days after Old Michaelmas, he continued to live with and work for his master as before, but without any new agreement. The master then paid the wages to the pauper's father, who had also been in his service during the above-mentioned term; and asked, "if he and his sons chose to go on with him." The pauper continued in the service as before, till Lady-day 1826, when the master, being about to quit the farm, paid him his wages down to that time, and he went into the service of the in-coming tenant:—Held, that the hiring after Michaelmas 1825, was not a general hiring, and that the service under it, connected with that of the preceding year, did not give a settlement: and the Court quashed an order of sessions made in favour of such settlement. *Rez v. Ardington*, 1 Ad. & E. 260, s.c. 3 N. & M. 304.

Contract by servant to serve cloth merchants for five years, and to do any part of the work the master should think proper. This being done, he was to be paid such and such wages. The hours for working, to be from six in the morning until seven in the evening; and to be paid for all over-time, and deducted for all short, either in sickness or in health:—Held, by Denman, C. J., Parke, J., and Patteson, J., that this was an absolute hiring; *dis-sentiente*, Taunton, J., who thought it was an exceptive one. *Rez v. Ossett-cum-Gawthorpe*, 2 Law J. (n.s.) M.C. 31, s.c. 4 B. & Ad. 216; 1 N. & M. 161.

The pauper was hired for a year, at 4s. a week, to work ten hours a day, from five o'clock in the morning till six in the evening, and to leave off in the middle of the day on Saturday, so as to make up the ten hours a day:—Held, that this was an exceptive hiring. *Rez v. Norton Bavant*, 4 Law J. (n.s.) M.C. 26, s.c. 4 N. & M. 687; 3 Ad. & E. 161.

(2) *Service.*

Where a servant is disabled by an accident, and after his recovery tenders himself within the year to return to his master, who refuses to receive him, the settlement of the servant is not prevented by such refusal. *Rez v. Sharrington*, 4 Doug. 11.

A servant a few days before the expiration of the year's service, is committed for getting a bastard child, the master being one of the overseers, and one of the persons apprehending him. At the expiration of the year he gives a bond to indemnify the parish, and is released. His master then pays

his wages, deducting a sum for the time he has been in custody:—Held, that no settlement was gained by this service. *Rex v. North Cray*, 4 Doug. 243.

A female of full age, who lived with her father, and was the main support of his family, hired herself, with his consent and at his desire, to a farmer in an adjoining parish, to work at weekly wages during his harvest; she worked for him under this hiring for three weeks; when she received her wages and returned home. In the following autumn, she again hired herself to the same farmer, and served him for a fortnight and two days; and on her return home she gave her wages to her father, who expended them for the use of his family. On both these occasions, she intended, and was expected by her father, to return home as soon as the harvest work was done. The Court of Quarter Sessions having, upon these facts, found that the pauper was emancipated:—Held, by Denman, C. J., Taunton and Patteson, Js., (*Littledale, J. dissentiente*), that their decision was right. *Rex v. Oulton*, 3 Law J. (N.S.) M.C. 33, s. c. 5 B. & Ad. 958; 3 N. & M. 62.

Pauper was hired for a year as a footman and groom, by a West India planter, residing at M, in England, at 7*l.* wages. He went into the master's service in February 1828, and in May following engaged to bind himself to serve the same master at Berbice, as clerk and overseer for three years, from the first day of his arrival there, at a certain salary. Soon after their arrival at Berbice, the pauper entered on the office of overseer and clerk, but he also continued to act as servant, and lived in his master's house, and did so until the following February, when they returned to England, the pauper acting in the capacity of servant on the homeward voyage, and after his arrival in England. No further contract had ever been entered into for the pauper's service as overseer. The master paid him his footman's wages till the time of their going abroad, and, on their return home, paid him 20*l.* as salary for the service in Berbice; after which he gave him weekly wages, under a new agreement:—Held, that there was no dissolution of the first contract, and that the pauper having served forty days under the first hiring, gained a settlement in M. *Rex v. Buckingham*, 3 Law J. (N.S.) M.C. 64, s. c. 5 B. & Ad. 953; 3 N. & M. 72.

### (3) Residence.

A yearly servant, who had afterwards married, and who went, by permission, as an indulgence, every Saturday to his wife in another parish, returning every Monday morning to work in his master's parish:—Held, to have gained a settlement in the parish where he went to see his wife on the last night of his year, and where he slept that night,—the whole number making up more than forty nights. The rule, in this respect, differs from the case of an apprentice; in which case, such an absence would not be considered as in furtherance of the object of the apprenticeship. *Rex v. Dremmerthion*, 1 Law J. (N.S.) M.C. 40, s. c. 3 B. & Ad. 420.

For the purpose of a settlement by hiring and service, it is not necessary that the whole of the forty days' residence should be under a yearly hiring.

It is sufficient if a part of such residence be under such hiring, and the whole of the forty days' residence within the compass of one year. *Rex v. Child Okeford*, 1 Law J. (N.S.) M.C. 88, s. c. 3 B. & Ad. 809.

### (c) By Apprenticeship.

See 3 & 4 Will. 4, c. 63; 11 Law J. Stat. 111. No settlement is to be gained by apprenticeship in the sea service, after the passing of the Poor Law Amendment Act. 4 & 5 Will. 4, c. 76, s. 67; 12 Law J. Stat. App. xv.

### (1) Binding.

Where an apprenticeship is intended, but, to save expense, an unstamped agreement is entered into, whereby the pauper agrees to serve the master in his business of a carpenter for four years, it is a defective apprenticeship, and not a hiring and service. *Rex v. Hignam*, 4 Doug. 238.

A binding, in evasion of the express provision of an act of parliament passed for effecting an important public object, is inoperative; and no settlement can be gained by a service under it.

Accordingly, the statute 10 Geo. 2, c. 31, passed, among other things, to guard against the consequences of a want of skill in watermen, provided that no waterman should take more than two apprentices; and that none should take an apprentice who had not a house to lodge him in, and that the apprentice should lodge in the house with the master. A master who already had two apprentices took a third; but, apparently to comply with the terms of the statute, the apprentice was, in form, bound to another person, who in fact had no house to lodge the apprentice; and the service took place with the master really intended:—Held, that the binding was absolutely void; and that the service under it conferred no settlement. *Rex v. Gravesend*, 1 Law J. (N.S.) M.C. 20, s. c. 3 B. & Ad. 240.

An indenture of apprenticeship, properly drawn up, to which the father of the intended apprentice, as well as the apprentice himself, were parties, was executed by a person in their presence, at their request, writing each of their names opposite the seal intended for them. The indenture was not read over to either, who were both unable to write:—Held, to be a sufficient execution of the indenture. *Rex v. Longnor*, 2 Law J. (N.S.) M.C. 62, s. c. 4 B. & Ad. 647; 1 N. & M. 576.

Where a testator devised lands to the churchwardens and overseers of the poor of a parish for the time being; in part for the benefit of poor widows, and in part for binding out as apprentices poor children of the parish:—Held, that the fund was not a public parochial fund, within the meaning of the 56 Geo. 3, c. 139, s. 11, so as to require the assent of Justices to the indenture of apprenticeship of a child so bound, and the premium for which binding was paid by the churchwardens out of that fund. *Rex v. Halesworth*, 1 Law J. (N.S.) M.C. 71, s. c. 3 B. & Ad. 714.

A local act gave power to a corporation to bind out apprentices, "provided the child be not bound for a longer time than until he or she shall have attained a certain age:"—Held, that a deed of apprenticeship by which a boy was bound out for a longer

time than that mentioned in the proviso was voidable only, and not void, and that he gained a settlement by residence under it. *Rez v. St. Gregory*, 4 Law J. (n.s.) M.C. 9, s. c. 2 Ad. & E. 99; 4 N. & M. 137.

Apprenticeship to a person, who at the time of the binding, is residing in the parish under a certificate, will not confer a settlement on the person serving under it; although the master afterwards, and during the apprenticeship, rent a tenement of the annual value of 10*l.* in the parish. *Rez v. Leeds*, 2 Law J. (n.s.) M.C. 32, s. c. 4 B. & Ad. 248; 1 N. & M. 650.

When it is proposed to bind an apprentice under the 59 Geo. 3, c. 139, notice is necessary to be given to the parish officers of the parish into which it is proposed to bind, although the Justices have jurisdiction over both parishes, and they are in the same county. *Rez v. Threlkeld*, 2 Law J. (n.s.) M.C. 20, s. c. 4 B. & Ad. 229; 1 N. & M. 14.

A local act incorporated certain persons by the name of "The guardians of the poor within the hundred of Stow, in the county of Suffolk;" there was a power to the body at large to elect directors and acting guardians, for putting the powers of the act in execution; the directors and acting guardians were empowered to bind out poor children:—Held, that such binding should be in the name of the corporation by its corporate name; and that a binding, by deed, by "the directors and acting guardians," to which deed the corporate seal was affixed, was invalid. *Rez v. Haughey*, 2 Law J. (n.s.) M.C. 56, s. c. 4 B. & Ad. 650; 1 N. & M. 625.

The pauper agreed with a master flannel-manufacturer, for three years, to learn the art of weaving flannels, and was to be paid by his master half of what he could get, and to find himself meat, drink, and lodging; and the master was to have the other half for teaching him the art of weaving. He left his master by consent, and afterwards applied to J W, another master manufacturer, to take him upon the same terms, informing him of his having left, and what the contract was, and how he had been employed to make slags and throw the shuttle. J W said he would take him upon the same terms, but for twelve months only; adding, that twelve months would be long enough, if he was a good boy:—Held, that the agreement with the latter master was a defective contract of apprenticeship, and not for hiring and service; consequently, that no settlement was gained by service under it. *Rez v. Newton*, 3 Law J. (n.s.) M.C. 79, s. c. 1 Ad. & E. 238; 3 N. & M. 306.

The overseers of a parish, in which the mother and family of a poor child are resident, and to which she is chargeable, have power, under the statute 43 Eliz. c. 3, s. 35, to bind out such poor child, although at the time of executing the indenture, the child be residing in another parish; and it is not necessary for them to go through the formality of sending for the child, in order to bind it out. *Rez v. St. George's, Exeter*, 4 Law J. (n.s.) M.C. 100, s. c. 4 N. & M. 61; 3 Ad. & E. 373.

A person of the age of twenty-one years, is not a poor child whom the parish officers are to bind out apprentice, with the assent of two Justices, within the meaning of the 56 Geo. 3, c. 139.

Section 11 of that statute extends only to indentures of apprenticeship of poor children; and therefore, an indenture whereby a person of the age of twenty-four is bound apprentice, part of the premium being paid out of the public parochial funds, does not require the assent of two Justices. *Rez v. Bedwardine*, 2 Law J. (n.s.) M.C. 68, s. c. 5 B. & Ad. 169.

The trustees of a charity, established for placing out poor boys of a parish as apprentices, bound out a poor boy of the parish, and paid the premium, the parish officers furnished him from the parochial funds, with a suit of clothes, all of which would not have been given to him at the time, except with the prospect of his being bound; but no stipulation was made on the subject by or with the master:—Held, that the supply of clothes was not an expense incurred by the parochial funds, within the 56 Geo. 3, c. 139, s. 11, and, consequently, that the indenture did not require the approval of two Justices. *Rez v. Quainton*, 3 Law J. (n.s.) M.C. 93, s. c. 1 Ad. & E. 133; 3 N. & M. 289.

## (2) Stamp.

The assignment of an indenture of apprenticeship is not within the provision of the stat. 8 Anne, c. 9; and therefore, if it be produced properly stamped, although stamped after the time limited by that statute for stamping indentures of apprenticeship, it will be available. *Rez v. Ide*, 1 Law J. (n.s.) M.C. 9, s. c. 2 B. & Ad. 866.

A public charity agreed to pay 4*l.* as a premium with an apprentice; and that sum was mentioned in the indenture, as the consideration; but, before it was executed, the mother of the apprentice, unknown to the officers of the charity, agreed to pay the master 1*l.* in addition to the 4*l.* to be paid by the charity. The stamp was sufficient to cover the whole 5*l.*:—Held, nevertheless, that the indenture was void by the stat. 8 Anne, c. 9, s. 39, the true consideration not being stated; and that no settlement could be gained under it. *Rez v. Baildon*, 1 Law J. (n.s.) M.C. 34, s. c. 3 B. & Ad. 427.

An agreement by the father of an apprentice to provide him with clothes, &c. is not such a benefit to the master as to render the indenture liable to stamp duty, although the master covenants, on the face of the indenture, to provide for the apprentice. *Rez v. Aylesbury*, 1 Law J. (n.s.) M.C. 38, s. c. 3 B. & Ad. 569.

Where 15*l.* was paid by a charity on binding out a person as an apprentice, and the master to whom he was so bound subsequently assigned the apprentice to another, and paid part of the sum, namely, 6*l.*, to the new master:—Held, that this assignment could not be considered within the exemption from stamps, as an assignment upon money given by a public charity. *Rez v. Fakenham*, 4 Law J. (n.s.) M.C. 77, s. c. 4 N. & M. 553; 2 Ad. & E. 528.

By the 37 Geo. 3, c. 111, an additional duty was imposed on certain deeds, and it contained a proviso, that it should not extend to any indenture of apprenticeship, where a sum or value not exceeding 10*l.* shall be given, &c.:—Held, that this only extended to exempt money contracts, where some sum not exceeding 10*l.* was paid, and that an indenture of apprenticeship, where no sum was given,

was not exempt. *Rex v. Mabe*, 4 Law J. (n.s.) M.C. 107, s. c. 5 N. & M. 241; 3 Ad. & E. 531.

### (3) Assignment.

To constitute a valid assignment of a parish apprentice, under the 32 Geo. 3, c. 57, there must be, at least, an express authority, by the original master to another person, authorizing him to assign the apprentice. Whether the master must himself execute the assignment—*quære*.

Accordingly, where the master of a parish apprentice resided, permanently, abroad, his steward, having the general management of his estate, executed, in the master's name, an assignment of such apprentice, and charged the expenses in his accounts, which were subsequently allowed by the master; but the master had given no previous direction on the subject:—Held, that, whether the execution by the master was necessary or not, this was not a valid assignment by the master. *Rex v. Spreyton*, 1 Law J. (n.s.) M.C. 79, s. c. 3 B. & Ad. 818.

### (4) Inhabiting.

There being disputes between a master and his apprentice, the master (who was a cork-cutter) being under the usual engagement to maintain him, it was agreed that the master should supply the apprentice with a quantity of corks every week to enable him to maintain himself. This was carried into effect; and the apprentice went and lived with his father; receiving the corks weekly, disposing of them, and working occasionally for other persons; but doing no work for the master:—Held, that the residence with the father under these circumstances was referable to the character of apprentice, it being a part of the agreement, by the indenture, that the master should maintain the apprentice; and, consequently, that a forty days' residence in the parish where the father lived was sufficient to confer a settlement. *Rex v. Banbury*, 1 Law J. (n.s.) M.C. 64, s. c. 3 B. & Ad. 706.

Actual service is not necessary to shew that a person bound as an apprentice is filing that character at a particular time. Accordingly, where an apprentice, being ill, was desired by his master to go to his mother, who lived in another parish, promising to come and agree with her for her son's board and maintenance; and accordingly the apprentice so went, and the master accordingly came there, promised to remunerate the mother, and took him to a medical gentleman for advice; and the pauper resided there eight weeks, but, during that time, did not perform any actual service for his master:—Held, that, nevertheless, he "inhabited" in the parish in the character of an apprentice, within the meaning of the 3 Will. & Mary, c. 11, s. 8, and thereby gained a settlement. *Rex v. Linkinhorne*, 1 Law J. (n.s.) M.C. 42, s. c. 3 B. & Ad. 413.

An apprentice was told by his master, that he had no work for him to do, and that he had better see if he could get a place, and that one B, a person of the same trade, wanted hands. The apprentice went and engaged, with the consent of his master, to work for B at the trade, being paid by the piece. Subsequently, the apprentice learning he could get better pay from another person in the

same trade, wrote to his old master for leave, and received verbal leave. He agreed with, and worked for that person for a considerable time, supporting himself by what he received from his earnings:—Held, by Denman, C. J., Littledale J. and Patteson, J., that the residences, while in these services, were under the indenture, and sufficient to confer a settlement; *Parke, J. dissentiente*. *Rex v. Banbury*, 2 Law J. (n.s.) M.C. 66, s. c. 5 B. & Ad. 176; 2 N. & M. 105.

The pauper was bound apprentice to J and W M, who were partners. After a time, J and W M dissolved partnership, and J M took into partnership P, and they continued to carry on the same business. The pauper continued to serve with J M and P till the death of J M, and afterwards with P alone; but it did not appear that W M knew anything of the partnership between J M and P, or that he ever gave his assent to the pauper's serving with P:—Held, that the residence of the pauper with P, after the death of J W, could not be considered as a residence which had reference to the indenture; and that, therefore, the pauper gained no settlement thereby. *Rex v. St. Martin's, Exeter*, 4 Law J. (n.s.) M.C. 54, s. c. 4 N. & M. 388; 2 Ad. & E. 665.

The consent of the first master of an apprentice to a service under another master, is sufficiently expressed by his giving the apprentice a character as servant. *Rex v. St. Mary, Lambeth*, 4 Doug. 329.

On a special case, the Sessions found, that J E by indenture in 1774, was put apprentice to P for and in respect of W's estate; and there was a covenant by P to teach J E the business of husbandry. The indenture was executed by the parish officers, and W P was a farmer and tenant to W, who was a stocking-weaver. J E never served P, but lived with W long enough to gain a settlement by apprenticeship, if he could acquire one by such service. The Sessions not having found that P ever executed the indenture, or assigned the apprentice to, or assented to his service with W, it was held, that a settlement by apprenticeship was not proved. *Rex v. St. Cuthbert, Wells*, 3 Law J. (n.s.) M.C. 35, s. c. 5 B. & Ad. 939; 3 N. & M. 100.

A boy bound out by a parish an apprentice in husbandry, till he should be twenty-one years of age, served the master, first in husbandry, and afterwards as a miner. He then left his master, and went to live with his own father, (who was a miner,) and worked with his father at the same mine at which he had worked with his master. The master afterwards agreed with the father, that the apprentice should remain with the father, and the indenture be given up on a subsequent day, upon the payment of a sum of money. On the day appointed, which was before the passing of the 56 Geo. 3, c. 139, the money was paid, and the indenture given up to the father. The son was then under age. He worked with the father as a miner till his majority, when the indenture was given up to him by his father. From his first coming to his father the father had received his wages, and maintained him:—Held, that even supposing the parties to have had power to dissolve the apprenticeship, and to have intended to do so, it was not dissolved till the money was paid, and that a residence of forty

days between the making of the agreement and the payment of the money, was a residence under the apprenticeship, and conferred a settlement. *Rex v. Guinear*, 3 Law J. (n.s.) M.C. 81, s. c. 1 Ad. & E. 152; 3 N. & M. 297.

(f) *On a Tenement.*

[See Certificate, post.]

After the passing of the Poor Law Amendment Act, no person can acquire a settlement by occupying a tenement, unless he shall have been assessed to the poor-rate, and paid the same in respect of such tenement, for one year. 4 & 5 Will. 4, c. 76, s. 66; 12 Law J. Stat. App. xv.

(1) *The Tenement.*

A building consisting of two houses without any internal communication, but under the same roof—Held, to be a building, within the meaning of the 6 Geo. 4, c. 57, the occupation of which would confer a settlement. *Rex v. Macclesfield*, 1 Law J. (n.s.) M.C. 6, s. c. 2 B. & Ad. 870.

A man by marrying a woman who was a yearly tenant of premises under the annual value of 10*l.*, held to gain a settlement—although the renting by her was subsequent to the 59 Geo. 3, c. 50. *Rex v. North Cerney*, 1 Law J. (n.s.) M.C. 39, s. c. 3 B. & Ad. 463.

Whether the hiring and occupying of two distinct and separate buildings, at rents amounting to 10*l.*, will satisfy the statute 6 Geo. 4, c. 57—*quære*.

But a room used as a shop, part of a dwelling-house, having an external communication with the street, and an internal communication with the dwelling-house—Held, not to be a separate and distinct building, within the above act; although the Sessions, for the purpose of raising the first question, had found it to be a separate and distinct building. *Rex v. Rickingham*, 2 Law J. (n.s.) M.C. 22, s. c. 1 N. & M. 47.

A dwelling-house in one part of a parish, hired of a person at a rent less than 10*l.* a year, and a building in another part of the parish, hired of another person, at a rent less than 10*l.* a year, but the combined rents, exceeding 10*l.*, may be united for the purpose of satisfying the requisites of the 6 Geo. 4, c. 57, in order to obtain a settlement. *Rex v. Tadcaster*, 2 Law J. (n.s.) M.C. 63, s. c. 4 B. & Ad. 703; 1 N. & M. 466.

The pauper went into the service of B, and was to make and burn pots, to do which he was to have the use of the kiln, &c. B was to keep the kiln and sheds in repair, &c., and the pauper resided in a cottage which he rented of B. This agreement was put an end to, and a second agreement entered into, by which the pauper was to pay to B 6*l.* after each burning, for the use of the kiln, &c. B was to keep the kiln, &c. in repair, and the pauper was to dig the clay, and do as he liked with the ware:—Held, that, upon the construction of the second agreement, the pauper must be considered as standing in the relation of tenant to B of the pot-kiln, &c.; and that being a tenement of the value of 10*l.*, gave a settlement. *Rex v. Iken*, 4 Law J. (n.s.) M.C. 27, s. c. 2 Ad. & E. 147; 4 N. & M. 117.

A person hiring a house and stable for a year, in a parish, under different landlords, at rents amounting together to 10*l.*, holding such house and stable,

and residing in the house, for the year, and paying the whole rent, acquired a settlement in such parish, under the act 59 Geo. 3, c. 50, though the house and stable were entirely separate from each other. *Rex v. Gosforth*, 1 Ad. & E. 226, s. c. 4 N. & M. 303.

(2) *The Renting or Settling upon.*

A, by lease, demised a house and land to B and C, for a term of years, at 16*l.* per annum. There was a covenant by them jointly and severally to pay taxes and rates, &c., but none to pay rent. B occupied the whole premises, and paid the rent for five years:—Held, that, the demise being joint, the rent was payable by the two jointly, and that each could only be considered as having rented a tenement at 8*l.* a year, and, consequently, that B did not gain a settlement, either by renting the tenement, or by being rated and paying rates in respect of it. *Rex v. Great Wakering*, 3 Law J. (n.s.) M.C. 51, s. c. 5 B. & Ad. 971; 3 N. & M. 47.

A curate licensed by the bishop at a yearly salary, according to the 57 Geo. 3, c. 99, resided in the rectory-house, which was assigned to him pursuant to the same statute, and was above the value of 10*l.* a year, for more than forty days before the passing of 59 Geo. 3, c. 50:—Held, that this was a coming to settle, within the statute 13 & 14 Car. 2, c. 12, and that a settlement was gained thereby. *Rex v. St. Mary, Newington*, 3 Law J. (n.s.) M.C. 10, s. c. 5 B. & Ad. 540; 2 N. & M. 357.

Under stat. 1 Will. 4, c. 18, no settlement is gained by occupying the same tenement for a continuous year, the occupation during part of the year being under one hiring for a year, and during the remainder under another hiring for a year. If W, being a tenant from year to year to C, let to T, from year to year, and W give up his own interest to C, by verbal agreement, and afterwards T agree verbally with C to become his tenant from year to year, such last agreement is a new hiring by T, and puts an end to his former hiring. *Rex v. Banbury*, 3 Law J. (n.s.) M.C. 76, s. c. 1 Ad. & E. 136; 3 N. & M. 292.

A settlement was gained under 6 Geo. 4, c. 57, by renting, under distinct hirings, of the same owner, for the same year, two dwelling-houses, (one of which the tenant underlet, and never personally occupied), at the rents of 8*l.* and 5*l.* a year, in different parts of the parish. *Rex v. Wootton*, 3 Law J. (n.s.) M.C. 98, s. c. 1 Ad. & E. 232; 3 N. & M. 312.

A rented a house in the appellant parish of L, as tenant from year to year, and died. His widow, a fortnight after his death, told the landlord that she wished to pay the rent weekly; he assented, and she paid it weekly for the following nine months, when she quitted on a week's notice. Two months after her husband's death, the attorney for the respondent parish (which had relieved the widow,) told her she had a right to take out an administration if she chose, and if she would leave it to him, he would do whatever was necessary; she assented. The letters of administration were obtained, and the pauper resided forty days afterwards in the appellant parish. The Sessions found that the administration was fraudulently taken out by the direction and at the expense of the respondent

parish, for the purpose of settling the pauper in the appellat parish.

Held, that as the widow was not only entitled, but bound by law, to take out administration, there was no fraud in the transaction which could prevent her from taking, as administratrix, her husband's interest as yearly tenant, and thereby acquiring a settlement. But the Court referred it back to the Sessions as a question of fact, whether the widow, after administration granted, continued a weekly tenant, or became a tenant from year to year, in her husband's right. *Rex v. Great Glenn*, 5 B. & Ad. 188, s. c. 2 N. & M. 91.

### (3) *The Occupation.*

To give a settlement by renting a tenement, since the stat. 1 Will. 4, c. 18, there must be an occupation, in fact, of the whole dwelling-house or building of which the tenement consists, by the party hiring the same: and, therefore, where A took a lease for a year of a house consisting of three floors, at the rent of 40*l.* per annum, after he had been in possession three months, underlet two floors by the quarter, at the rate of 22*l.* per annum, to another person, who occupied them for two quarters, the ground floor only, during that time, being occupied by A, and in all other respects the provisions of 6 Geo. 4, c. 57, and 1 Will. 4, c. 18, were complied with,—it was held, that A did not gain a settlement. *Rex v. St. Nicholas, Rochester*, 3 Law J. (n.s.) M.C. 45, s. c. 5 B. & Ad. 219; 3 N. & M. 21.

A person rented two houses under one continuous roof, having distinct outer doors, and no internal communication; he took the whole at one hiring, but paid distinct rents for them of 6*l.* each per annum, occupied one house himself, and allowed his son exclusive possession of the other:—Held, that by such renting and occupation for a year, he acquired a settlement under 6 Geo. 4, c. 57, s. 2. *Rex v. Iver*, 3 Law J. (n.s.) M.C. 37, s. c. 1 Ad. & E. 228; 3 N. & M. 28.

In order to gain a settlement by renting a tenement since the statute 1 Will. 4, c. 18, the person renting it must be in the actual occupation of the whole house. Where, therefore, the pauper let part to a person who had the exclusive occupation of that part for three weeks:—Held, that he gained no settlement.

The statute applies equally to a case where the agreement was entered into, and the occupation under it commenced, previous to the passing of 1 Will. 4, c. 18, as to one where the agreement was made after the passing of the act. *Rex v. St. Nicholas, Colchester*, 4 Law J. (n.s.) M.C. 46, s. c. 4 N. & M. 422; 2 Ad. & E. 599.

Agreement for tenancy of a cottage and land for a year at a rent exceeding 10*l.*; but it was agreed that the land should be entered at Lady-day, and the cottage not until the May-day in the same year.—Entry, occupation, and payment of rent accordingly,—Held sufficient to confer a settlement. *Rex v. Ormesby*, 2 Law J. (n.s.) M.C. 19, s. c. 4 B. & Ad. 214; 1 N. & M. 27.

### (4) *The Payment of Rent.*

The second section of the act, 1 Will. 4, c. 18, passed to remove doubts as to the 7 Geo. 4, c. 57,

is retrospective in its operation; consequently, all settlements in question upon the construction of that section are to be governed by the rules of interpretation given in the former act; although the facts may have occurred before the passing of the former statute.

Accordingly, a pauper who had lived in, held, and occupied, a tenement at a yearly rent of 36*l.*, and had paid 29*l.* of that rent before the 1 Will. 4, c. 18, was passed, was held to have thereby gained a settlement under the 6 Geo. 4, c. 57. *Rex v. Dursley*, 1 Law J. (n.s.) M.C. 37, s. c. 3 B. & Ad. 466.

The 1 Will. 4, c. 18, is retrospective as to the 2nd section only; consequently, where a tenement was held and occupied between the time of passing the 6 Geo. 4, c. 57, and that of the passing of the first-mentioned act; and the rent was paid, but not "by the party hiring the same"—Held, to be sufficient for the purpose of gaining a settlement. *Rex v. Ruthin*, 2 Law J. (n.s.) M.C. 71, s. c. 5 B. & Ad. 215; 2 N. & M. 97.

### (g) *By Estate.*

No person is to retain a settlement by estate, longer than he shall inhabit within ten miles of the parish. 4 & 5 Will. 4, c. 76, s. 68, Poor Law Amendment Act; 12 Law J. Stat. App. xv.

A father, in consideration of a debt of 26*l.*, and of natural love and affection, let his son into possession of an estate exceeding 30*l.* in value, but executed no conveyance to him. The son received the rents, and afterwards sold the estate, the father conveying by the direction of the son:—Held, that this conferred no settlement by estate upon the son, it being for want of an actual conveyance, in the nature of a purchase for a pecuniary consideration, less than 30*l.*, and, therefore, within the 9 Geo. 1, c. 7. *Rex v. Piddlehinton*, 1 Law J. (n.s.) M.C. 43, s. c. 3 B. & Ad. 460.

Surrender by a father to his son of a copyhold estate. The consideration did not appear upon the surrender, but it was verbally agreed that the son should pay off a charge of 16*l.* upon the estate, and allow his father and mother to reside upon it, rent free, for the rest of their lives:—Held, not to be a purchase within the meaning of the 9 Geo. 1, c. 7, and that the son gained a settlement in respect of this estate. *Rex v. Hatfield Broad Oak*, 1 Law J. (n.s.) M.C. 39, s. c. 3 B. & Ad. 566.

A person seised in fee agreed among his children to divide his land in parcels among his children, for them to build upon. Accordingly, the husband of one of his daughters built upon the portion set out for himself, and resided on it sixteen or seventeen years:—Held, that he thereby gained a settlement by estate.

The preceding facts being shewn at sessions, a deed was put in appearing to be a conveyance by the son of the party seised to the husband of the sister of the party conveying, by which the son conveyed, in consideration of two guineas. To meet this, evidence was offered to shew that this was intended merely as a conveyance to confirm the previous title; and that the two guineas were never paid or intended to be paid:—Held, that such evidence was properly received by the Sessions; and that the effect of it was to leave the facts, applicable to a settlement by estate, to their ordinary

effect. *Rex v. Cheadle*, 1 Law J. (N.s.) M.C. 75, s.c. 3 B. & Ad. 833.

A inclosed and built upon part of the waste of a manor, with the knowledge of the lessees of the manor. Some years afterwards he gave, by parol, a part of the encroachment to his wife's illegitimate son, upon his marriage. The wife's son built a cottage upon that part, and enjoyed it for sixteen years. If the time, during which the father-in-law held the whole, were to be added, there would be thirty years' possession:—Held, that there was twenty years of adverse possession, and that the son-in-law gained a settlement. *Rex v. Pensax*, 1 Law J. (N.s.) M.C. 82, s.c. 3 B. & Ad. 815.

The father of an infant devisee, who is above the age of fourteen years at the death of the deviser, is not entitled to be considered as the guardian in socage of his child. And in his character of guardian by nature, he does not take any legal interest in the land, sufficient to confer upon him a settlement by estate by residing upon the estate devised. *Rex v. Sherington*, 1 Law J. (N.s.) M.C. 71, s.c. 3 B. & Ad. 714.

A surrender to the lord of an old lease by one member of a family, and the taking of a new lease by another member, at a nominal fine to the lord, is not a purchase within the 9 Geo. 1, c. 7, although the property be under the value of 30*l*. *Rex v. Lyddinch*, 2 Law J. (N.s.) M.C. 5, s.c. 4 B. & Ad. 150; 1 N. & M. 38.

In order to prove a settlement by estate in the parish of B, the respondents put in a deed of feoffment, which conveyed an estate, set out on the deed by abutals, but which was described as being in the parish of S:—Held, that the respondents might bring forward parol evidence, to shew that the lands described in the deed, and of which livery was given, were situate in the parish of B, and not of S, as therein described. *Rex v. Wickham*, 4 Law J. (N.s.) M.C. 45, s.c. 4 N. & M. 406; 2 Ad. & E. 517.

Where a pauper, having a fourth share in an equity of redemption of certain leasehold property, had, before residing in the parish, verbally agreed to assign all his interest to another, and, by subsequent assignment, the different parties who were entitled to a share (among them the pauper) in consideration of 30*l*. assigned to the person to whom the pauper had before, by parol, conveyed his share, and no money passed from that person to the pauper:—Held, that he had parted with his equity of redemption before coming to reside in the parish, and gained no settlement. *Rex v. Creggina*, 4 Law J. (N.s.) K.B. 89, s.c. 4 N. & M. 455; 2 Ad. & E. 536.

A certificate man purchased a freehold cottage in the township to which he was certificated, and died, leaving a widow and three children residing in the cottage at the time of his death, and who continued to reside there for ten weeks:—Held, that the widow acquired a settlement in right of her quarantine, which she communicated to her children. A child of ten years of age, removed from her mother's house on account of illness, remains part of her mother's family. *Rex v. Long Wittenham*, 4 Doug. 193.

An order of removal being appealed against, on the ground that the pauper was settled in a third township, by estate acquired through his wife, the

Sessions discharged the order, but stated the following facts for the opinion of the Court of King's Bench. Pauper married a widow; her first husband, at the time of his death (September 1826), rented a cottage in M, the third township, at 50*s*. a year, payable in June and December. The widow did not take out administration, but continued to reside on the premises with her children, till her marriage with the pauper, and paid the rent due in December 1826, and June 1827. She married the pauper in September 1827, and he then occupied the cottage, and paid the rent in December 1827, and for several subsequent years; latterly, at an advanced rate per annum. If the Court should be of opinion, under the circumstances, that the pauper was settled in M, the order of sessions was to be confirmed, otherwise quashed:—Held, by Lord Denman, C. J. and Taunton J., (Patterson J. and Williams J. *dissentientibus*), that the above facts, so submitted to this Court by the Sessions, were sufficient to shew that the widow, at her husband's death, commenced a new tenancy on her own account, and did not continue in possession as a party entitled to take out administration, but neglecting to do so. Agreed by all the Court, that if such new tenancy was established, the pauper obtained a settlement in M, but not otherwise. *Rex v. Barnard Castle*, 2 Ad. & E. 108, s.c. 4 N. & M. 128.

In 1732, Lord W made a lease of a cottage for ninety-nine years, if three persons should so long live. In 1784, he made another lease for the same term to another party (Gilling). At that time, J W was in possession, claiming on the ground that one of the lives in the lease of 1732 was in existence. He continued in possession until his death, twenty-three years ago; and, after his death, his widow retained possession for sixteen years, and, upon her death, devised to M H, the mother of the pauper's husband, and made her executrix and residuary legatee, who, with her husband, lived in the cottage until they conveyed the property away, but she had never proved the will. It appeared, that when the lease was granted in 1784, all the persons for whose lives the former lease was granted were dead; that W and those claiming under him paid no rent, but that G paid rent up to the present time to Lord W:—Held, that, as J W claimed on the ground that one of those persons was living, and not adversely to Lord W, and the Sessions had not found that the possession was adverse, he could not be considered as gaining an estate by adverse possession; neither could the widow, as she must be considered as retaining possession in the same kind of way as her husband had done before her; and, as she could, therefore, by her will, only convey what she must be considered as possessed of, namely, a term of years, her daughter took no estate before probate, the term for years being vested at that time in Gilling. *Rex v. Axbridge*, 4 Law J. (N.s.) M.C. 61, s.c. 4 N. & M. 477; 2 Ad. & E. 520.

The fact of a woman being induced to take out letters of administration to her husband, by and at the expense of the parish officers, in order to fix her settlement in a parish other than their own, does not prevent the settlement; although the Sessions find, that the letters of administration were taken out fraudulently for that purpose. *R. v.*



v. *Great Glenn*, 2 Law J. (N.S.) M.C. 69, s. c. 5 B. & Ad. 188.

(h) By Payment of Taxes.

[See ante, *Settling upon a Tenement*, 3 N. & M. 47.]

A settlement may yet have been gained by payment of rates, (before the 6 Geo. 4, c. 57, came into operation,) in respect of a tenement of the annual value of 10*l.*; although the landlord has agreed to allow the rates on payment of the rent. *Rex v. Pearyn*, 2 Law J. (N.S.) M.C. 14, s. c. 4 B. & Ad. 224; 1 N. & M. 74.

(i) By Serving an Office.

No settlement is to be acquired, after the passing of the Poor Law Amendment Act, by serving an office. 4 & 5 Will. 4, c. 76, s. 64; 12 Law J. Stat. App. xv.

Whether the office of pindar is a public annual office for the purpose of settlement—*quære*.

Where a person served such an office by desire of persons in the parish, (in which there had been no such officer before), and by their desire was sworn in before a Justice:—Held, that this was not a sufficient appointment to the office, for the purpose of settlement. *Rex v. Chisby*, 2 Law J. (N.S.) M.C. 4, s. c. 4 B. & Ad. 153; 1 N. & M. 118.

The appointment by a court baron to an office to be exercised in the whole of a township, in which township are several other manors, and no manor paramount, is a bad appointment; and no settlement is conferred by having served the office. *Rex v. Newmarket St. Mary*, 4 Law J. (N.S.) M.C. 89, s. c. 4 N. & M. 693; 3 Ad. & E. 151.

To confer a settlement by office, there must be a residence in the parish to which the duty of the office refers.

Accordingly, where there was a public annual office, served for a year in one parish, to which alone the duties related, and the residence was in another parish:—Held, that no settlement was gained. *Rex v. Woodbridge*, 2 Law J. (N.S.) M.C. 58, s. c. 4 B. & Ad. 711; 1 N. & M. 457.

Where by 10 Geo. 4, c. 97, Justices had power to appoint constables for such time as they should think proper, and by a subsequent section, they were empowered to give such constable a salary, "provided such salary did not exceed the annual sum of 20*l.*":—Held, that the office of constable under that act, was not in its nature an annual office, and that a party gained no settlement by serving the office, although he might have been appointed for a year. *Rex v. Middlewich*, 4 Law J. (N.S.) M.C. 90, s. c. 4 N. & M. 682; 3 Ad. & E. 156.

In a parish governed by a select vestry, public notice was given that the vestry would meet to elect an organist for a newly-erected chapel. At the meeting C S was elected, and it was entered in the minutes of vestry, that she was appointed organist at 60*l.* per annum. She performed the office for several years, receiving the salary half-yearly, and residing in the parish, till, on complaint made against her by the congregation, she was dismissed by an order of vestry:—Held, that the office of organist, so held by C S, was not a public annual

office, by which a settlement could be gained under 3 W. & M. c. 11, s. 6. *Rex v. St. George's, Hanover Square*, 3 Law J. (N.S.) M.C. 8, s. c. 5 B. & Ad. 571.

(C) CERTIFICATE.

Where a certificate was granted to a parish of A, and afterwards other certificates to the parishes of B, C and D, and the pauper was removed from D to the certificating parish,—Held, that the original certificate was discharged. *Rex v. Birdham*, 4 Doug. 245.

A person going into a parish, under a certificate, and taking a tenement of 10*l.* a year, by means of pasture feeding, (before the 59 Geo. 3, c. 50,) acquires a settlement after forty days' residence, though before the pasture feeding has taken place; so as to discharge the effect of the certificate, touching the settlement of his yearly servant. *Rex v. Nacton*, 1 Law J. (N.S.) M.C. 47, s. c. 3 B. & Ad. 543.

Where an instrument, which was fifty-nine years old, purporting to be an acknowledgment by a parish, that the grandfather of the pauper was settled in the parish which gave the instrument, came from the parish chest to which it purported to be given, but it did not appear, by the instrument or otherwise, that it had been allowed by two Justices:—it was held, that the Court of Quarter Sessions were justified, after so long a time, in coming to the conclusion, that it had been a perfect instrument allowed by two Justices. *Rex v. Slaithwaite*, 3 Law J. (N.S.) M.C. 17, s. c. 2 N. & M. 347.

(D) REMOVAL.

Repeal of acts relating to removal of poor born in Scotland and Ireland, and substitution of other provisions. 3 & 4 Will. 4, c. 40; 11 Law J. Stat. 91.

No person is to be removed till notice of his chargeability has been sent to the parish to which he is to be removed: he may be removed if the order is submitted to, but not if there be an appeal. See 4 & 5 Will. 4, c. 76, s. 79, (Poor Law Amendment Act); 12 Law J. Stat. App. xvii.

Removal to "the township of B." Appeal by the same description. But, in fact, the township of B was part of the parish of B:—Held, that after the appeal, the appellant parish could not object to the order for this misdescription.

Held also, that the Sessions might amend the order under the 5 Geo. 2, c. 19. *Rex v. Bingley*, 2 Law J. (N.S.) M.C. 97, s. c. 4 B. & Ad. 567; 2 N. & M. 103.

A parish was divided into seven townships, each respectively having overseers, and maintaining its own poor, but the parish at large had no overseers, and made no rate for the maintenance of the poor. A portion of the parish in which the pauper gained a settlement, was part of a marsh which had been derelict by the sea, and no evidence was given to shew of what particular township it formed a part, or whether it did form a part of any township:—Held, that the order upon the parish at large, which had no overseers, could not be supported.

*Quære*—suppose there had been such overseers, on whom was the *onus probandi*, in which township this portion was situate, or whether in any? *Scmble*

—on the respondents. *Rex v. Carmel*, 4 Law J. (n.s.) M.C. 53, s.c. 4 N. & M. 357; 2 Ad. & E. 562.

The 9 Geo. 4, c. 40, s. 38, empowers Justices, by an order under their hands and seals, directed to the overseers of the poor where a person deemed insane is chargeable, according to the form in the schedule annexed to the act, "to cause the said poor person to be conveyed to a lunatic asylum," &c. The form annexed recites, "that it appears to the Justices, &c. that — is lunatic, insane, or a dangerous idiot (as the case may be)." By the 44th section, Justices are empowered to make the same inquiry as to persons who are not chargeable, who shall be wandering about, and to make an order to the overseers of the parish where such person is found; and if, upon examination, &c. the Justices shall be satisfied that such person is so disordered in his senses, that it is dangerous for him to be permitted to go abroad, the Justices shall inquire into the place of his last legal settlement, and they are to proceed in the same manner as in the case of a person chargeable, &c.:—Held, that an order made under the 44th section, which pursued the form given in the schedule to section 38, except in stating, "that the person was a person so far disordered in his senses that it was dangerous for him to be permitted to go abroad," was a good order.

Held also, that a statement in the order, that the Justices having made inquiry, &c. "we have adjudged," was a sufficient adjudication.

A retrospective order of maintenance of such person is bad as to so much as is retrospective. *Rex v. St. Nicholas, Leicester*, 4 Law J. (n.s.) M.C. 97, s.c. 4 N. & M. 624; 3 Ad. & E. 79.

Two Justices ordered F C, the wife of R C, a Scotchman, having no settlement in England, and a lunatic, to be removed from parish A, where she had become chargeable, to parish B, which was adjudged to be her lawful settlement. The order did not state where the husband was when it was made:—Held, that the order was not void, on the ground that it would effect the separation of husband and wife; because it was not to be presumed that when it was made the husband was residing in parish A, or was not residing in parish B. *Rex v. Stockton*, 3 Law J. (n.s.) M.C. 48, s.c. 3 B. & Ad. 546; 2 N. & M. 353.

An order of removal unappealed from, to a certificated parish from a third parish, is conclusive against the certificated parish, on a removal to the certifying parish. *Rex v. Ealing*, 4 Doug. 12.

An order of removal was made on the 21st of May 1826; and its execution suspended by indorsement, but this was not served until more than a year afterwards,—viz. the 12th of August 1826. Nothing further was done until more than four years after the last step—viz. the 24th of January 1831, when the suspension was taken off. On the 16th of February following, the pauper was removed, and the parish to which the removal was made, then appealed to the next Sessions:—Held, that the delay in the service of the order was unreasonable, and rendered the order voidable: but that, to avoid it, the appeal should have been to the next practicable sessions after the service; and

consequently that the appeal was too late. *Rex v. Penkridge*, 1 Law J. (n.s.) M.C. 48, s.c. 3 B. & Ad. 538.

By the 35 Geo. 3, c. 101, no act done by a person continuing to reside in a parish under the suspension of an order of removal, shall be effectual for the purpose of giving him a settlement.

Held, that since 6 Geo. 4, c. 57, and 1 Will. 4, c. 18, the occupation by a pauper is an act done within the meaning of those words: that, therefore, an occupation for the year (inclusive of the time during which the order of removal was suspended) would not confer a settlement. *Rex v. St. John's, Hackney*, 4 Law J. (n.s.) M.C. 51, s.c. 4 N. & M. 336; 2 Ad. & E. 548.

An order of Justices, under the 35 Geo. 3, c. 101, sufficiently states the chargeability of a woman, by stating her to be "a widow now pregnant." *Pattrington v. Cottingham*, 2 Dowl. P.C. 473.

A house in the parish of W was let to A, and B, his wife, for their joint lives, and the life of the survivor. A and B were ejected wrongfully from the house, but their furniture, and a person who had lodged with them, remained in the house. Afterwards A assisted the lessor to destroy the lease:—Held, that, after these transactions, A and B continued irremovable from W, though they had become actually chargeable. *Rex v. Matlock*, 3 Law J. (n.s.) M.C. 94, s.c. 1 Ad. & E. 124.

The parish of Bishop Wearmouth has no overseers of the poor, but contains several townships separately maintaining their own poor, and having distinct overseers. Two of these townships are called "Bishop Wearmouth" and "Bishop Wearmouth Pann's." Paupers whose settlement was in Bishop Wearmouth Pann's were, by an order of Justices, directed to be removed to the parish of Bishop Wearmouth. The order was served on the overseers of Bishop Wearmouth Pann's, who refused to receive the paupers (on the ground that that township was not named in the order), unless certain expenses were waived. This being refused, the paupers were taken away. The removing parish afterwards served the churchwarden of the whole parish of Bishop Wearmouth with the order, and delivered the paupers to him. The latter took the paupers to the workhouse of Bishop Wearmouth township, where they were maintained:—Held by Denman, C. J. and Littledale, J., (Taunton, J. and Patteson, J. *dubitantibus*,) that the inhabitants of the township of Bishop Wearmouth, although they were not bound to maintain the paupers under the order, had reasonable ground for thinking they might be aggrieved by it, and, therefore, were entitled to appeal. *Rex v. Bishop Wearmouth*, 3 Law J. (n.s.) M.C. 61, s.c. 5 B. & Ad. 942; 3 N. & M. 77.

An order of sessions, quashing an order of removal generally, is conclusive evidence between the parties to the appeal, that when the order of removal was made, the appellant parish was not bound to receive the pauper, but it is only *prima facie* evidence that the pauper was not settled in that parish; and, therefore, upon the trial of an appeal between the same parishes against a second order of removal of the same party, the removing parish may shew by parol evidence that the first order of removal was quashed, on the ground that

the pauper resided on a tenement of his own, which made him irremovable, though it did not confer a settlement; and that he afterwards sold the tenement, and thereby became removable. *Res v. Wick St. Lawrence*, 3 Law J. (N.S.) M.C. 82, s. c. 5 B. & Ad. 526; 2 N. & M. 289.

#### (E) EXAMINATION OF PAUPERS.

*Quere*, whether the declarations of the husband, who is dead, as to facts concerning his settlement, are admissible. If the settlement depends on a written instrument, it must be shewn that due inquiry has been made after the written instrument, before parol evidence can be admissible. *Res v. St. Sepulchre*, 4 Doug. 336.

#### PORT AND PORT DUTY.

[See SHIP AND SHIPPING, Pilot.]

The corporation of Truro, in 1795, made a lease of the office of meter, with all fees, emoluments, &c., arising from the measuring of coal, &c. imported. It was proved that they had been accustomed, for nearly sixty years, to receive these payments upon all coal imported into the port. The learned Judge told the jury, that he was not aware that there was any rule of law to prevent them presuming the immemorial existence of the right from the modern usage; but he did not expressly advise them, that they ought to make such presumption, unless some evidence to the contrary appeared; neither did he explain to the jury the nature of a port-duty, and state, that, as such, the claim in question might be referred to a modern grant. The Court granted a new trial. *Jenkins v. Harvey*, 5 Law J. (N.S.) Exch. 17, s. c. 1 C. M. & R. 877; 5 Tyr. 326.

The first count of the declaration stated, that the mayor and burgesses of the borough of Truro had, from time whereof the memory of man was not to the contrary, held and exercised, by the mayor of the said borough, or the lessee or lessees, farmer or farmers of the said mayor and burgesses for the time being, or their deputy or deputies, a certain ancient office or place of meter, for the measuring of all coal imported by sea, and brought within the limits of the port of Truro, to be there disposed of; and that from time whereof, &c. there had belonged to the said mayor and burgesses, &c., by reason of the said office, an ancient fee, reward, or toll, for the measuring as aforesaid, and for the keeping and maintaining of measures, weights, &c., i. e. the fee, &c. of 4d. the chaldron, to be received for the measuring, or being ready and willing to measure, each chaldron of coal imported as aforesaid, to be disposed of by measure; and the fee, &c. of 8d. by the three tons, to be received for the weighing, or being ready and willing to weigh, each three tons of coal imported, &c. as aforesaid, to be disposed of by measure. The count then stated a demise by the corporation to the plaintiff of the office of meter, with the fees and privileges belonging to it, under which the plaintiff claimed a toll from the defendant in respect of a cargo of coals imported by him into the port of Truro. The second count claimed the same fee as a perquisite of the office, not stating it to be imme-

morial. The third count claimed a reasonable fee. Other counts claimed the toll as a duty receivable by the corporation, or their lessees, from all merchants importing coal by sea within the limits of the port.

The jury found a written verdict in these terms: "We find for the plaintiff; and that the corporation of Truro have, from time immemorial, been possessed of, and have exercised, the office of meter, and have, from time immemorial, received, for the performance of the duties of the office, the sum of 4d. a chaldron on coal and culm":—Held, that the finding sufficiently supported the first count of the declaration, that it did not import that the corporation were entitled only on actually measuring the coals; and that it did not disconnect their right to the toll from their ownership of the port, and their obligation to maintain it; in respect of which ownership and obligation only, they would be entitled to the payment, without performing some actual service for it.—Held, also, that the toll being due to the corporation, as owners of the port, as well as for the measuring, no objection could be maintained against it on the ground of its rankness.

Two leases from the corporation of the office and dues in question were put in, the first dated in 1762 (in consideration of 631*l.*), the second in 1795. It was proved, that the fee of 4d. a chaldron had been paid, without interruption, from the year 1772 to 1828, although the meter never actually measured them himself, the only measurement being for the purpose of ascertaining the custom-house duties payable on them. A corporation book, of the date of 1680, was also produced at the trial:—Held, that this was sufficient *prima facie* evidence that the corporation and the office of meter were immemorial; and that it sufficiently supported the immemorial claim for coals not actually meted. *Jenkins v. Harvey*, 5 Law J. (N.S.) Exch. 17, s. c. 2 C. M. & R. 393.

#### PORTIONS.

[See SETTLEMENT, Marriage.]

A married woman, by a testamentary instrument, made in execution of a power, contained in her marriage settlement, gave 2,000*l.*, subject to the life-interest of her husband, to trustees, upon trust, for the benefit of her child or children, to be equally divided between them, share and share alike; but, in case the 2,000*l.* should become payable before her children, being sons, should have attained twenty-one, or, being daughters, should have attained that age, or day of marriage, then, in trust, to invest and apply the interest to their maintenance and education, and when they should attain twenty-one, or day of marriage, to pay to them their respective shares of the principal; and in case any of the children should happen to die before their portions should become payable, then the same should go and belong to the survivors or survivor of them. The testatrix left a son and two daughters, all of whom had attained twenty-one at her decease. The son, and afterwards a daughter, died in the lifetime of their father:—Held, that, on the death of the father, the surviving daughter was entitled

to the 2,000*l.* by survivorship, except as to that share of it which accrued to the deceased daughter upon the death of the son, which belonged to the representative of the deceased daughter. *Bright v. Rowe*, 3 M. & K. 316.

### POSSESSION.

[See *TRESPASS*.]

A decree of the Court of Chancery, shewing that the father of the tenant was let into possession of the lands, admissible to prove such fact, but not to prove a title to such lands. *Davies v. Lowndes*, 4 Law J. (N.S.) C.P. 214, s.c. 1 Bing. N.C. 697, 620; 2 Sc. 71, 78.

### POSSESSIO FRATRIS.

[See *MONEY HAD AND RECEIVED*, *Clarence v. Marshall*.]

### POSTEA.

[See *LOCAL COURT—PRACTICE*.]

### POST-HORSE DUTY.

The 4 Geo. 4, c. 62, s. 2, imposes upon the postmaster a duty of 1*s.* 9*d.* per horse, or the one-fifth part of the sum charged to the customer, upon every horse hired under certain conditions. The 8th section of the statute requires him to insert in his stamp-office weekly accounts, (amongst other things) *the amount of the sum charged for or in respect of every letting for hire*. The 30th section makes him answerable and accountable for one-fifth part of the sum so charged, or for the sum of 1*s.* 9*d.* the horse hired under certain conditions. The 33rd and 34th sections authorize the farmer of the duties to require the postmaster to verify his account on oath before a magistrate. Where the defendant, a postmaster, returned 2*s.* 6*d.* as the amount of duty on two horses hired five miles out and the same distance back; and 2*s.* as the amount of duty on two horses hired three miles out and the same distance back, but did not, as required by the statute, return the *amount of the sum* charged for the letting or hire:—Held, that he was not liable to the larger duty of 1*s.* 9*d.* per horse; but that his return, under the circumstances, was sufficient to shew that he had made his election of being charged the one-fifth part of the amount paid for the hire. *Hammond v. Hooley*, 3 Law J. (N.S.) C.P. 227, s.c. 1 Bing. N.C. 131; 4 Mo. & Sc. 664.

### POST-OFFICE.

[See *JURY*, Exemption.]

Regulation of, and of privilege of franking, in Ireland. 2 Will. 4, c. 15; 10 Law J. Stat. 20.

Repeal of so much of 5 Geo. 4, c. 25, as relates to inland postage in North America. 4 Will. 4, c. 7; 12 Law J. Stat. 17.

Regulation extending the accommodation of, to foreign parts, and other matters relating to. 5 & 6 Will. 4, c. 25; 13 Law J. Stat. 47.

To make a party liable to the penalties inflicted

by the 9 Anne, c. 10, for permitting and suffering letters to be opened, it is necessary that the act should be done with the consciousness that it was a wrong act: therefore, where a postmaster had delivered letters of a bankrupt to his assignee, under the belief that the assignee was entitled to have them, he was held not to be within the statute. *Muriles v. Banning*, 1 Law J. (N.S.) K.B. 36, s.c. 2 B. & Ad. 909.

*Semble*, that the delivery of a letter to the bellman is a delivery to the Post-office. *Pack v. Alexander*, 3 Mo. & Sc. 789.

Secreting a letter, containing any of the instruments specified in 52 Geo. 3, c. 145, s. 2, is not within that statute, if the object of the prisoner was to deliver the letter with its contents according to the direction, but to cheat the revenue of the postage. *Res v. Sharpe*, 1 R. & M. C.C. 125.

If the wife of a party, to whom a letter is directed, pays the postage of the letter, she is entitled to demand an overcharge made for it, and a refusal on the part of the letter-carrier to account for it to her, is evidence of an embezzlement by him. *Res v. Borrett*, 6 C. & P. 124.

On an indictment for embezzlement against a letter-carrier, charged under 2 Will. 4, c. 4, as a person employed in the public service of His Majesty, it is not necessary to prove his appointment as a letter-carrier; but evidence of his having acted as such is sufficient. *Id.*

On the trial of a person, on the stat. 52 Geo. 3, c. 143, s. 2, for embezzling a letter containing a bill of exchange, he being at the time employed under the Post-office, it is sufficient to prove that such person acted in the service of the Post-office, and it is not necessary to go into proof of his appointment. *Res v. Rees*, 6 C. & P. 606. [Parke]

### POUND.

[See *DISTRESS*.]

When cattle are distrained damage feasant, are impounded, and escape from the pound without the fault of the distrainor, his remedy by action, for the trespass, remains. *Williams v. Price*, 1 Law J. (N.S.) K.B. 258, s.c. 3 B. & Ad. 695.

### POWER.

[See *WILL*, Probate Duty.]

- (A) WHERE VOID OR VALID.
- (B) CONSTRUCTION AND EXECUTION.
- (C) LEASING POWERS.
- (D) HOW EXTINGUISHED OR DESTROYED.
- (E) DEFECTIVE EXECUTION, WHERE AIDED.

(A) WHERE VOID OR VALID.

A power of sale, to be exercised during the continuance of successive estates tail, is good. *Waring v. Coventry*, 1 M. & K. 249.

A marriage settlement vested certain messuages and premises in trustees and their heirs, to the use of the husband for life, with a power of appointment to husband and wife to one or more of the children or remoter issue; and, in default of such appointment, to the use of all the children,

their heirs and assigns for ever, in equal shares, as tenants in common; and if any one or more of the children should die under the age of twenty-one years without leaving issue, then, as to the share or shares of the child or children so dying, to the use of the other or others of the said children in fee, in equal shares as tenants in common. A power to lease during the minority of children entitled under the limitations, for any term not exceeding twenty-one years, was then given to the trustees or trustee for the time being, and a further power of sale to the trustees or trustee for the time being, with the consent of the husband and wife, or of the survivor of them, and after the decease of such survivor, at the discretion of the trustees or trustee for the time being:—Held, that the power of sale was valid, so far as to enable the original trustees, with the consent of the husband and wife, to sell the premises. *Boyce v. Haning*, 1 Law J. (N.S.) Exch. 123, s.c. 2 C. & J. 334; 2 Tyr. 327.

#### (B) CONSTRUCTION AND EXECUTION.

[See SETTLEMENT, Marriage, Construction of.]

A married woman, by her settlement, had a power to appoint leasehold and stock; and by her will, duly executed in the manner required by, but not referring to, the power, gave all her property, both real and personal, which she might possess at her death, to her husband:—Held (on appeal, affirming the judgment of the Vice Chancellor), that this was not an execution of the power. *Lovell v. Knight*, 1 Law J. (N.S.) Chanc. 47.

A feme covert having a power of appointment over land by deed, joined with her husband, in a covenant to levy a fine of the land, which fine was afterwards taken and acknowledged, but no writ of covenant had thereon:—Held, not a good execution of the power of the wife. *Hull v. Budd*, 1 Law J. (N.S.) Chanc. 184.

A, being entitled, as one of a class, to part of a fund, in the event or for default of any appointment, in the settlement made on her marriage, directs, that what she shall eventually be entitled to, out of that fund, shall be held by the trustees of the settlement, upon trust for the benefit of her husband and children. An appointment is afterwards made of the fund, by which A's share is appointed to the trustees of that settlement on the trusts of the settlement:—Held, that such appointment is, substantially, an appointment to A, and good in equity.—And *semble*, that such appointment would be supported in favour of persons not coming within the consideration of marriage. *Lambard v. Grote*, 2 Law J. (N.S.) Chanc. 10, s.c. 1 M. & K. 1.

A person having a power of appointment, by deed or will, over two sums, one of which is standing in her own name, sells the funds standing in her own name, and purchases long annuities with a part of that fund, and disposes of these long annuities by her will; but makes no allusion to the other fund: her will contains a general bequest of all the residue of her personal estate:—Held, that this bequest is an execution of the power. *Newman v. Wall*, 2 Law J. (N.S.) Chanc. 208.

A settlor vested certain lands of which he was seised in fee simple, in three sets of trustees, upon

certain trusts. The term vested in the first set was one of 99 years, for securing a jointure of 200*l.* per annum for wife of settlor; that vested in the second set was one of 500 years, for raising 5,000*l.*; that vested in the third set was one of 600 years, for raising 2,000*l.* The settlement also contained a clause enabling settlor, his heirs or assigns, to release and discharge the said premises from the payment of the said annuity and sums of money, or any of them, by charging such annuity and such sums, or any of them, upon any other estate of competent value, *with the consent and approbation of the respective trustees*. The settlor (the defendant), by indentures of lease and release, expressed to be made between him and the three sets of trustees, conveyed to B C and their heirs certain premises to the uses, upon the trusts, &c. contained in the original settlement, to the intent that the premises conveyed by the latter indentures might be charged with the said jointure, and the two sums of 5,000*l.* and 2,000*l.* in lieu of, and as a substitution for, such or so many of the premises contained in the settlement. These deeds of release and substitution were signed by the two trustees of the first term of 99 years for securing the jointure,—only by one of the trustees of the term of 500 years, for securing 5,000*l.*; and they were signed by neither of the trustees of the term of 600 years, for raising 2,000*l.*:—Held, that the power of substitution of new premises for those charged with the respective sums of 2,000*l.* and 5,000*l.*, and of causing a ceasing of the terms of 500 and 600 years, was not well executed, inasmuch as the deeds were signed only by one trustee of the one term, and by neither trustee of the other: that the premises contained in the original settlement were only released, and those substituted were only burthened as to the term of 99 years, for securing the jointure, the deed as to this term having been signed by the two trustees.—Held, also, that where the nature and object of the power, and the circumstances of the case, point to a previous consent, there such previous consent is necessary, although not required by the terms of the power. *Greenham v. Gibbeson*, 3 Law J. (N.S.) C.P. 128, s.c. 10 Bing. 368; 4 Mo. & Sc. 198.

A person having a power of appointment by will over real estates, and also being seised in fee of a reversion in the estate, over which he had the power, and seised in fee in possession of other property, devised all his real estate whatsoever and wheresoever to which he, or any person in trust for him, was entitled for any estate of freehold in possession, remainder, &c., and also all leasehold, &c. and all other his real or personal estate whatsoever or wheresoever:—Held, that this did not operate as an execution of the power. *Davies v. Williams*, 3 Law J. (N.S.) K.B. 217, s.c. 1 Ad. & E. 588; 3 N. & M. 821.

Where a testator, by his will duly attested, charges the produce of real estate with such legacies and annuities, and for such purposes, as he may by any codicil or codicils give, bequeath, direct, or appoint; a codicil, purporting to be an execution of such power, must be executed with the solemnities required for passing real estate by devise; and such a power reserved in a will does not amount to a general charge of legacies on the produce of real estate, in aid of the personal estate,

so as to come under the class of cases authorizing a charge of legacies on real estate by an unattested codicil. *Whytall v. Kay*, 3 Law J. (N.S.) Chanc. 94, s.c. 2 M. & K. 765.

A surrender of copyhold was made to the lord, to the use of A for life, and after his decease, to the use of such person as he, by any other surrender, or by his will attested by three witnesses, should appoint. A was admitted; he never made any surrender; but by a will, attested by only two witnesses, he devised the copyhold. He died after the passing of the 55 Geo. 3, c. 192:—Held, that as he had an interest as well as a power of appointment, his will operated upon the remainder in fee; and the 55 Geo. 3, c. 192, having dispensed with a surrender to the uses of the will, the devise took effect. *Doe d. Hickman v. Hickman*, 1 Law J. (N.S.) K.B. 238, s.c. 4 B. & Ad. 56; 1 N. & M. 780.

A power to raise such a sum as A B should direct, to be divided amongst such younger children as A B should direct, authorizes an exclusive appointment to one.

Where a party has a power over an estate, but no estate is vested in him, he may execute his power by a general disposition of the subject, without referring to the power. *Tanner v. Babbage*, 4 Law J. (N.S.) Chanc. 101.

A power to a woman to appoint notwithstanding coverture may be well exercised after coverture has ceased.

A power to appoint copyholds may be well exercised without referring to the power.

But where a power was exercised by a will made before the passing of the 55 Geo. 3, c. 192, by which the testatrix, who was seised of freehold and copyhold, devised her "real estate" in general terms:—Held, that the copyholds did not pass by this devise for want of a surrender, although the testatrix died after the passing of that act. *Doe d. Smith v. Bird*, 3 Law J. (N.S.) K.B. 78, s.c. 5 B. & Ad. 695; 2 N. & M. 679.

A power of appointment, exercised in favour of children, upon an understanding, that the children should afterwards make a loan of the money to the father, will not stand. *Arnold v. Hardwicke*, 4 Law J. (N.S.) Chanc. 152.

A, being tenant for life, with remainder to his children as he might appoint, and being indebted to one of the trustees of the fund, soon after his eldest son came of age, he executed the power in his eldest son's favour, and the whole fund was retained by the trustee in satisfaction of the debt. The son, who was twenty-three years of age, executed to the trustees a release of all claims in respect thereof; and eighteen years afterwards, he, in conjunction with a younger brother and sister, filed a bill against the trustees to set aside the transaction. The Court declared the whole transaction fraudulent and void. The trustees were ordered to restore the fund, and the father was also held responsible. *Wade v. Cox*, 4 Law J. (N.S.) Chanc. 105.

M D, by will, gave to trustees all her real and personal estate, in trust, for her sister E B for life, with an absolute power of appointment by her will. Part of the property of M D, namely, a watch, pianoforte, and some music-books, remained unconverted, and were suffered to remain in possession of E B to the time of her death; E B, by her

will, which did not refer to the power, bequeathed, among other things, "the watch which belonged to my sister," and also "my pianoforte and music-books." She had no other pianofortes or music-books, except those which had belonged to her sister, and were part of the property over which she had a power of appointment. *Quere*, whether this constituted such a reference to the subject of the power, as to pass the other property over which she had a power of appointment, under her sister's will. *Hughes v. Turner*, 4 Law J. (N.S.) Chanc. 141.

By indenture of settlement, a fund was assigned to trustees upon trust for all and every the child and children of a marriage, in such shares, at such age or ages, and subject to such conditions and limitations, as the wife, in case she survived the husband, should appoint. There was one child only of the marriage, and the wife surviving the husband, appointed the fund to that child for her separate use for life, and after her decease to such persons as the child should appoint, and in default of appointment, to the child's executors or administrators. The child by her will appointed to the fund, and died:—Held, that the power in the settlement was well exercised by the wife, and that the child's appointment by her will carried the fund to her appointee after the death of the wife. *Bray v. Bree*, 2 C. & F. 453, s.c. 8 Bligh, N.S. 568.

Copyholder in fee surrenders to such uses as A shall appoint; and in default of and until such appointment, to the use of A in fee. A, without having been admitted, appoints. The appointment is a good execution of the power, and entitles the appointee to be admitted as surrenderee of the copyholder, who continues tenant to the lord till some one is admitted under his surrender. *Rex v. Lord of the Manor of Ousdale*, 3 Law J. (N.S.) K.B. 117, s.c. 1 Ad. & E. 283; 3 N. & M. 496.

Where the Court directed a deed of appointment as to the respective interests of a father and his children to be made within a limited time, and a deed was executed within the time, containing a power of revocation:—it was held, that the intention of the Court was defeated, and that the deed was, consequently, void. *Piper v. Piper*, 3 M. & K. 159.

Where a power is, by will, given to a trustee, which he neglects to execute, the execution of the trust devolves upon the Court; but if, in the events which happen, the intended trustee dies before the time arrives for the execution of the trust, and the trust therefore fails, the testator is to be considered as having so far died intestate. *Ray v. Adams*, 3 M. & K. 237.

Where, in a marriage settlement, a power of appointment, by will, signed, sealed, published, and declared in the presence of two witnesses, is given to the wife, notwithstanding her coverture, and an instrument afterwards executed by the wife is proved as a will, the Court of Chancery is concluded by the decision of the Ecclesiastical Court, that the instrument propounded is a will, and is bound to consider it as a valid execution of the power, if the instrument be proved in the Court of Chancery to have been executed with the formalities prescribed by the power. *Douglas v. Cooper*, 3 M. & K. 378.

A power over personal property was required to be executed by a will, signed and published in the

presence of, and attested by two witnesses. The donee professed to exercise the power by a will, which was signed by her, and she acknowledged her signature to the two witnesses, but did not sign it in their presence; and the witnesses, at different times, signed an attestation, that the testatrix had signed and delivered the will in their presence:—Held, that though delivery was equivalent to publication, the power was not well exercised. *Simeon v. Simeon*, 4 Sim. 555.

Where, on marriage, a settlement is made of the wife's property to herself for life, to her separate use, with remainder as she should appoint, by any writing signed by her, and attested by two witnesses, and for default of appointment to the children of the marriage, and the trustees part with the trust fund, upon the joint application of the husband and wife, by letter, not attested by any witness, the trustees, after the death of the wife, must make good the trust-fund for the children. *Hopkins v. Myall*, 2 Russ. & M. 86.

The Countess of Burlington, by will, devised certain estates to trustees to the use of W Lord Cavendish for life, remainder to trustees to preserve, &c., remainder to the use of one or more of the child or children of W Lord C, for such estate and estates, and in such shares and proportions, and under and subject to such powers, provisos, restrictions, &c. as the said W Lord C should by any deed, &c., or by his last will, &c. direct, limit, or appoint. W Lord C, by his will, devised the premises to trustees, to the use of his son Richard for life, remainder to trustees to preserve, remainder to trustees for a term, for providing jointures and portions for the wife and children of Richard, remainder to the first and every other son of Richard in tail male, with remainder to testator's son George for life, and the sons of that son in tail male, remainder to his eldest son William in fee. The will contained considerable bequests of personalty to all the children:—Held, that this was a good execution of the power, and that, if not good as to the children of Richard, that the limitation to George took effect. *Doe d. Dukes of Devonshire and Portland v. Lord George Cavendish*, 3 Doug. 48.

### (C) LEASING POWERS.

A lease, executed professedly in pursuance of a power, included property to which the power did not extend. There was one entire rent reserved:—Held, that the lease was entirely void against the remainder-man, as the rent could not be apportioned. *Doe d. Williams v. Matthews*, 2 Law J. (n.s.) K.B. 163, a.c. 2 N. & M. 264; 5 B. & Ad. 298.

By will, the testator devised an estate for life, remainder in tail, with a power to tenant for life to lease for sixty-one years, for the purpose of new-building, or effectually rebuilding and repairing.—The meaning of "rebuilding" is something more than repairing; it is rebuilding such buildings as require it, and repairing such as want repairing only:—therefore, the power is not pursued by the lease containing a covenant effectually to repair.

*Semble*—that a covenant to expend a particular sum in well and effectually repairing, does not amount to a covenant effectually to repair; as, whether the sum were sufficient or not for the purpose, if the covenantor expended that sum, he would not

be liable any further upon his covenant. *Doe d. Dymoke v. Withers*, 1 Law J. (n.s.) K.B. 38, a.c. 2 B. & Ad. 896.

Tenant for life, with a power to lease for seven years, to commence from the day of her decease, "so as there be reserved the best rent which could be gotten for the same, without taking any premium for the making thereof," made a lease for seven years, to commence from the day of her decease, in which the lessee covenanted to provide meat, drink, and lodging for three of the lessor's children, at a small sum per annum, and for one without any remuneration:—Held, that evidence was admissible, to shew that the rent reserved was the best rent which could be gotten, and to shew that the covenants were not for the benefit of the lessor:—The question being, whether, under the circumstances under which the lease was made, the covenants were for the benefit of the tenant for life, so as to constitute a premium within the terms of the proviso. *Per Parke, J. and Patteson, J.*; Taunton, J. *dissentiente*. *Doe d. Rogers v. Rogers*, 3 Law J. (n.s.) K.B. 23, a.c. 5 B. & Ad. 755; 2 N. & M. 550.

A power to tenant for life, to lease for lives or years, reserving "by half-yearly payments, the best and most approved yearly rents that can reasonably be obtained," is not duly executed by a lease for lives, dated the 11th of January, "to hold from the 4th of January," yielding and paying a yearly rent, "upon the two most usual feasts or days of payment in the year—that is to say, the feast of St. Philip and St. Jacob the Apostles, and St. Michael the Archangel, (the 1st of May and the 29th of September,) by even and equal portions, the first payment to begin and be made on the feast of St. Philip and St. Jacob the Apostles next ensuing the date thereof."

Leases of other estates in the same part of the county, are not admissible in evidence, for the purpose of shewing that the days on which rent is reserved in the lease, are the usual days for half-yearly payments of rent in that part of the country. *Doe d. Harries v. Morse*, 3 Law J. (n.s.) Exch. 70, a.c. 2 C. & M. 247; 4 Tyr. 185.

By will, a power was given to tenant for life to grant leases of premises in P, which had been anciently demised, for ninety-nine years, determinable on two or three lives, either in possession or reversion, "so as the accustomed yearly rents and reservations be thereby reserved." The will also contained the following clause:—"All and every of such leases of my said estates at P, held or to be held for ninety-nine years, determinable upon lives, and of my said farms, lands, and estates, being from time to time made and granted in the same manner and form, with and under such and the like reservations, restrictions and covenants, conditions and agreements, as are usually and customarily contained in leases of the same kind, in the several and respective parishes, places, &c., where the said premises are situated:—Held, that leases of the same kind in P, of other premises than the premises in question, were admissible in evidence, to shew what were the covenants, restrictions, &c. contained in such leases; but that the last lease of the premises themselves, which was in existence at the time when the will was made and the power created, was the proper evidence of what the ac-

customed yearly rents and reservations were. And where by the last lease the rent had been reserved half-yearly, but, in a lease under the power, the reservation was of the rent quarterly—*Quere*, whether the lease was a good execution of the power?

Where the old lease contained a power of re-entry, if the rent were in arrear twenty-one days, and the lease under the power gave the right of entry, if it were in arrear twenty days, *semble* good, because it was better for the remainder-man.

In the ancient lease, the right of entry was given in case there should be no overt distress: in the lease under the power, the word "overt" was omitted:—Held, no valid objection; for although the law recognizes the distinction between *pound overt*, and *pound covert*, it attaches no legal meaning to the term overt, as applicable to a distress.

The omission to reserve a heriot, heriots having been reserved in the former lease, would render the lease under the power void; but where the reservation in the old lease was of the best goods of the tenant, or of such person as shall be in possession of the premises, and the lease under the power was of the best goods of the tenant, *semble*, that is not such a difference as will avoid the lease; because, as this heriot, not being by ancient tenure or custom, could only be enforced by distress or action, a distress could be made on the best beast of the tenant, or, if he were dead, or had parted with the possession, upon what was his best beast.

Rent, heriot, suit of mill, and suit of court, are reservations; but what relates to the privilege of hunting, fishing, &c. is only a privilege or right granted to the lessor, although words of reservation are used; and what relates to the wood and underground produce, is an exception, and not a reservation. But if in the lease under the power, the exceptions are not so full and beneficial to the remainder-man, as were contained in the old lease, the former will not be a good execution of the power; for the same rent being reserved, and more demised, it is not a reservation of the ancient and accustomed rent. Thus, in the old lease, the exception was, of all and all manner of timber trees, and trees likely to be timber: in the lease under the power, "all timber trees, bodies of pollard, and other trees whatsoever:"—Held, that as under the ancient exception the remainder-man would be entitled to the loppings, &c. which would be likely to prove timber, but under the new exception he would lose that right, and they would be demised to the lessee, the lease was, therefore, bad, notwithstanding that, by the second lease, the remainder-man would have the pollards, &c. in lieu;—that, as the exception in the old lease was greater than that in the new, and the demise at the same rent, it could not be considered to be at the ancient and accustomed rent. *Doe d. Douglas v. Lock*, 4 Law J. (n.s.) K.B. 113, s.c. 4 N. & M. 807; 2 Ad. & E. 705.

A, having a power to lease at the best improved rent, agrees to grant a lease to be estimated at a fair valuation, without reference to money stipulated to be laid out by the lessee in improvements, which are, however, to form part of the consideration for the lease. *Quere*—whether such a lease is inconsistent with the terms of the power. *Price v. Asheton*, 4 Law J. (n.s.) Exch. Eq. 4, s.c. 1 Y. & C. 82.

By a local act trustees had power to make leases, provided the lease was duly executed by the trustees, &c., and the rent reserved payable to the treasurer of the trustees, &c., or, in default, the lease to be null and void:—Held, that a reservation of rent "to the trustees or their treasurer" was not in accordance with the provisions of the act, and that the lease was void. *Pearse v. Morris*, 4 Law J. (n.s.) K.B. 21, s.c. 2 Ad. & E. 84; 4 N. & M. 48.

#### (D) HOW EXTINGUISHED OR DESTROYED.

A, tenant for life, with a power of appointment among his children, of freeholds, with remainder in default of appointment to his sons successively in tail, with reversion to A in fee; the power cannot after A's bankruptcy be exercised by him so as to affect the reversion in fee, which is vested in the assignees of his estate. *Badham v. Mee*, 2 Law J. (n.s.) Chanc. 4, s.c. 1 M. & K. 32.

Under his marriage-settlement A was tenant for life; and a power was given to trustees, with A's consent, to sell the property. A, by lease and release, conveyed his life estate by way of mortgage:—Held, that his power of consenting was not thereby destroyed, and that it might be exercised either by the mortgagee reconveying the estate, or joining in the conveyance to the purchaser. *Walmesly v. Butterworth*, 4 Law J. (n.s.) Chanc. 253.

#### (E) DEFECTIVE EXECUTION, WHERE AIDED.

[*Cockerell v. Cholmley*, 2 Law J. Dig. 225, s.c. 1 Russ. & M. 418; 1 Tam. 436; Aff., 1 C. & F. 60; 6 Bligh, n.s. 120. See also *Lord Mahon v. Earl Stanhope*, 6 Bligh, n.s. 166, n.]

### POWER OF ATTORNEY.

[See BILL OF EXCHANGE, Indorsement.]

Affidavit verifying the handwriting of the attesting witness, sufficient authentication of a power of attorney executed abroad. *Filoge v. Stewart*, 4 Law J. (n.s.) Chanc. 33.

When an application is made for payment of money out of court, to a party authorized to receive it under a power of attorney executed abroad, the Court requires an affidavit to be made that the power is in force and unrevoked. *Agabeg v. Hurtwell*, 4 Law J. (n.s.) Chanc. 190.

### PRACTICE.

#### 1. AT COMMON LAW.

##### (A) GENERAL RULES.

##### (B) PROCESS.

- (a) *In general.*
- (b) *Issuing.*
- (c) *Indorsement.*
- (d) *Signature.*
- (e) *To whom directed.*
- (f) *Altering.*
- (g) *Service.*
- (h) *Return.*
- (i) *Irregularity.*
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##### (C) APPEARANCE.



- (D) DECLARATION.  
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 (g) *Delivery.*  
 (h) *Striking out Counts.*
- (E) IMPARLANCE.
- (F) PLEA.  
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 (b) *Time for pleading.*  
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- (G) DEMURRER.
- (H) REPLICATION AND RULE TO REPLY.
- (I) REJOINDER.
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- (N) A TERM'S NOTICE OF PROCEEDING.
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- (Q) POSTEA.
- (R) JUDGMENT.
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- (V) PROCEEDINGS.  
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- (V) SALE BY THE MASTER.
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## 3. IN THE ECCLESIASTICAL COURTS.

## 4. IN THE HOUSE OF LORDS.

## 5. IN THE PRIVY COUNCIL.

## 6. IN CRIMINAL PROCEEDINGS.

## 1. AT COMMON LAW.

## (A) GENERAL RULES.

The rules of pleading of Hil. T. 4 Will. 4, are part and parcel of the law of the land. *Raffey v. Smith*, 6 C. & P. 662. [Denman]

## (B) PROCESS.

(a) *In general.*

[See BAIL, Affidavit to hold to—PROCESS, ACT FOR UNIFORMITY OF.]

In a county palatine the defendant should be served with the latitat, and not with the mandate of the Chancellor. *Griffin v. Higgin*, 1 Dowl. P.C. 45.

By the 2 Will. 4, c. 39, s. 10, where successive writs are sued out upon returns of *non est inventus*, to avoid the Statute of Limitations such returns must be entered of record before the expiration of one calendar month after the return. But it is not necessary that the first writ should be actually served, or that there should be any *bond fide* attempt to serve it. *Williams v. Roberts*, 4 Law J. (N.S.) Exch. 78, s. c. 1 C. M. & R. 876; 5 Tyr. 421.

The statute 2 Will. 4, c. 39, applies only to actions commenced after that act came into operation; process, therefore, according to the old law, may still be sued out, for the purpose of continuing a writ, sued out previous to the passing of that act. *Store v. Bold*, 2 Law J. (N.S.) K.B. 10, s. c. 4 B. & Ad. 112.

(b) *Issuing.*

Under the Uniformity of Process Act, there is no limited time for issuing an *alias* or *pluries* writ, or for entering continuances, except where the original writ is to be made available to prevent the operation of a Statute of Limitations. *Nicholson v. Leman*, 3 Law J. (n.s.) Exch. 133, s. c. 4 Tyr. 208; 2 Dowl. P.C. 296; 2 C. & M. 469.

Two original writs of *capias* may issue on the same affidavit of debt into different counties. *Rodwell v. Chapman*, 2 Law J. (n.s.) Exch. 4, s. c. 1 C. & M. 70.

Neither the 2 Will. 4, c. 39, nor the rules 6th and 7th of Michaelmas term, 3 Will. 4, prohibit the issuing of concurrent original writs into different counties. Where, therefore, a plaintiff issued a *capias* into the county of M, and during the currency of that writ issued another, founded on the same affidavit of debt, into the county of D:—Held, that such second writ was regular and valid. The second writ is, in such a case, to be considered as an original; and a Judge's order, treating it as an *alias*, would be set aside. *Dunn v. Harding*, 3 Law J. (n.s.) C.P. 186, s. c. 10 Bing. 553; 4 Mo. & Sc. 450.

A writ of summons dated on a Sunday is a nullity, and the objection is not waived by lapse of time. The Court is bound to take judicial notice, that a particular day of the month falls on a Sunday. *Hanson v. Shackleton*, 4 Dowl. P.C. 48.

Where a *ca. sa.* has issue in the course of a term, tested in the name of the Chief Justice, who was dead at the time of issuing the writ, but alive on the first day of the term, the Court will not inquire into the exact day of issuing the writ, but will consider it regular, as on the face of it the teste is proper. *Sutton v. Lord Cardross*, 1 Dowl. P.C. 511.

(c) *Indorsement.*

[See PRISONER, Discharge of.]

A writ of *capias* must be indorsed with the name of the attorney immediately employed, according to 2 Geo. 2, c. 23, s. 22; and therefore, if indorsed with the names of his agents only, will be set aside for irregularity. *Sheppard v. Sturm*, 1 Law J. (n.s.) Exch. 246, s. c. 2 C. & J. 632; 2 Tyr. 742.

No indorsement on the writ of the amount claimed is necessary, where the claim is for damages as well as for a debt. *Perry v. Patchett*, 3 Law J. (n.s.) Exch. 353, s. c. 1 C. M. & R. 87; 4 Tyr. 725.

Where on a judgment in debt for £121, the penalty of a bond to secure 1561, a writ of *ca. sa.* was sued out, indorsed "to satisfy 1881. 9s., and farther interest from the 31st of January then instant, on 1561, until paid:" the Court refused to set aside the writ as uncertain or too large. *Williams v. Waring*, 4 Law J. (n.s.) Exch. 292, s. c. 2 C. M. & R. 354.

The form of the indorsement on the writ of summons in the schedule to the Uniformity of Process Act, No. 1. is, "This writ was issued by &c. attorney for the said A B:"—Held, that a writ was not bad where the indorsement was "attorney for the said plaintiffs." *Hennah v. Wyman*, 4 Law J. (n.s.) Exch. 200, s. c. 2 C. M. & R. 239; 3 Dowl. P.C. 673.

The indorsement on the writ of the name of an

attorney who is not on the roll of the Court of Exchequer, is not such an irregularity as will entitle the defendant to a stay of proceedings *in toto*; but the Court will direct the proceedings to be stayed until a proper attorney is appointed, on payment of costs by the attorney whose name is so indorsed. *Constable v. Johnstone*, 2 Law J. (n.s.) Exch. 25, s. c. 1 C. & M. 88; 3 Tyr. 231.

Where the indorsements on two writs of *capias* were bad, being "within four days of the execution thereof," and "of the arrest thereon," instead of "the date thereof,"—the Court gave the defendant four days additional, to pay the money and the costs of the writ, and also a rule to set the same aside, stating, however, that they should give the plaintiff leave to amend. *Slater v. Thomas*, 4 Law J. (n.s.) Exch. 1, s. c. called *Hooper v. Walker*, 1 C. M. & R. 437; 3 Dowl. P.C. 167, called *Cooper v. Walker*.

The substitution of the word "execution" for "service," in an indorsement on the copy of the writ of *capias*, delivered to the defendant, under Rule 11, Hilary term, 2 Will. 4, is no ground for delivering up the bail-bond to be cancelled; but an amendment will be allowed on payment of costs. *Shirley v. Jacobs*, 4 Law J. (n.s.) C.P. 61, s. c. 1 Sc. 67.

In the indorsement pursuant to 2 Reg. Gen. Hilary term, 3 Will. 4, if "execution" is substituted for "service," it is an irregularity, but which may be amended on terms. *Urquhart v. Dick*, 3 Dowl. P.C. 17.

In the indorsement pursuant to 2 Reg. Gen. Hilary term, 2 Will. 4, the word "service" and not "execution" must be used, although the defendant has been arrested. *Colls v. Morpeth*, 3 Dowl. P.C. 23.

Where the indorsement on the writ was "within four days after the arrest or service thereof:"—Held, that the words "arrest or" were surplusage, and did not affect the validity of the writ. *Sutton v. Burgess*, 4 Law J. (n.s.) Exch. 109, s. c. 1 C. M. & R. 770; 5 Tyr. 320.

"No. 7, Gray's Inn Square, London," is a good description of the plaintiff's attorney's place of abode, in an indorsement of a writ of *capias*. *King v. Monkhouse*, 3 Law J. (n.s.) Exch. 35, s. c. 2 C. & M. 314; 4 Tyr. 234.

In the indorsement on a writ of summons, the residence of attorney stated thus:—"No. 1, Clifford's Inn Passage, Fleet Street, in the City of London," without mentioning the parish, is sufficient. *Arden v. Garry*, 2 Sc. 186, *Arden v. Jones*, 4 Dowl. P.C. 120.

"Gray's Inn, London," is a good description of an attorney's residence, under the provisions of 2 Will. 4, c. 39, s. 12. *Jelks v. Fry*, 3 Dowl. P.C. 37.

"Southampton Buildings" is an insufficient description of an attorney's residence in the indorsement of a writ of *capias*; but a lapse of more than two months from the time of the arrest is too great to enable a defendant to avail himself of the objection. *Rust v. Chise*, 3 Dowl. P.C. 565.

The omission of the word "London" in the indorsement on the copy of the *capias*, held sufficient cause for setting aside the copy. *Smith v. Pennell*, 2 Dowl. P.C. 654.

A copy of a bill filed against an attorney or pri-

soner, does not require the indorsement directed by Rule 11, Hilary term, 2 Will. 4, to be made upon the copy of any process served for the payment of a debt. *Long v. Wordsworth*, 4 B. & Ad. 367.

A bill against an attorney is not "process," within the meaning of 2 Reg. Gen. Hilary term, 2 Will. 4, and therefore does not require the indorsement of the amount of debt and costs claimed, as directed by that rule. *Lewellin v. Norton*, 1 Dowl. P.C. 416.

2 Reg. Gen. Hilary term, 2 Will. 4, as to the indorsement of the amount of debt and costs demanded by the plaintiff, applies to process issued against attorneys, under 2 & 3 Will. 4, c. 39. *Tomkins v. Chilcote*, 2 Dowl. P.C. 187.

2 Reg. Gen. Hilary term, 2 Will. 4, as to the indorsement on process of the amount of debt and costs demanded by plaintiffs, is not directory, but compulsory. *Ryley v. Boissenas*, 1 Dowl. P.C. 383.

The Court will not set aside process, on account of the amount of debt and costs not being indorsed upon it, according to 2 Reg. Gen. Hilary term, 2 Will. 4, unless it appears on affidavit, that the cause of action was a debt. *Curwin v. Mossley*, 1 Dowl. P.C. 432.

In an action on a bail-bond or a replevin-bond, it is not necessary to indorse the amount of debt and costs, pursuant to 2 Reg. Gen. Hilary term, 2 Will. 4, and 5 Reg. Gen. Michaelmas term, 3 Will. 4. *Rowland v. Dakeyne*, 2 Dowl. P.C. 332.

In an action on a bail-bond, it is unnecessary to make the indorsement of debt and costs, claimed pursuant to 2 Reg. Gen. Hilary term, 2 Will. 4, and 5 Reg. Gen. Michaelmas term, 3 Will. 4. *Smart v. Lovick*, 3 Dowl. P.C. 34.

A writ indorsed M & Co., agents for S, without specifying the christian names—held, sufficient. *Pickman v. Collis*, 3 Dowl. P.C. 429.

A writ indorsed in this form:—"The plaintiff claims 50*l.* for debt, with interest from the 25th of May last, and 2*l.* for costs"—held, regular. *Sealy v. Hearne*, 3 Dowl. P.C. 196.

An indorsement upon the *capias* that plaintiff claims 20*l.* for debt, "with interest thereon from the 10th of March," is sufficiently certain. *Coppelo v. Brown*, 1 C. M. & R. 575, s. c. 5 Tyr. 217.

#### (d) Signature.

After the Uniformity of Process Act, 2 Will. 4, c. 39, the Court directed the signer of King's Bench writs to sign a *pluries* bill of Middlesex, in a suit commenced before the act, and which, if recommenced, would have been barred by the Statute of Limitations. *Pinnis v. Montague*, 5 B. & Ad. 877, s. c. 2 N. & M. 804.

A *ca. sa.* is irregular, if it is tested before the time of signing judgment. *Peacock v. Day*, 3 Dowl. P.C. 291.

It is not necessary for the filacer to sign his name to a writ of summons; if he impress upon it the stamp of court it is sufficient, although the rule of Michaelmas term, 3 Will. 4, r. 2, allows fees to be taken for signing, as well as for sealing such writ. *Burt v. Jackson*, 3 Mo. & Sc. 552.

#### (e) To whom directed.

Serviceable process may be directed to a sheriff who is a party in a cause. *Hull, Mayor of, v. Bubb*, 1 Dowl. P.C. 161.

Where the *capias* was directed to the sheriff, instead of the sheriff of Middlesex, the Court discharged the defendant out of custody, on his entering a common appearance. *Jackson v. Jackson*, 4 Law J. (n.s.) Exch. 32, s. c. 1 C. M. & R. 438; 5 Tyr. 136. And see, *post*, Irregularity, *Barker v. Weedon*.

A writ directed to the Sheriff of London is good, as the two sheriffs are but one officer. *Clutterbuck v. Wiseman*, 1 Law J. (n.s.) Exch. 81, s. c. 2 C. & J. 213; 2 Tyr. 276.

#### (f) Altering.

Where a writ of summons, which had originally been issued into one county, was afterwards (without being resealed) altered by the substitution of another, the Court set aside the proceedings on payment of the debt without costs, although the defendant had before taking the objection, obtained a Judge's order for staying the proceedings, on his undertaking to pay the debt and costs, which order had afterwards been made a rule of court. *Siggers v. Sansom*, 3 Mo. & Sc. 194.

Altering and re-sealing a writ of summons does not amount to a re-issuing of the writ.

Therefore, where a writ of summons, tested in time to save the Statute of Limitations, has been re-sealed after an alteration of the description of the defendant, and of the place and county in which he resides, and has not been served until the six years have expired, it is not necessary for the plaintiff to shew when the re-sealing took place. *Braithwaite v. Lord Montford*, 3 Law J. (n.s.) Exch. 91, s. c. 2 C. & M. 408; 4 Tyr. 276.

#### (g) Service.

[See *Ridgway v. Baynton*, 2 Dowl. P.C. 183; and see, *post*, Distractions.]

An affidavit to support a rule to set aside the service of process for irregularity, for service in a wrong county, must negative a service on the confines of the proper county. *Coulson v. King*, 1 Law J. (n.s.) Exch. 149, s. c. 2 C. & J. 474.

The Court would not set aside service of a *latitat* in Middlesex, without an affidavit that the service was not on the confines of the county, and that there was no dispute as to the boundaries. *Thomson v. Burton*, 1 Dowl. P.C. 428.

Where, in an action against two defendants, who reside out of the jurisdiction of the court, as the drawers of a bill of exchange accepted by their agent in this country, process has been executed upon one of the defendants, and the time for declaring has nearly expired, the Court will not direct that the service of the *venire* upon the agent shall be deemed good service upon the other defendant. *Case v. Young*, 1 Law J. (n.s.) Exch. 121.

An affidavit of service of the *quo minus* must have stated a personal service, or how the process was served: it was insufficient merely to state that process was served at the defendant's house. *Graham v. Carruthers*, 1 Law J. (n.s.) Exch. 101.

In an action *ex contractu* against several defendants, the Court would not grant a rule to shew cause why service of the *quo minus* upon the wife of one of the defendants who was out of the country, should not be deemed good service, unless the other de-

defendants would consent not to plead in abatement. *Davis v. Morris*, 1 Law J. (n.s.) Exch. 121, a. c. 2 C. & J. 237; 2 Tyr. 238.

The Court will not allow process to be served at the house of the agent of the defendant out of the jurisdiction, in order to serve the Statute of Limitations; but the plaintiff may proceed according to the provisions of the 2 & 3 Will. 4, c. 39, s. 10. *Fritch v. Lord Dunsany*, 2 Dowl. P.C. 527.

Service of a summons on a peer, at his residence, when he is absent in France, is sufficient. *Anonymous*, 1 Dowl. P.C. 81.

The service of process, in order to entitle the plaintiff to file common bail for the defendant, must be personal. *Thompson v. Phoney*, 1 Dowl. P.C. 441.

Upon a motion to set aside the service of summons, however positively the defendant and his witnesses may swear to negative the personal service; yet, if it be left in doubt, by the affidavits on the other side, whether there was a sufficient service or not, the Court will not interfere. *Morris v. Cole*, 2 Dowl. P.C. 79.

Where a *distringas* is returned *non est invenius*, and *nulla bona*, and defendant's residence is a furnished lodging, attempts to execute the warrant should be made, the copy of the *distringas* and warrant issued thereon should be left at the lodgings, and an affidavit made stating the facts, and also that inquiries have been made, whether the defendant had goods elsewhere. If none can be discovered, the plaintiff will be suffered to enter an appearance for defendant, and proceed to judgment and execution under 2 Will. 4, c. 39, s. 3. It cannot be made part of the above rule, that service of notice of declaration at the defendant's last known place of residence, and sticking up a declaration in the office, be deemed good service. *Cornish v. King*, 3 Tyr. 576, a. c. 3 Dowl. P.C. 18.

The service of process under 5 Geo. 2, c. 27, s. 1, must be personal, and no difficulty in effecting personal service will dispense with it.

Service of process on a newspaper proprietor, at the place of abode given at the Stamp Office, according to the 38 Geo. 3, c. 78, s. 2, is not sufficient without personal service. *Digby v. Thomson*, 1 Dowl. P.C. 363.

#### (A) Return.

It was no objection to a writ, that it was made returnable on a day between the Thursday before and the Wednesday after Easter day, when they fell in Easter term. *Lilly v. Gompertz*, 1 Dowl. P.C. 876.

#### (i) Irregularity.

[See AMENDMENT, PROCESS—ATTACHMENT—BAIL, Cancelling the Bail-bond—MISNOMER—VARIANCE, Between Process and Copy. And see post, Proceedings, Where set aside; and ante, Indorsement.]

A writ of summons in an action of assumpsit, which does not follow precisely the form prescribed by 2 Will. 4, c. 39, Sch. No. 1, is irregular.

If a writ of summons be in an action of "trespass on the case on promises," and the notice of declaration in an action of "trespass on the case," this is a variance, sufficient to constitute an irregularity.

*King v. Staplington*, 2 Law J. (n.s.) Exch. 114, a. c. 1 C. & M. 363; 3 Tyr. 318.

The 2 Will. 4, c. 39, s. 4, (Uniformity of Process Act) requires, that, where it is intended to hold any person to special bail, the process shall be by writ of *capias*, according to the form contained in the schedule, No. 4, viz. in an action on promises, or of debt, &c. Where the writ of *capias* on which the defendant was held to bail, was in an action of trespass on the case—Held (Gaselee, J. dissenting), that the form prescribed by the statute was not complied with; and that the bail-bond should be delivered up to be cancelled. *Richardson v. Stuart*, 3 Law J. (n.s.) C.P. 37, a. c. 10 Bing. 319; 3 Mo. & Sc. 774, 778.

"Libel" is a sufficient description of the form of action in a writ of summons. *Pell v. Jackson*, 2 Dowl. P.C. 445.

"Slander" is a sufficient description of the form of action in a writ of summons. *Davies v. Parker*, 2 Dowl. P.C. 537.

A writ of *capias* directed to the "sheriffs" instead of the sheriff of Middlesex, and omitting the words "indorsed hereon," held bad. *Barker v. Weedon*, 3 Law J. (n.s.) Exch. 341, a. c. 1 C. M. & R. 396; 4 Tyr. 860.

The writ of *capias* was directed to the "Sheriff of Middlesex," and the copy delivered to the defendant was to the "Sheriff of *Middlesex*." The Court discharged the defendant out of custody upon his entering a common appearance. *Hodgkinson v. Hodgkinson*, 3 Law J. (n.s.) K.B. 167, s. c. 1 Ad. & E. 533; 3 N. & M. 564.

*Semble*—that the case of *Hodgkinson v. Hodgkinson*, in which it was decided that the word *Middlesex*, instead of *Middlesex*, was a fatal variance, cannot be supported. *Colston v. Berend*, 4 Law J. (n.s.) Exch. 54, a. c. 1 C. M. & R. 833; 5 Tyr. 511.

The writ of *capias* itself was against Angel Boxeius. The copy of the *capias* called the defendant Angel Boxeius, and afterwards referred to him as the said "Angel Boxeius."—Held, sufficient. *Levy v. Boxeius*, 4 Law J. (n.s.) K.B. 69.

It is no ground for setting aside a *distringas* for irregularity, that the writ of summons is against Andrews Bryan, in an action on promises, and the *distringas* against the goods of "Andrew Bryan, to answer in a plea of trespass on the case on promises." *Tyner v. Bryan*, 3 Law J. (n.s.) Exch. 183, s. c. 2 Dowl. P.C. 640.

Where a copy of a *capias* directed the sheriff to take the body of the defendant, "if —h— should be found in his bailiwick," it was held, that there was no fatal defect. *Sutton v. Burgess*, 4 Law J. (n.s.) Exch. 109, a. c. 1 C. M. & R. 770; 5 Tyr. 320.

Omission of the words "the" and "by" in the copy of the writ of *capias* served on the defendant, in that part which requires the sheriff to return the writ immediately after the execution; or if unexecuted at the expiration of four months, &c. or sooner if required "by order of the Court, or by any Judge thereof;"—not such a variance as will entitle the defendant to be discharged out of custody on entering a common appearance. *Pocock v. Mason*, 4 Law J. (n.s.) C.P. 60, s. c. 1 Bing. N.C. 245; 1 Sc. 51.

A writ directed to the Sheriff of London is good, as the two sheriffs are but one officer.

A copy of a writ of *quo minus*, need not contain

the signature of the clerk of the pleas, as that is affixed merely to authenticate the writ, and is no part thereof.

Notice to appear at a time anterior to the service of the writ, through a mere clerical mistake, will not vitiate the same, if the party served be not misled by such mistake; and therefore the Court refused to set aside the service of a *quo minus*, served on the 29th of December 1831, with a notice requiring the defendant to appear "on the 11th of January 1831." *Clutterbuck v. Wiseman*, 1 Law J. (N.S.) Exch. 81, s. c. 2 C. & J. 213; 2 Tyr. 276.

In order to set aside a declaration filed, by reason of the non-service of process, the defendant must deny, not only the actual service, but that the process has come either to his hands or his knowledge.

And, for the purpose of satisfying the Court, according to R. 33, H. T. 2 Will. 4, that he makes the application within a reasonable time, it is incumbent on him to state when he first knew of the notice of declaration. *Cicely v. Bennison*, 2 Law J. (N.S.) Exch. 3.

An irregularity in the writ itself will not support a rule to set aside the service for irregularity, if the service was regular. *Hasker v. Jarmaine*, 2 Law J. (N.S.) Exch. 166, s. c. 1 C. & M. 408; 3 Tyr. 381.

The plaintiff may declare against one defendant only, on a *seque* against two. *Bowles v. Bilton*, 1 Law J. (N.S.) Exch. 180, s. c. 2 C. & J. 474.

Upon a variance between the *ac etiam* and the affidavit to hold to bail, the defendant is entitled to be discharged, on giving bail to the amount of 40*l*.

It is no objection to an arrest for debt, on judgment, that a writ of *fi. fa.* had been sued out upon the same judgment, and not returned; nor is it an objection, that the *præcipe*, on which the writ issued, does not state on what day the bill of Middlesex is returnable. *Green v. Elgie*, 1 Law J. (N.S.) K.B. 150, s. c. 3 B. & Ad. 487.

The omission of the name of the chief clerk of the King's Bench, on a writ of summons, is not an irregularity. *Wilson v. Joy*, 2 Dowl. P.C. 182.

The omission of immaterial particulars in the writ of *capias*, is not an irregularity of which the Court will take notice, if the omissions do not alter the meaning of the writ. *Forbes v. Mason*, 3 Dowl. P.C. 104.

If the copy of the writ served on the defendant is materially defective, it is a ground for discharging the defendant on common bail, though the writ itself is right. *Street v. Carter*, 2 Dowl. P.C. 671.

"No. 1, Clifford's Inn Passage, Fleet Street, London," held a good description of the residence of the party by whom a writ is issued, within the 2 Will. 4, c. 39, s. 12, without naming any parish. *Arden v. Jones*, 4 Dowl. P.C. 120, *Arden v. Garry*, 2 Sc. 186.

It is not requisite to insert the addition of the defendant, in the writ of summons. *Morris v. Smith*, 4 Law J. (N.S.) Exch. 184, s. c. 2 C. M. & R. 120; 5 Tyr. 523.

The Court will not exercise any discretion in setting aside a writ as irregular, by reason of the omission of any of the matters required to be inserted by 2 Will. 4, c. 39, s. 4, Sch. n. 4, as the omission to state the defendant's residence in a writ of *capias*. *Price v. Huxley*, 3 Law J. (N.S.)

Exch. 19, s. c. 4 Tyr. 68; 2 C. & M. 211, s. c. (called *Rice v. Huxley*), 2 Dowl. P.C. 231.

"Yorkshire" is a good description of a defendant's residence, in a summons, although he resides at the town of Kingston-upon-Hull, if he may be supposed to be resident in the former county.

The blank in the form of the writ of *capias*, after the word "of" may be filled up by a description of the person. Therefore, where it was "F H, late of Devonshire-place," held, that the writ was good. *Hill v. Harvey*, 4 Law J. (N.S.) Exch. 228, s. c. 2 C. M. & R. 307.

The defendant was arrested on a writ, in which his real or supposed residence was not mentioned. There was, however, an indorsement on the writ in these words, "The defendant is a publican, and keeps a public-house (naming it) in Fuller's Rents, Holborn;"—Held, that such indorsement was not a compliance with the statute, 2 Will. 4, c. 39, s. 4, sch. 4, which pointed out a particular place in the writ for such insertion; and that the writ should be set aside. *Lindredge v. Rowe*, 3 Law J. (N.S.) C.P. 223, s. c. 1 Bing. N.C. 6.

The plaintiffs sued out a *pluries* writ of *capias* against the defendant, then in the custody of the sheriff of Middlesex, upon which he was detained. In this writ a blank was left for the residence of the defendant, whilst in the preceding writs he was described as residing in a certain place:—Held, that such omission was a violation of the Uniformity of Process Act, 2 Will. 4, c. 39, s. 4, sch. 4; and that a Judge's order for setting aside such writ and all subsequent proceedings, was correct. *Roberts v. Wedderburne*, 3 Law J. (N.S.) C.P. 226, s. c. 1 Bing. N.C. 4; 4 Mo. & Sc. 488.

In an action of trespass, for taking possession of a house, against several defendants, who, at the time of issuing the writ, continued in possession—Held, that it was a sufficient compliance with the act, 2 Will. 4, c. 39, to describe all the defendants as residing at the house. *Pogson v. Bull*, 3 Law J. (N.S.) Exch. 218.

If the defendant's residence is sufficiently described in a *capias*, with the exception of the county, that defect is supplied by the direction to the sheriff.

The omission of the day of the month in the teste of the copy of the writ, though the month itself is named, is fatal. *Perring v. Turner*, 3 Dowl. P.C. 15.

In a writ of *capias* it is not necessary that the plaintiff should describe the exact residence of the defendant, but he may give the best description he can of the place where he is to be found. A variance between the description of the defendant's residence in the affidavit of debt and the *capias* is immaterial. *Brown v. Jackson*, 2 Dowl. P.C. 505.

In bailable process it is not necessary to give a particular description of the defendant's place of residence: a place at which he may be expected to be found, is sufficient. *Welsh v. Langford*, 3 Dowl. P.C. 498.

Copy of writ of *capias* given to the defendant under the statute, described him as of Leman-street, Goodman's-fields, without the addition or description of county, city, town, or parish.—*Quere*, was such description a compliance with the 2 Will. 4, c. 39, the Uniformity of Process Act? *Borler v.*

*Levy*, 4 Law J. (N.S.) C.P. 29, s. c. 1 Bing. N.C. 362; 1 Sc. 270; 3 Dowl. P.C. 150.

The 2 Will. 4, c. 39, s. 12, which requires every writ to bear date on the day it issues, is not satisfied by a day being indorsed on the writ. *Anonymous*, 1 Dowl. P.C. 654.

The names of two defendants having been inserted in the writ of summons, separate proceedings were taken against each:—Held irregular. *Pepper v. Whalley*, 1 Bing. N.C. 71.

If a defendant, who is served with process in a wrong name, appears by his right name, the irregularity is cured. *Bogus v. Miles*, 4 Doug. 180.

Where there was an irregularity in the notice at the foot of the copy of a *latitat*, which was served in November, an application to set aside the proceedings for irregularity, made at the end of Hilary term, was too late. *Elean v. Rees*, 3 Doug. 382.

An inconsistency in the body of a bill of Middlesex, might be cured by the notice at the foot of the writ. *Willan v. Collins*, 1 Dowl. P.C. 35.

The mistake of Laurence instead of Lawrence, in the name of the defendant, in a writ of *capias*, is immaterial; it is sufficient, in a writ of *capias*, to describe the defendant as of Kent-street, in the county of Surrey. A writ of *capias* was indorsed, "Bail for 40*l*. and upwards, by affidavit"—held sufficient. There need not be a date to the indorsement on a writ of *capias*. *Webb v. Lawrence*, 1 C. & M. 806, s. c. 3 Tyr. 906; 2 Dowl. P.C. 81.

Where a writ was to take Christopher Hooper, and the English notice was directed to Christopher Wood, the Court set aside the service for irregularity, with costs. *Wright v. Hooper*, 2 C. & J. 236, s. c. 2 Tyr. 283.

In a summons, if the name of the plaintiff is omitted, as the person who will enter an appearance for the defendant, if he omit to enter one, it is an irregularity. *Smith v. Crump*, 1 Dowl. P.C. 519.

A writ was served on the 25th of October:—an application, on the 3rd of November, to set aside the service for irregularity (the 2nd being a Sunday), was held to be out of time, and that it should have been made on the 1st. *Tyler v. Green*, 3 Dowl. P.C. 439.

If the warning in a *capias* is placed at the foot of the writ, it is only necessary, in the body, to introduce the words "hereunder written," and not "indorsed hereon" besides. *Bridgman v. Carguven*, 3 Dowl. P.C. 1.

Where there is an objection in point of form, which applies as well to the writ as the copy, the defendant cannot move to set aside the service of the writ only, but he must move to set aside both writ and copy: there must be some irregularity in the service, to warrant the motion to set aside the service only. *Anonymous*, 1 Dowl. P.C. 654.

Service, or knowledge of copy of process, as well as process itself, must be denied, in order to set aside proceedings for irregularity, and want of service of process. *Cohen v. Watson*, 3 Tyr. 238.

The statute 1 Will. 4, c. 70, s. 6, does not exclude the days between the Thursday before and the Wednesday after Easter day, from Easter term; and a *venire facias* returnable on one of those days is regular. *Hall v. Welchman*, 1 Law J. (N.S.) Exch. 174, s. c. 9 C. & J. 473.

The *capias*, of which the form is given by the

statute 2 Will. 4, c. 39, is not a new process, but only a modification of the old writ. Therefore where an affidavit had been sworn before the deputy signer of the bills of Middlesex previous to the passing of that act, and a writ of *capias* was sued out upon it from that office after it came into operation,—it was held, that an arrest thereon was legal. *Young v. Beck*, 4 Law J. (N.S.) Exch. 26, s. c. 1 C. M. & R. 448; 5 Tyr. 24.

#### (k) *Distingas*.

[See OUTLAWRY; and see post, Appearance.]

The service of the writ of summons, to ground a motion for a *distingas*, must be made at the dwelling-house or place of abode of the party; a service at the office of an employer will not suffice. *Thomas v. Thomas*, 2 Mo. & Sc. 730.

A *distingas* will not be granted on an affidavit merely stating the defendant to be absent in Ireland, without shewing that he has gone there to avoid his creditors, although he may have a residence in town, at which unsuccessful attempts to serve him have been made. *Evans v. Fry*, 3 Dowl. P.C. 581.

A copy of the writ of summons must be left at the defendant's dwelling-house, or last place of residence, before the Court will grant a *distingas* thereon. *Street v. Lord Alvanley*, 2 Law J. (N.S.) Exch. 4, s. c. 1 C. & M. 27; 3 Tyr. 162; 1 Dowl. P.C. 638.

The plaintiff cannot obtain a *distingas* on a writ of summons, until eight days after the last time of calling at the dwelling-house, for the purpose of serving the defendant personally, and leaving a copy of the writ; as that is the time when the Court, in granting a *distingas*, consider such a service to have been made, as will satisfy the exigency of the writ, that the defendant shall cause an appearance to be entered within eight days after the service thereof. *Brian v. Stretton*, 2 Law J. (N.S.) Exch. 2, s. c. 1 C. & M. 74; 3 Tyr. 163.

The affidavit to obtain a *distingas*, must state the residence of the defendant at the time of the attempts to serve the *venire*. *Bowser v. Austen*, 1 Law J. (N.S.) Exch. 59, s. c. 2 C. & J. 45; 2 Tyr. 164.

In general, a *distingas* will not be allowed to issue, unless three attempts at least have been made to serve the *venire*. *Fisher v. Goodwin*, 1 Law J. (N.S.) Exch. 40, s. c. 2 C. & J. 94; 2 Tyr. 164; and see *Hoblyn v. Simpson*, *Latchmann v. Cross*, and *Anonymous*, 2 Tyr. 165.

In order to get a *distingas* under the 2 Will. 4, c. 39, there must be three attempts to serve, and the summons left, or a positive affidavit that the defendant keeps out of the way to avoid being served. *Anonymous*, 1 Dowl. P.C. 513. [Patteson]

A *distingas* granted after four attempts to serve the *venire*, where the defendant's son told the plaintiff's attorney that the defendant kept out of the way to avoid being arrested, and to enable him to sell his property for the benefit of his other creditors, and that it was no use to attempt to serve him, as he would continue to keep out of the way until his property was disposed of. *Bennington v. Owen*, 1 Law J. (N.S.) Exch. 66, s. c. 2 C. & J. 12.

A *distingas*, allowed to issue on an affidavit which does not state that a copy of the writ was left at the defendant's house, is not irregular. *Smith v. Mac-*

*donald*, 2 Law J. (N.S.) Exch. 149, s.c. 1 Dowl. P.C. 688.

To found an application for a *distringas*, it must be shewn that the defendant is at home or in the neighbourhood during the time that the party calls to serve him. *Price v. Bower*, 2 Dowl. P.C. 1. [Bayley]

Six calls to serve a writ on a defendant, and the only answer he obtained was, that he was out of town:—Held, not sufficient to get a *distringas*. *Waddington v. Palmer*, 2 Dowl. P.C. 7.

Service of a writ of summons to procure a *distringas*, all the three calls need not be made by the same person. *Smith v. Good*, 2 Dowl. P.C. 398.

A *distringas* was granted against the defendant, though he had not been served with the writ, it appearing that he had gone abroad to avoid his creditors, and had left his servants at his house in town. *Moon v. Thynne*, 3 Dowl. P.C. 153.

To entitle a plaintiff to a *distringas* upon a writ of summons not personally served, it is not sufficient to shew that unsuccessful attempts were made to serve the defendant at his residence on three occasions, and that on the second a copy of the writ was left, and referred to on the third. The copy of the writ must be left on the third visit. *Mason v. Lee*, 5 N. & M. 240.

The attempts to serve a summons, in order to obtain a *distringas*, may be made in the same day, if it appear that the defendant is purposely keeping out of the way. *White v. Western*, 2 Dowl. P.C. 451.

In order to obtain a *distringas*, the person endeavouring to serve the summons must appoint the day and hour at which he will make his subsequent calls. *Wills v. Bowman*, 2 Dowl. P.C. 413.

In order to satisfy the Court, under 2 & 3 Will. 4, c. 39, s. 3, that proper means have been taken to serve a *distringas* on a defendant, who was a clerk in a victualling office, in order to enter an appearance against him, it should be shewn not only that his residence or property could not be discovered, but that attempts had been made to serve him at the victualling office. *Rounceill v. Bower*, 4 Tyr. 374.

To obtain a *distringas*, it is not sufficient that three calls are made, if the day and hour for the two subsequent calls are not mentioned, unless it is evident that a defendant endeavours to keep out of the way. *Johnston v. Disney*, 2 Dowl. P.C. 400.

Where a defendant is absent at the time of the endeavour to serve a writ of summons, a *distringas* cannot be moved for unless there are grounds shewn from which the Court can infer that the defendant keeps out of the way to avoid being served. *Simpson v. Lord Graves*, 2 Dowl. P.C. 10.

In executing a *distringas*, it is sufficient that the sheriff should take all the property on the premises, although it amounts to less than 40s.; and on the sheriff's return, the plaintiff will be entitled to enter an appearance for the defendant. *Jones v. Dyer*, 2 Dowl. P.C. 445.

A *distringas* under 2 Will. 4, c. 39, must be issued expressly for one of two purposes; either to compel appearance, or with a view to outlawry, not in the alternative. *Fraser v. Case*, 9 Bing. 464, s.c. 2 Mo. & So. 72; 1 Dowl. P.C. 725.

A *distringas* for the purpose of proceeding to outlawry, may be obtained upon an affidavit, which would be insufficient for a *distringas* for the purpose

of entering an appearance for the defendant. *Hewitt v. Melton*, 2 Law J. (N.S.) Exch. 297, s.c. 1 C. & M. 720; 3 Tyr. 822; see *Phillips v. Bowen*, 3 Tyr. 822.

The Court will not order the issues levied under writs of *distringas*, issued as at common law, to be sold. *Farmer v. Stanford*, 1 Law J. (N.S.) Exch. 133, s.c. 2 C. & J. 435.

The old rules of practice in this court as to the requisites of an affidavit to obtain a *distringas* upon a *venue*, are applicable to the new process by writ of summons. *Johnson v. Rouse*, 2 Law J. (N.S.) Exch. 3, s.c. 1 C. & M. 26; 3 Tyr. 161; 1 Dowl. P.C. 641.

The Court will not grant an application to increase the issues after a levy of 40s. on a *distringas*, according to the ancient common-law course of the Court;—but will leave the plaintiff to act at his own peril. *Watson v. Lock*, 1 Law J. (N.S.) Exch. 69, s.c. 2 C. & J. 203; 2 Tyr. 212.

The Court refused to set aside a *distringas* for irregularity, because in the copy of the writ of summons which was left, the name of Andrew Bryan was put as the defendant's name, instead of Andrews Bryan. *Tyser v. Bryan*, 3 Law J. (N.S.) Exch. 183, s.c. 2 Dowl. P.C. 640.

#### (C) APPEARANCE.

[See BAIL, Cancelling Bail-bond.]

What are due and proper means to execute a *distringas*, in order to obtain the permission of the Court to enter an appearance for the defendant. *Saunderson v. Bourn*, 3 Law J. (N.S.) Exch. 135, s.c. 2 C. & M. 315; 2 Dowl. P.C. 338.

An affidavit to obtain leave to enter an appearance under 2 Will. 4, c. 39, s. 3, must state some means used to serve the *distringas*; stating that the deponent has "diligently endeavoured to serve the *distringas*," is insufficient. *Harris v. Gribble*, 3 Law J. (N.S.) Exch. 208.

The plaintiff, in the Court of Exchequer, may enter a common appearance at any time before the cause is out of court, and therefore he has four terms for that purpose.

A defendant who has not appeared, had no right to an imparlance. *Cook v. Allen*, 2 Law J. (N.S.) Exch. 113, s.c. 1 C. & M. 350; 3 Tyr. 378; 1 Dowl. P.C. 676.

After the sheriff has levied on a *distringas*, and returned the issues on the levy, the plaintiff may enter an appearance for the defendant, without an affidavit of service of the writ made by the officer. *Page v. Hemp*, 4 Law J. (N.S.) Exch. 230, s.c. 2 C. M. & R. 494.

Where the defendant has obtained possession of the original writ of summons, and will not deliver it up, the Court will allow an appearance to be entered, without an indorsement of the day of service, computing the time for entering an appearance from the day when the defendant obtained possession of the writ, and making the defendant pay the costs of the appearance.

Service of a rule for that purpose at the defendant's dwelling-house, after ineffectual attempts to serve the defendant personally—held, sufficient. *Brook v. Edridge*, 3 Law J. (N.S.) Exch. 216, s.c. 2 Dowl. P.C. 647.

The defendant in a suit in the Exchequer on the revenue side is entitled to appear in court in per-

son, on the day specified in the process, and to have his appearance recorded, without a motion to obtain the leave of the Court so to appear. *Attorney General v. Birch*, 3 Law J. (N.S.) Exch. 58, s. c. 2 Dowl. P.C. 255.

The affidavit on which to found a motion for leave to enter an appearance for the defendant, under 2 Will. 4, c. 42, should state specifically what inquiries were made by the sheriff's officer to discover the defendant's residence, in order to serve him with a copy of the writ of *distringas*, and it is not sufficient that the affidavit states generally, that the sheriff's officer *made diligent inquiry*. *Copeland v. Neville*, 4 Law J. (N.S.) K.B. 205, s. c. 5 N. & M. 172; 3 Ad. & E. 668.

Where the defendant cannot be served personally with the summons or *distringas*, the Court will not allow an appearance to be entered, unless the affidavit is strictly accurate, and it is shewn that no reasonable means have been left untried to serve the defendant. *Scarborough v. Eeans*, 1 Dowl. P.C. 9.

If the defendant neglects to enter his appearance to the writ within eight days, and the plaintiff enters an appearance for him, and then the defendant enters an appearance, and gives notice of it, the plaintiff may proceed as if no such appearance had been entered, and may sign judgment without a demand of plea. *Davis v. Cooper*, 2 Dowl. P.C. 135.

To induce the Court to allow an appearance to be entered for a defendant, the affidavit must shew what means have been taken to execute the *distringas*. *Balguy v. Gardner*, 2 Dowl. P.C. 52.

Where the sheriff has distrained on a defendant's goods under the 2 & 3 Will. 4, c. 39, s. 3, and the defendant does not appear according to the exigency of the writ, the plaintiff may enter an appearance for him without leave of the Court. *Johnson v. Smealey*, 1 Dowl. P.C. 526.

The appearance must be entered in the county into which the original writ issues, though the service be of an *alias* into another county. *Brown v. McCulloch*, 1 Mo. & Sc. 679.

Where three attempts have been made to serve a *distringas*, which have been rendered ineffectual by the conduct of the defendant or his agents, the Court will allow an appearance to be entered for him. *Tryng v. Gooding*, 2 Dowl. P.C. 162.

#### (D) DECLARATION.

##### (a) When to declare.

If the defendant appear on the eighth day after the service of the writ of summons, the plaintiff may deliver a declaration on the same day. *Morris v. Smith*, 4 Law J. (N.S.) Exch. 307, s. c. 2 C. M. & R. 314.

The rule of Hilary term, 2 Will. 4, c. 35, applies to all courts and causes, whether commenced originally in the superior courts, or removed from an inferior court by *habeas corpus*.

Where, therefore, a cause has been removed from an inferior court to the Court of King's Bench by *habeas corpus*, the plaintiff has four terms from the time when the defendant has filed bail, to declare; and the cause is not out of court until the end of *four terms* from that time; consequently, proof, in *an action* for a malicious arrest, that the cause was

removed, and that the plaintiff did not declare within two terms, was held insufficient to shew that the original suit was determined. *Norris v. Richards*, 4 Law J. (N.S.) K.B. 254, s. c. 5 N. & M. 268; 3 Ad. & E. 733.

The rules of Hilary term, 2 Will. 4, extend only to proceedings in which the three courts have a common jurisdiction; and therefore rule 35, as to the time for declaring, does not apply to a declaration in a real action.

But the general rule of practice, that if a plaintiff does not declare within a year after the return day of the writ, he shall be considered out of court, does apply to real actions, and, consequently, a declaration in *quare impedit* delivered after that time is irregular;—in such a case, as well as in personal actions, the proper course is to apply for time to declare. *Barnes v. Jackson*, 4 Law J. (N.S.) C.P. 120, s. c. 1 Bing. N.C. 545; 1 Sc. 520.

If a plaintiff proceeds by a writ of summons, he cannot declare against the defendant until eight days after the service, inclusive of the day of serving the writ, have expired; and if he does, he will not be entitled to the costs of his declaration.

It is not too late on the 25th to take advantage of an irregularity in declaring too soon, which has occurred on the 7th. *Fish v. Palmer*, 2 Dowl. P.C. 460.

If a plaintiff's proceedings on a writ of summons are stayed by rule, he is bound to declare within a year after the expiration of that rule, or he will be out of court. *Unite v. Humphrey*, 3 Dowl. P.C. 532.

##### (b) Against what Parties.

Where the original writ was against two, and the plaintiff declares against them separately, the Court would not set aside the proceedings. *Durrant v. Scrook*, 3 Doug. 400.

A declaration against one, where process has issued against two, is not irregular, if no other declaration has been filed. *Caldwell v. Blake*, 4 Law J. (N.S.) Exch. 200, s. c. 2 C. M. & R. 249; 3 Dowl. P.C. 656.

##### (c) De bene esse.

##### [See BAIL, Discharge of.]

Though a plaintiff is not bound to declare *de bene esse*; yet, if he do not, he cannot say that he has lost a trial, so as to have the bail-bond stand as a security on setting aside proceedings upon the bail-bond. *Balmont v. Morris*, 1 C. & M. 661, s. c. 3 Tyr. 821.

Where a plaintiff had declared conditionally after the time for the defendant's appearing had expired, and the defendant took the declaration out of the office—held, a waiver of the irregularity. *Gilbert v. Kirkland*, 1 Dowl. P.C. 153.

Where the defendant is not in actual custody, and bail is not put in within eight days of the execution of the writ of *capias*, a plaintiff may declare *de bene esse*. *Hodgson v. Mee*, 4 Law J. (N.S.) K.B. 256, s. c. 5 N. & M. 302; 3 Ad. & E. 765.

The right of declaring *de bene esse* has not been taken away by the 2 Will. 4, c. 39, and therefore if a plaintiff declare *de bene esse* at any time before the bail have been perfected, he is entitled to have the bail-bond stand as a security, but not if he



omit to do so *Bazeley v. Newbold*, 4 Law J. (n.s.) Exch. 323, s. c. 2 C. M. & R. 325.

(d) *Form.*

[See EJECTMENT, Declaration, Pleading and Evidence—INITIALS.]

The writ of summons is now the commencement of an action, and, therefore, if the form of action declared upon is different from the form specified in the writ, the declaration is irregular. *Thompson v. Dicus*, 2 Law J. (n.s.) Exch. 294, s. c. 1 C. & M. 768; 3 Tyr. 873.

Since the stat. 2 Will. 4, c. 39, a plaintiff in the Court of Exchequer need not declare as a "debtor" to the king. *Hurst v. Pitt*, 2 Law (n.s.) Exch. 103, s. c. 1 C. & M. 324; 3 Tyr. 264; 1 Dowl. P.C. 659.

The new rules, which the Judges of the various courts are empowered by the 3 & 4 Will. 4, c. 42, s. 1, to promulgate, apply only to those cases in which the Courts have a common and concurrent jurisdiction.

Therefore, the rule by which every pleading, as well as the declaration, shall be entitled of the day and year when the same was pleaded, and shall bear no other time or date, does not apply to a count in a writ of right, which, consequently, may be still entitled of the term. *Miller v. Miller*, 4 Law J. (n.s.) C.P. 135, s. c. 1 Sc. 387.

The date of the writ need not be stated in the declaration, notwithstanding the pleading rules of Hilary term, 4 Will. 4. *De Pre v. Langridge*, 2 Dowl. P.C. 684.

It is no ground of special demurrer, that the plaintiff omits to describe the nature of the action at the commencement of the declaration, pursuant to the rule of Michaelmas term, 1654. *Marshall v. Thomas*, 3 Mo. & Sc. 98.

The form provided by Reg. Gen. Trinity term, 1 Will. 4, and entitled, "common counts," constitutes separate counts, as well for the purposes of pleading as of taxation of costs. (See Reg. Gen. of Pleading, Hilary term, 4 Will. 4, No. 5.) *Jourdain v. Johnson*, 5 Law J. (n.s.) Exch. 42, s. c. 5 Tyr. 524.

If the Crown demises during a term, a declaration in ejectment may be entitled as of the first year of the successor's reign. *Anonymous*, 1 Dowl. P.C. 4.

(e) *Notice of.*

A declaration filed is good only from the time of notice; and therefore, if an appearance be entered by the defendant between the time of filing the declaration, and of the notice thereof, such declaration may be set aside for irregularity. *Weddle v. Brazier*, 2 Law J. (n.s.) Exch. 4, s. c. 1 C. & M. 69; 3 Tyr. 237; 1 Dowl. P.C. 639.

A variance between the description of the form of action stated in the notice of declaration, and in the declaration itself, is an irregularity, but it is waived by the defendant taking the declaration out of the office. *Robins v. Richards*, 1 Dowl. P.C. 378.

The notice of declaration (whether the declaration be filed absolutely or conditionally), must state the nature of the action.

Notice of a declaration in case, where the declaration filed was in debt, was held to be irregular, and the proceedings were set aside. *Cock v. Johnson*, 1 Mo. & Sc. 115.

DIGEST, 1831—35.

The motion under the 49th rule of Hilary. 1 Will. 4, that sticking up a notice of declaration in the office may be deemed good service, where the defendant's residence is unknown, is absolute in the first instance. *Bridger v. Austin*, 1 Mo. & Sc. 521.

Where in the service of a notice of declaration the probabilities are, that it has come to the hands of the defendant, and the latter does not deny that it has come to his knowledge, the Court will not set aside the service. *Rolfe v. Brown*, 3 Dowl. P.C. 628.

(f) *Service of.*

Leave to serve a declaration, by sticking up a copy in the office, &c. refused, where the writ had been served personally, and the affidavit stated, that inquiries had been made for the defendant's place of residence, and that it was unknown, but did not state that any inquiry had been made for the defendant. *Heming v. Duke*, 3 Law J. (n.s.) Exch. 200, s. c. 2 Dowl. P.C. 637.

On a motion to serve a declaration by leaving a copy at the defendant's last place of residence, and sticking up a copy in the office, the Court will not give leave to serve future notices in the same manner; but, to prevent a suspension of proceedings during vacation, they will grant a rule, allowing such service on obtaining the leave of a Judge. *Martin v. Colville*, 3 Law J. (n.s.) Exch. 342.

The motion under 1 Reg. Gen. Hilary term, 2 Will. 4, 49, that sticking up a notice of action in the office may be deemed good service, where the defendant's residence is unknown, is absolute in the first instance. *Bridger v. Austin*, 1 Dowl. P.C. 272.

In order to render good the service of a declaration, by sticking it up in the King's Bench Office, more than one attempt must be made to find the defendant. *Fry v. Rogers*, 2 Dowl. P.C. 412.

Where the defendant's residence is unknown, application must be made to the Court in the first instance for leave to serve the declaration in a particular manner, and if the declaration is left at the defendant's last place of abode, the Court will not afterwards declare such service to be good. *Troughton v. Craven*, 3 Dowl. P.C. 436.

(g) *Delivery.*

[See, post, Proceedings, Where stayed.]

(h) *Striking out Counts.*

It is too late to strike out counts on promises to the plaintiffs as executors, after the cause has been taken down to trial at the assizes. *Tomlinson v. Nanny*, 2 Dowl. P.C. 17.

In an action for tithes, the plaintiff introduced two counts into the declaration, one for the treble value of tithes not set out, the other for the same tithes bargained and sold:—Held, that this was a violation of the rule of Hilary term, 3 & 4 Will. 4, reg. 1, s. 5, and the Court ordered the last count to be struck out with costs, but bound the defendant to agree not to set up a composition at the trial, or that if he did, the declaration might be amended. *Laurence v. Stephens*, 3 Dowl. P.C. 377.

A declaration in ejectment on the demise of the churchwardens and overseers of a parish, to recover parish property, contained two sets of counts; one

specifying the names of the individuals, and the other not. The Court ordered one set to be struck out.—Held, also, that a motion for that purpose, involving a point of law, and the construction of an act of parliament was properly brought before the full court. *Doe d. Churchwardens and Overseers of the parish of Llandaff v. Roe*, 4 Dowl. P.C. 222.

### (E) IMPARLANCE.

The Court would not grant a rule for an imparlance; the defendant might take it without. *Phillips v. Hardings*, 3 Doug. 314.

Where the declaration was delivered in a different term from that in which the writ was returnable and the appearance entered, the defendant was not precluded by the rule Trinity term, 1 Will. 4, from claiming an imparlance.

But a summons for time to plead, and a consent indorsed thereon, amounts to a waiver of the imparlance; and if no order was drawn up, the plaintiff might sign judgment for want of a plea, before the enlarged time for pleading had expired. *Edensor v. Hoffman*, 1 Law J. (N.S.) Exch. 66, s.c. 2 C. & J. 140; 1 Dowl. P.C. 304.

Where a plaintiff declared on or before the last day of term, the defendant was not deprived of his imparlance by reg. 7, Trinity term, 1 Will. 4, unless the process was returnable in the same term. *Thomson v. Smith*, 1 Dowl. P.C. 381.

Where a plaintiff declared in vacation, the defendant was held entitled to an imparlance, notwithstanding the 2 & 3 Will. 4, c. 39, s. 11, and 2 Reg. Gen. Hilary term, 4 Will. 4, (Pleading Rules), *Frean v. Chaplin*, 2 Dowl. P.C. 523.

The 2 & 3 Will. 4, c. 39, s. 11, abolished imparlances. *Wigley v. Tomlins*, 3 Dowl. P.C. 7.

Since the Uniformity of Process Act, all imparlances are abolished. Therefore, where a declaration having been delivered on the 25th of October, judgment was signed on the 31st for want of a plea, it was held to be regular. *Nurse v. Gething*, 4 Law J. (N.S.) Exch. 4, s.c. 1 C. M. & R. 567; 5 Tyr. 170.

### (F) PLEA.

#### (a) In general.

#### [See ATTORNEY, Bill for Costs—DEMURRER.]

If a plaintiff sues out serviceable process, and without discontinuing, sues out bailable process for the same cause of action, the defendant may plead the pendency of the former suit, and the Court will not relieve the plaintiff. *Prescott v. Stevens*, 1 Dowl. P.C. 57.

#### (b) Time for pleading.

In an order for time to plead, one day is to be reckoned inclusive, the other exclusive; and, although the pleas delivered are irregular, the plaintiff cannot sign judgment until the time for pleading is out. *Pepperell v. Burrell*, 3 Law J. (N.S.) Exch. 806, s.c. 1 C. M. & R. 372; 4 Tyr. 809.

An order for time to plead on the "usual terms" does not import the acceptance of short notice of a writ of inquiry. *Stevens v. Pell*, 3 Law J. (N.S.) Exch. 88, s.c. 2 C. & M. 421; 4 Tyr. 6.

A defendant has four days' time to plead after

judgment of respondeat oster. *Cantwell v. Earl of Stirling*, 1 Law J. (N.S.) C.P. 77, s.c. 8 Bing. 174; 1 Mo. & Sc. 297, 365.

Where an order for particulars and an order for time to plead have been obtained, the time for pleading will run, although no particulars are given; unless it is expressed in the order for time to plead, that it is not to begin to run till after the delivery of particulars. *Adams v. Drummond*, 1 Dowl. P.C. 99.

If a plaintiff gives a greater number of days for pleading than by the practice of the Court is required, the defendant is entitled to avail himself of that greater number, *Solomanson v. Parker*, 2 Dowl. P.C. 405.

If the time for pleading does not expire until after the 10th of August, although it may be enlarged time, the defendant has still the same time for pleading, as if the declaration had been filed or delivered on the 24th of October. *Wilson v. Bradstocks*, 2 Dowl. P.C. 416.

If a defendant obtains an enlarged time for pleading previous to the 10th of August, but which does not expire on that day, he is entitled to the remainder of the enlarged time after the 24th of October, for the purpose of pleading. *Trinder v. Smedley*, 3 Dowl. P.C. 87.

Where the plaintiff will not be materially prejudiced by the delay, the Court will, under certain circumstances, grant the defendant a year's time to plead. *Hunt v. Barclay*, 3 Dowl. P.C. 646.

#### (c) Rule to plead.

A rule to plead, of the term in which judgment is signed, is not necessary where the declaration has been delivered, and a rule to plead given in the preceding vacation. *Mould v. Murphy*, 2 Law J. (N.S.) Exch. 231, s.c. 1 C. & M. 495; 3 Tyr. 538; 2 Dowl. P.C. 54.

Taking out a summons for time to plead is a waiver of a rule to plead. *Nugee v. McDonnell*, 3 Dowl. P.C. 579.

#### (d) Demand of Plea.

A demand of plea cannot be served on a defendant not an attorney, by sticking it up in the King's Bench Office. *Anon.* 1 Dowl. P.C. 68.

A demand of plea before the defendant has appeared, although not available by the plaintiff, may be adopted by the defendant; and in a bailable action, he may, after such a demand (served before special bail) immediately file common bail and plead; and thus deprive the plaintiff of his right to special bail.

But the plaintiff, upon discovering his mistake, may countermand the demand of plea; and if such countermand be served before the defendant has acted upon the demand, (but not otherwise,) it will be in time; and will restore both parties to their former situation. *Rouse v. Stevens*, 1 Law J. (N.S.) K.B. 206.

Notice to "appear and plead" in a specified time, gives the defendant all that time to enter an appearance. Consequently, where, after delivering a declaration *de bene esse*, indorsed "to appear and plead in eight days," the plaintiff entered an appearance according to the statute, and subsequently, within the eight days, the defendant also entered an

appearance:—it was held, that a judgment signed without a demand of plea was irregular. *Wilket v. Wilson*, 1 Law J. (N.S.) Exch. 117, s.c. 2 C. & J. 356.

(c) *In Abatement.*

A plea in abatement by an Earl, of misnomer in his title of dignity, must allege positively, and not merely by inference, that he was Earl at the time of suing out the writ. *Digby v. Alexander*, 1 Law J. (N.S.) C.P. 122, s.c. 8 Bing. 416; 1 Mo. & Sc. 559.

If a plea in abatement be a nullity, no act of the plaintiff, apparently acquiescing in it, will be construed into a recognition of it. *Garratt v. Hooper*, 1 Dowl. P.C. 28.

(f) *Issuable Pleas.*

If, in an action against an administrator, the defendant, when under an order to plead issuably, plead *plene administravit* and his bankruptcy, the plaintiff may sign judgment as for want of a plea. *Serle v. Bradshaw*, 3 Law J. (N.S.) Exch. 22, s.c. 2 C. & M. 148; 4 Tyr. 69.

A demurrer, though trivial, cannot be treated as a nullity, where the defendant is not under terms to plead issuably; but, if he is, he cannot demur specially; and where good grounds are stated, the Court will sometimes allow the special causes of demurrer to be struck out. *Natney v. Kenrick*, 1 Dowl. P.C. 609.

A defendant, who was under terms to plead issuably in an action against him as acceptor of a bill of exchange by an indorsee, pleaded that he had received no consideration from the plaintiff; and the plea was delivered so late in Trinity term, that there was not sufficient time to get the demurrer argued that term. The Court ordered the plea to be set aside, and that the plaintiff should be at liberty to sign judgment, unless the defendant consented to amend upon payment of all costs, and going to trial at the next sittings. *Brown v. Austin*, 4 Dowl. P.C. 161.

(g) *Sham Pleas.*

Rule 8 of Hilary term, 4 Will. 4, which requires, that where defendant shall plead a plea of judgment recovered in another court, he shall, in the margin of such plea, state the date of such judgment, and, if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea,—applies merely to the sham plea of judgment recovered, and does not apply to a plea of judgment recovered pleaded by an executor. *Power v. Izod*, 4 Law J. (N.S.) C.P. 5, s.c. 1 Bing. N.C. 304; 1 Sc. 119.

(h) *Repugnant Plea.*

[See BILL OF EXCHANGE, Pleading and Evidence.]

(i) *Inconsistent Pleas.*

It is no objection to pleas that they are inconsistent. *Wilkinson v. Small*, 3 Dowl. P.C. 564.

(k) *Nullities.*

[See JUDGMENT, For want of a Plea.]

(l) *Signatures.*

[See JUDGMENT, For want of a Plea.]

The old rule of practice in the Common Pleas, requiring pleas to be signed by a Serjeant, is virtually repealed by His Majesty's warrant of 24th of April 1834, throwing open that court. *Power v. Izod*, 4 Law J. (N.S.) C.P. 5, s.c. 1 Bing. N.C. 304; 1 Sc. 119; s.c. as *Power v. Fry*, 3 Dowl. P.C. 140.

(m) *Delivering.*

The delivery of a plea after nine o'clock in the evening, does not entitle the plaintiff to sign judgment for want of a plea, without returning the plea, or giving notice of the objection to the time of delivery. *Horsley v. Purdon*, 3 Law J. (N.S.) Exch. 65.

The first rule, Reg. Gen., Hil. 4 Will. 4, which requires that pleadings should be delivered between the parties, does not apply to actions of ejectment, it having been usual, before those rules were made, to file them at the Judge's chambers, and not with any officer of the Court. *Doe d. Williams v. Williams*, 4 Law J. (N.S.) K.B. 39, s.c. 2 Ad. & E. 381; 4 N. & M. 259.

A plea of the general issue is within rule 8 of Michaelmas term, 1 Will. 4; and, therefore, the fixing up of a copy in the Office of Pleas, where the plaintiff's attorney resided nine miles from London, and had not entered a place of service according to the rule:—Held, sufficient. *Blackburne v. Peate*, 3 Law J. (N.S.) Exch. 15, s.c. 2 C. & M. 244; 4 Tyr. 38.

(n) *Striking out.*

A plea of *nil debet*, to debt on a French judgment, ordered to be struck out, where the defendant also pleaded special pleas, stating that he was taken in execution on the judgment, and remained in prison four months. *Allen v. Furniss*, 2 Law J. (N.S.) Exch. 172, s.c. 1 Dowl. P.C. 690.

In an action on an attorney's bill, the defendant's attorney suffered judgment to go by default, which was set aside on an affidavit of merits and payment of costs, and the defendant was let in to plead. She pleaded that no signed bill had been delivered; and afterwards added two pleas, of non assumpsit, and that the plaintiff had not taken out his certificate. The plaintiff, on application to a Judge at chambers, obtained an order confining the defendant to the plea of the general issue. The Court held, that this order was proper, it appearing that the defendant had had the bill taxed. *Biggs v. Maxwell*, 3 Dowl. P.C. 497.

Where there are two pleas to the whole action, upon one of which issue is joined to the country, and upon the other judgment is given for the defendant upon demurrer, the Court will not allow the defendant to strike out the general issue. *Young v. Beck*, 3 Dowl. P.C. 804.

(o) *Pleading several Pleas.*

[See TROVER, Pleading.]

The defendant will not be allowed to plead the general issue, and a special plea of justification, where a statute entitles him to give matters of jus-

tification in evidence under the general issue; as, in trespass for breaking and entering the plaintiff's dwelling-house, and seizing goods, &c., to plead not guilty, and a justification as landlord under a distress for rent. *Neale v. McKenzie*, 3 Law J. (n.s.) Exch. 228, s.c. 1 C. M. & R. 61; 4 Tyr. 670.

It is a rule in pleading, that a plea must not be double; and, if the plaintiff means to object to it on that account, he must demur; but if he does not demur, he must reply to the whole, or it will be a discontinuance:—Held, not to apply to double pleading in two several pleas.

Where, therefore, the defendant pleaded *nil debet*, and a second plea, according to the form of the statute, in a county court, and the plaintiff took issue upon the first plea, taking no notice of the second, and obtained judgment:—Held, that, as in county courts they have no power to give leave to plead two pleas, the plaintiff was justified in taking issue upon one plea, and treating the second as a nullity. *Chitty v. Dendy*, 4 Law J. (n.s.) K.B. 191, s.c. 4 N. & M. 842; 3 Ad. & E. 319.

The Court allowed the assignees of a bankrupt to plead in covenant on a lease, 1st, that the lessee's interest did not pass to them; 2ndly, that they renounced the term in time to be discharged from the performance of covenants. *Thompson v. Bradbury*, 1 Bing. N.C. 326, s.c. 1 Sc. 279.

Motion for leave to plead several matters, 1st, non assumpsit; 2ndly, payment as to part; 3rdly, as to part, that the goods were warranted like the sample; 4thly, as to part, the goods were warranted to be of good merchantable quality; 5thly, that they were warranted to be one ton weight of black lead. First and fourth disallowed. *Steele v. Sterry*, 1 Sc. 101.

A defendant may plead to the same demand—first, the general issue; and, secondly, that the demand accrued for carrying into effect illegal wagers. *Triabner v. Duerr*, 1 Bing. N.C. 266, s.c. 1 Sc. 102.

A summons to plead several matters is a stay of proceedings, if it is returnable at the time the Judgment Office opens on the day after the time for pleading expires. *Wells v. Secret*, 2 Dowl. P.C. 447.

(p) *Puis darrein continuance.*

A plea, *puis darrein continuance*, of the plaintiff's bankruptcy, cannot be pleaded till the execution of the assignment to the assignees; and where the assignment was executed on the day of the last continuance in banc, and the defendant did not plead the plea till the assizes, the Court refused to set it aside, as it did not appear that the assignment was executed sufficiently early to allow the defendant to plead it on the last continuance day. *Bretherton v. Osborne*, 1 Dowl. P.C. 457.

Where, after issue is joined, one of several defendants in assumpsit pleads bankruptcy *puis darrein continuance* in banc, to which plea the plaintiff demurs, he ought to make up the record afresh, and enter such plea and demurrer on the roll, and sue out a *venire tamquam* to try the issue, and assess contingent damages on the demurrer.

And where a plaintiff, without having pursued that course, went down to trial, on a *venire*, to try the issue only, and obtained a verdict generally, against the defendant, the Court, on motion, set

aside the verdict. *Thompson v. Percival*, 1 Law J. (n.s.) K.B. 68, s.c. 2 B. & Ad. 968.

(q) *Setting aside.*

Where a defendant pleaded a plea containing a number of facts, and calculated to perplex the plaintiff, the Court, on an affidavit of its falsity, and no pretence being shewn for pleading it, ordered it to be set aside. *Miley v. Walls*, 1 Dowl. P.C. 648.

(r) *Judgment for want of a Plea.*

[See DEMURRER—JUDGMENT, For want of a Plea.]

(G) DEMURRER.

[See DEMURRER.]

(H) REPLICATION AND RULE TO REPLY.

By the 54th rule of Hilary term, 2 Will. 4, service of a rule to reply or plead any subsequent pleading is necessary. *Pound v. Lewis*, 3 Mo. & Sc. 210.

Where a defendant is under terms to plead issuable, the plaintiff cannot reply double; and if he do, the Court will give leave to the defendant to assign it as cause of demurrer, and will not allow it to be argued. *Gisborne v. Wyatt*, 3 Dowl. P.C. 605.

(I) REJOINDER.

A defendant under terms to "rejoin gratis" must rejoin within twenty-four hours. *Clark v. Adams*, 1 Law J. (n.s.) Exch. 217, s.c. 2 C. & J. 683; 2 Tyr. 155.

(K) PARTICULARS OF DEMAND.

[See GOODS SOLD—NUISANCE—PRESCRIPTION, *Monmouth Canal Company v. Harford*.]

A defendant cannot sign judgment against a plaintiff, for non-delivery of particulars. *Sutton v. Clarke*, 1 Law J. (n.s.) C.P. 56, s.c. 8 Bing. 165; 1 Mo. & Sc. 271.

The plaintiffs were spirit-merchants, and through inadvertence, a bill of particulars was delivered for goods sold to the defendant, as in their trade of brewers. The jury found a verdict for the plaintiffs, on proof of delivery of spirits; and the defendant having obtained a rule nisi for a nonsuit, on the ground that he had been surprised by the variance between the particular and the proof;—but it appearing, that he had been neither surprised nor misled, the Court discharged the rule. *Lambirth v. Roff*, 1 Law J. (n.s.) C.P. 120, s.c. 8 Bing. 411; 1 Mo. & Sc. 597.

When the bill of particulars is appended to the record pursuant to the rule of court, it is not necessary to prove the delivery of it to defendant. *Macarthy v. Smith*, 1 Law J. (n.s.) C.P. 73, s.c. 2 Bing. 145; 1 Mo. & Sc. 227.

A particular of demand is not to be construed so strictly, as to authorize the nonsuit of a plaintiff for inaccuracies by which the defendant cannot be misled: thus, under an item for "cash advanced," held, that the amount of disbursements made by the plaintiff for the defendant, could be recovered. *Harrison v. Wood*, 1 Law J. (n.s.) C.P. 116, s.c. 8 Bing. 371; 1 Mo. & Sc. 536.

Though the particulars of demand vary from the evidence which the plaintiff adduces, yet, if the defendant appears and defends, and is not misled

by them, the variance is no ground for nonsuiting the plaintiff. *Green v. Clark*, 2 Dowl. P.C. 18.

It will not prevent the plaintiff from giving evidence on a special count in his declaration, that he has not included that part of his claim in his particular of demand, as a particular is only necessary to explain the common counts. *Day v. Davies*, 5 C. & P. 340. [Tindal]

#### (L) OYER.

If a plaintiff inadvertently grant oyer of the original, the Court will not strike it out after plea in abatement. *Durrant v. Laurence*, 4 Doug. 19.

Oyer cannot be demanded of an indenture in the condition of a bond, but the Court will order a copy of the indenture to be given to the defendant. *Lidgier v. Aldus*, 4 Doug. 202.

#### (M) DELIVERING, AND FORM OF THE ISSUE.

[See WRIT OF TRIAL.]

An issue, prefaced by a memorandum, in the old form, will not be set aside for irregularity, without a previous application to the plaintiff's attorney to strike out the memorandum. *Hart v. Dally*, 3 Law J. (n.s.) Exch. 36.

It is not necessary to insert the form of action in the issue, but the dates of the pleadings must be inserted. *Ball v. Hamlet*, 4 Law J. (n.s.) Exch. 48, s.c. 1 C. M. & R. 575; 5 Tyr. 201.

#### (N) A TERM'S NOTICE OF PROCEEDINGS.

The rule requiring a term's notice prior to proceedings being taken, where the cause has been at issue more than four terms, does not apply to proceedings taken on the part of the defendant. *Shinfield v. Laxton*, 4 Mo. & Sc. 187.

A term's notice of proceeding is not necessary after the lapse of four terms, if the delay has taken place at the defendant's request. *Evans v. Davies*, 3 Dowl. P.C. 786.

The rule requiring a term's notice of proceeding, does not extend to a motion for costs of the day, for not proceeding to trial. *French v. Burton*, 1 Law J. (n.s.) Exch. 267, s.c. 2 C. & J. 634.

A term's notice of motion to discharge a rule for a new trial, is necessary, where no proceeding has been taken for more than four terms after the rule has been obtained.

An order, by consent, to change the defendant's attorney, is not a proceeding in the cause so as to render such notice unnecessary. *Deacon v. Fuller*, 2 Law J. (n.s.) Exch. 175, s.c. 1 C. & M. 349; 3 Tyr. 382; 1 Dowl. P.C. 675.

#### (O) JURY PROCESS.

The jury process must be sent to the sheriff in the case of common jurors, ten days, and in the case of special jurors, three days at the least, before the commission day at the assizes. *Charlton v. Burfit*, 1 Mo. & Sc. 450.

#### (P) TRIAL.

##### (a) Notice of.

[See WRIT OF TRIAL.]

On a new trial, a fresh notice of trial is necessary. *Bingley v. Mallison*, 3 Doug. 402.

An intervening Sunday is not reckoned as a day in a notice of continuance of trial; therefore, where

a cause stands for trial on Monday, such notice served on a Saturday is insufficient. *Grajean v. Manning*, 1 Law J. (n.s.) Exch. 262, s.c. 2 C. & J. 636; 2 Tyr. 725.

An undertaking to accept short notice of trial does not entitle the plaintiff to give short notice of countermand. *King v. Jones*, 2 Law J. (n.s.) Exch. 1, s.c. 1 C. & M. 71; s.p. *Sutton v. Barnett*, 2 Law J. (n.s.) Exch. 2.

In country causes, "short notice of trial," under all circumstances, means four days peremptorily. *Lawson v. Robinson*, 2 Law J. (n.s.) Exch. 238, s.c. 1 C. & M. 499; 3 Tyr. 490; 2 Dowl. P.C. 69.

Where a notice of trial for one sittings is indorsed on the issue, it is irregular to serve another notice for a different sittings on a separate paper. *Kerry v. Reynolds*, 4 Law J. (n.s.) Exch. 313, s.c. 2 C. M. & R. 310.

Where the defendant is under terms to take short notice of trial for the last sittings in term, he is not bound to take short notice for the sittings after term. *Isaacs v. Windsor*, 3 Doug. 430.

Two days' notice of continuance of trial to another sittings must be given exclusive of a Sunday. *Wardle v. Ackland*, 3 Tyr. 819.

A continuance of notice of trial on Friday for Monday is sufficient. *Stewart v. Abraham*, 2 Dowl. P.C. 709.

A notice of trial at "Guildhall, Westminster," the Court of King's Bench not sitting there, is defective, if the defendant swears that he was misled by it. *Cross v. Lang*, 1 Dowl. P.C. 342.

In all cases of peremptory undertaking to try, a fresh notice of trial should be given, though the cause remains in the paper. *Suleh v. Cranbrook*, 1 Dowl. P.C. 148.

In all cases of peremptory undertaking, though the cause may be in the paper, a fresh notice of trial must be given. *Bainbridge v. Purves*, 1 Dowl. P.C. 444.

A request by a defendant, that a notice of trial may be put through his door, is no waiver of a personal service of notice of trial. *Fry v. Mann*, 1 Dowl. P.C. 419.

Practice with respect to short notice of trial under the new rules. *Pound v. Penfold*, 5 N. & M. 186, s.c. 3 Ad. & E. 655.

Where, in a country cause, a defendant undertakes to accept short notice of trial, he is entitled to four days' notice before the commission day; although, from the length of the pleadings, issue is not joined soon enough to admit of so many days. The plaintiff having obtained a verdict, with only three days' notice, the defendant being an executor, the Court granted a new trial without an affidavit of merits. *Lawson v. Robinson*, 2 Dowl. P.C. 69.

##### (b) Peremptory Undertaking.

A plaintiff, who has given a peremptory undertaking to try at a particular sitting, is bound to be prepared for the purpose, although the defendant is not ready to proceed. *Saxon v. Swabey*, 4 Dowl. P.C. 105.

##### (c) Withdrawing the Record.

A counsel, to whom a retainer in a cause has been given, no brief having been delivered, cannot

withdraw the record. *Doe d. Crake v. Brown*, 5 C. & P. 315. [Gurney]

Where the plaintiff or prosecutor has obtained and struck a special jury, and has withdrawn his record, the defendant may take down the record by proviso, and claim a new trial by a common jury. *Res v. Derbishire*, 1 M. & R. 307. [Denman]

#### (d) Putting off.

The Court will not put off a trial, on the ground of the absence of a material witness, when it appears no application has been made to the witness to know whether he will appear. *Worsley v. Bisset*, 3 Doug. 58.

A motion to postpone a trial on account of the absence of a material witness, need not be supported by an affidavit of merits. *Hull v. Prosser*, 3 Dowl. P.C. 704.

Where a cause standing in the paper is postponed at the instance of the plaintiff on payment of costs by him, the defendant is entitled to no more costs than he would have been entitled to, if the record had been withdrawn. *Walker v. Lane*, 3 Dowl. P.C. 504.

Where a defendant applies to put off a trial, on account of the absence of a material witness, but does not give notice to the other side till expense has been incurred in bringing up witnesses, the application will only be granted on payment of the expense of witnesses. It is not necessary that the affidavit, in support of such an application, should swear to a good defence on the merits; it is sufficient, if the witness is sworn to be material and necessary. *Attorney General v. Hull*, 2 Dowl. P.C. 111.

The presentment of a bill for a capital offence may be postponed, on affidavit of the attorney for the prosecution of the illness of a material and necessary witness, although such witness have been examined before a magistrate, and his deposition do not disclose matter of sufficient importance to shew that his evidence was necessary, as the important facts may have been discovered since. *Res v. Palmer*, 6 C. & P. 652.

The Judge, at the Assizes, will not postpone the trial at the instance of the plaintiff, on the ground of the illness of a material witness, as the plaintiff can withdraw his record. *Maspers v. Strashan*, 5 C. & P. 514. [Tindal]

#### (e)ittings.

*Semble*, that the sittings in term are not regarded as one sitting in law, so that a trial at any sitting day would have relation to the first day of the sittings. *Nathan v. Budge*, 3 Dowl. P.C. 207.

Where a plaintiff is prepared to try at one sittings, but, from the press of business, the cause does not come on, and those sittings last till the second sittings commence; but the plaintiff is obliged to withdraw his record on account of its not having been re-sealed, he is still not liable to the costs of the first sittings. *Waters v. Weatherby*, 3 Dowl. P.C. 328.

#### (f) Cause List.

The Court in banc has no jurisdiction over the cause list at Nisi Prius. *Jacob v. Rule*, 1 Dowl. P.C. 349.

#### (g) Mode of conducting in Court.

[See WITNESS, Examination of, at Law. And see NEW TRIAL, *Bird v. Higginson*, 2 Ad. & E. 160.]

On the trial of a writ of right, though the demurrer has been tendered, the tenant must begin. *Jones v. Brearly*, 5 C. & P. 319. [Bosanquet]

The fifteen Judges have made a resolution that the plaintiff shall begin on the trial in all actions for personal injuries, libel, and slander, although the general issue may not be pleaded, and the affirmative be on the defendant. *Carter v. Jones*, 6 C. & P. 64. [Tindal]

In trespass, with plea of *liberum tenementum*, and no general issue, the defendant is entitled to begin. *Pearson v. Cokes*, 1 M. & R. 206. [Patteson]

Upon a plea in abatement of the non-joinder of other parties, the plaintiff is entitled to begin, unless the damages are admitted. *Morris v. Lolan*, 1 M. & R. 233. [Denman]

In an action for a libel where there is no general issue, but a justification as to part, and judgment is suffered by default as to the residue, the plaintiff is entitled to begin. *Wood v. Pringle*, 1 M. & R. 277. [Denman]

The plaintiff is entitled to begin where damages of an unascertained amount are the object of the action, though the affirmative of the issues on the record be with the defendant. *Carter v. Jones*, 1 M. & R. 281. [Tindal]

Where a defendant in replevin pleads property in a third person, and issue is taken thereon, he is entitled to begin. *Colstone v. Hicobbs*, 1 M. & R. 301. [Alderson]

In an action of trespass for taking goods, the defendant, without pleading the general issue, pleaded that the house of the plaintiff was "within and parcel of the parish of M.," and that he, being a constable, took the goods under a warrant of distress for parochial rates. The replication stated that the house was not "within or parcel of the parish of M." The plaintiff's counsel claimed the right to begin, as he had to prove the demand of perusal and copy of the warrant. This the defendant's counsel offered to admit:—Held, that the defendant had a right to begin.

*Quere*,—whether a new trial can be obtained on the ground that a party has been improperly deprived of his right to begin. *Burrell v. Nicholson*, 6 C. & P. 202, s.c. 1 M. & R. 304. [Denman]

In ejectment by lessors claiming under several descents from a particular ancestor, when the defendant admits all the descents except the first, and claims under a will of this ancestor, the defendant is entitled to begin. *Doe d. Wollaston v. Barnes*, 1 M. & R. 356. [Denman]

In assumpsit for work and labour, the defendant pleaded that the "promise was made to the plaintiff and J S, and not with the plaintiff alone." Replication, that the "promise was made to the plaintiff alone, and not to the plaintiff and J S":—Held, that on this issue the plaintiff ought to begin. *Davies v. Evans*, 6 C. & P. 619. [Parke]

In an action by the indorsee of a bill of exchange against the acceptor, the defendant pleaded, first, that the bill was accepted for a debt from which he was discharged under the Insolvent Debtors Act, of which the plaintiff, at the time of the indorsement,

had notice; and secondly, that the bill was accepted to induce the drawer not to oppose the discharge of the defendant under that act, of which, at the time of the indorsement, the plaintiff had also notice. The plaintiff, in his replication, denied the notice in each of the pleas:—Held, that, on these issues, the defendant must begin, and that the onus of proving that the plaintiff had notice was on the defendant. *Warner v. Haines*, 6 C. & P. 666. [Denman]

If, in an action for false imprisonment, the defendant plead, as a justification, that the plaintiff stole feathers, and that he was therefore imprisoned, and the plaintiff reply *de injurid*, the plaintiff is entitled to begin, although the affirmative is on the defendant, and there be no general issue. *Atkinson v. Warne*, 6 C. & P. 687. [Gurney]

If, in assumpsit on bills of exchange, with a count upon an account stated, the defendant plead payment to the counts on the bills, and non assumpsit to the account stated,—Held, that the defendant is entitled to begin, unless the plaintiff's counsel have some evidence to give upon the account stated. *Smart v. Rayner*, 6 C. & P. 721. [Parke]

On a plea of payment, if that be the only one, the defendant is bound to begin. *Richardson v. Fell*, 4 Dowl. P.C. 10.

A party gave a cheque for the amount of a deposit on a sale by auction, and the sale was void. In an action on the cheque, he pleaded there was no consideration for the cheque, and the plaintiff replied that there was consideration:—Held, that on this issue the defendant must begin. *Mills v. Oddy*, 6 C. & P. 728. [Parke]

In a covenant to recover damages for non-performance of an agreement under seal, if the defendant plead only that the deed was obtained by fraud and covin, the affirmative of the issue being upon him, his counsel has a right to begin, although the damages are uncertain, and evidence is necessary to guide the jury in forming their estimate of them. *Reeves v. Underhill*, 6 C. & P. 773.

In an action for debt, for a penalty of 50*l.*, for taking the plaintiff to prison under mesne process, within twenty-four hours, the defendant pleaded that it was by the plaintiff's own consent. Replication that he did not consent. The defendant is entitled to begin, as the plaintiff does not go for unliquidated damages. *Silk v. Humphery*, 7 C. & P. 14. [Coleridge]

In an action on a bill of exchange, by the indorsee against the acceptor, the defendant pleaded that it was an accommodation bill, and that a blank acceptance had been filled up, and applied in discharge of this and other bills; the plaintiff replied that the defendant "broke his promise without such cause as in his plea is alleged":—Held, that the defendant was entitled to begin. *Faith v. McIntyre*, 7 C. & P. 44. [Parke]

In assumpsit, the plea was, as to 20*l.*, payment, and as to the residue, a set-off. The defendant must begin. *Cashead v. Huish*, 7 C. & P. 63. [Parke]

Assumpsit on a bill of exchange, by indorsee against acceptor. The only plea was, that the bill had been altered after acceptance:—Held, that the defendant's counsel had the right to begin, and that upon his calling for the bill, the plaintiff's counsel

ought to produce it without notice. *Barker v. Malcolm*, 7 C. & P. 101. [Tindal]

If, in an action for non-repair, &c., the defendant plead affirmative pleas, which are denied by the replication, the defendant is entitled to begin.

The new rule of practice made by the Judges, as to the right to begin, does not extend to actions of contract. *Lewis v. Wells*, 7 C. & P. 221. [Coleridge]

To a mandamus to a rector to restore a parish clerk, the rector returned, that the clerk was guilty of acts of intoxication, and therefore he dismissed him. The clerk brought an action for a false return, and in his declaration recited the return, and negatived the allegations contained in it. The rector, by his plea, repeated the charges contained in the return:—Held, that, on these pleadings, the defendant had the right to begin. *Bowles v. Neale*, 7 C. & P. 262. [Denman]

The rule, with respect to defendants not fixed by the evidence, is, that the verdict in their favour is to be given at the close of the plaintiff's case. *Russell v. Rider*, 6 C. & P. 416. [Bosanquet]

Where in tort there are several defendants, if there be, at the close of the case for the plaintiff, no evidence against some of the defendants, the Judges have resolved that those defendants against whom there is no evidence, shall be immediately acquitted, and that their acquittal shall not be delayed till the case of the other defendants is gone into. *Child v. Chamberlain*, 6 C. & P. 213, s.c. 1 M. & Ro. 318. [Parke]

Where a defendant relies upon a legal objection, and calls evidence to support it, the plaintiff's counsel having answered the objection, the defendant is entitled to be heard on the law in reply. *Arden v. Tucker*, 1 M. & Ro. 191. [Tenterden]

Where a defendant, indicted for a nuisance, conducted his own case, the Judge, at the conclusion of the case on the part of the prosecution, warned him that, if he called a witness, or read any letter or paper not already in evidence, or opened new facts, the counsel for the prosecution would have a right to reply. *Rea v. Carille*, 6 C. & P. 636.

In ejectment, the defendant's counsel has no right to the general reply, unless he admits the whole *prima facie* case of the lessor of the plaintiff; therefore, where the counsel for the defendant only admitted the pedigree of the lessor of the plaintiff, and his counsel proved the seisin of the ancestor, by receipt of rent, which case was answered by setting up a will, the validity of which was disputed by evidence on the part of the lessor of the plaintiff, —it was held, that the defendant's counsel was not entitled to the general reply. *Doe d. Pile v. Wilson*, 6 C. & P. 301, s.c. 1 M. & Ro. 328. [Denman]

Where plaintiff's counsel had, in his reply, read a letter which he had caused one of the defendant's witnesses to prove, but did not put it in, nor give any other evidence, the Judge would not let the defendant reply, but suggested that the letter ought to be put in as a matter of fact, by the plaintiff, and that the defendant should reply. *Faith v. McIntyre*, 7 C. & P. 44. [Parke]

A counsel has no right to state what he cannot prove; as, for example, conversations which are in his client's knowledge only. *Stevens v. Webb*, 7 C. & P. 60. [Parke]

If a letter be shewn to a witness for the defendant, on the *voire dire*, to make out that he has an interest, and the witness be released and examined, the Judge will not prevent the plaintiff's counsel from observing on his letter in his reply. *Paul v. White*, 5 C. & P. 237. [Taunton]

Where the defendants sever in their plea in assumpsit, and appear at the trial by separate counsel, they may cross-examine the witnesses, and address the jury separately—*semble*. *Ridgeway v. Philip*, 4 Law J. (N.s.) Exch. 14, s. c. 1 C. M. & R. 415; 5 Tyr. 131.

A party, appearing in person, must examine the witnesses, as well as address the jury. Counsel can only be heard to assist him on legal objections. *Shuttleworth v. Nicholson*, 1 M. & R. 254. [Tindal]

If a defendant's counsel, in cross-examining a witness, put a letter into his hand, and, after asking him if he wrote it, desire him to read it, and then put questions upon it, the defendant's counsel is not bound to have the letter read till after he has addressed the jury. *Holland v. Reeves*, 7 C. & P. 36. [Alderson]

A defendant's counsel, in addressing the jury, has no right to say to the jury that he shall call witnesses, unless they inform him that they are satisfied that the defendant is entitled to a verdict, as the case stands; he must either call his witnesses, or close his case, without saying anything about them. *Mortarty v. Brooks*, 6 C. & P. 684. [Lyndhurst]

If, in an action for use and occupation, the defendant cannot shew, by the cross-examination of the plaintiff's witnesses, that the premises are held under a written agreement, but it afterwards appears, by the evidence of the defendant's witnesses, that the premises are so held, the plaintiff is not bound to put in the written agreement. *Marston v. Dean*, 7 C. & P. 13. [Coleridge]

If the opposite party be called on to produce a paper (under a notice to produce), he must either produce it when called for, or not at all; and he cannot, after having refused to produce it, put it into a witness's hand, at a later period of the cause, to ask him at what time an interlineation was made in it. *Doe d. Higge v. Cockell*, 6 C. & P. 525. [Alderson]

If an original parish register be produced on a trial, that certain entries should be read, the jury may look at the book to see whether the entries which have been read are in their proper places or not, but for no other purpose. *Walker v. Beauchamp*, 6 C. & P. 552. [Alderson]

The defendant read in evidence a part of a record roll of presentments before Justices in Eyre, and it appearing that there was one roll for each hundred, and that reference was made in one part to another part of the same roll,—it was held, that the plaintiff was entitled to have read such parts as he thought proper. *Lancum v. Lovell*, 6 C. & P. 455. [Tindal]

In addressing the Court in aggravation of punishment, upon a conviction for a nuisance, it is competent to the prosecutor to advert to provisions contained in an act relating to a private company, if such act contain a clause declaring it to be a public statute, though it be not referred to in any of the prosecutor's affidavits. *Rex v. the Equitable Gas Company*, 3 N. & M. 759.

A witness for the defendant was examined on a commission granted under the stat. 1 Will. 4, sess. 2, c. 22, s. 4; on his cross-examination, a paper, signed by him, was produced to him, and a portion of his cross-examination and re-examination related to it, and was founded on it. The paper was annexed to the deposition:—Held, that this paper was not to be read as part of the cross-examination of the witness, but that if the plaintiff's counsel wished it to be read before the cross-examination was read, it must be read as his evidence, so as to entitle the defendant's counsel to observe on it in a special reply. *Stephens v. Foster*, 6 C. & P. 289. [Lyndhurst]

Although an action of covenant on a lease, by the assignee of the lessee against the lessor, is local, and properly triable in the county where the property is situate; yet the Judge at Nisi Prius in another county will not be warranted in refusing to receive evidence, and nonsuiting the plaintiff; or, if he persist in appearing, in directing a verdict for the defendant, where the fact of the premises being situate in a county different from that in which the venue is laid, does not appear on the face of the record. *Boyes v. Hewetson*, 7 C. & P. 127. [Tindal]

A question arising at Nisi Prius, from the obscurity of the handwriting, what the words of a written instrument produced in evidence really were, the Lord Chief Justice decided it, and refused to have it put to the jury. *Remon v. Hayward*, 4 Law J. (N.s.) K.B. 64, s. c. 2 Ad. & E. 666.

A person's having a lien upon a document, is no objection to his producing it on a trial at Nisi Prius; but if he fears that it may be abstracted, the Judge will allow him to stand by the witness, while the witness is examined respecting it. *Thompson v. Mosely*, 5 C. & P. 501. [Lyndhurst]

If a witness refresh his memory from entries in a book, the opposite counsel may cross-examine on those entries without making them his evidence, and the jury may see the entries if they wish to do so; but if the opposite counsel cross-examine as to other entries in the same book, he makes them his evidence. *Gregory v. Tavernor*, 6 C. & P. 280. [Gurney]

Where a witness, on cross-examination, proves the handwriting of the opposite party to a paper, the counsel for such party has no right to see the paper to enable him to found an examination as to whether it was really the writing of his client or not. *Russell v. Rider*, 6 C. & P. 416. [Bosanquet]

#### (h) Verdict.

A defendant pleaded a right of way for the inhabitant householders of M, to carry goods and fetch water. The jury found, that they had a right of way to fetch water and to water horses, but negatived the right of way to carry goods:—Held, that, as to the right of way for fetching water, a verdict should, under the rule of Hilary term, 4 Will. 4, r. 6, be entered for the defendant; and as to the carrying of goods, for the plaintiff; and that, as to the watering of horses, the verdict was inoperative. *Knight v. Moore*, 7 C. & P. 258. [Williams]

Where in an action of replevin the pleas to the avowries or cognizances, damage feasant, claim a right of common in respect of distinct lands, the jury must have sufficient evidence before them to



enable them to say in respect of which lands the right of common exists. Thus, where in one set of pleas the plaintiff claimed a right of "common of pasture over certain uninclosed strips of land in respect of 100 acres of land, for all commonable cattle levant and couchant thereon;" and in another set claimed that right as an occupier of such strips *poor cause de vicinage*, "for all cattle levant and couchant upon the strips of land he occupied," and the jury found a verdict generally for the plaintiff; that verdict was held to be imperfect, and a new trial granted. *Newby v. Singleton*, 1 Law J. (N.S.) K.B. 165.

In replevin a defendant avowed for rent payable yearly, for rent payable half-yearly, and for rent payable quarterly; and to each of these avowries the plaintiff pleaded *non tenuit*, and *riens in arrear*. A holding at a rent payable half-yearly, was proved, and the jury were directed to find for the plaintiff on the first and fifth issues, for the defendant on the third and fourth, and the jury were discharged on the second and sixth issues. *Willson v. Davenport*, 5 C. & P. 531. [Parke]

In replevin the defendant avowed for rent in arrear from one J M, and also claimed the goods as being the property of himself and another, as assignees of J M, against whom a commission of bankrupt had issued. A verdict having been taken for the defendant on the whole record, the Court directed it to be entered for the plaintiff on the issue taken on the title of the assignees, on the ground that the defendant could not be permitted on the same record to claim the goods as a distress for rent, and also to set up the title of the assignees. *Emery v. Mucklow*, 4 Mo. & Sc. 263.

#### (Q) POSTEA.

Where a party dies after verdict, but before judgment, no judgment can be entered up, except it be within two terms; 17 Car. 2, c. 8. The Court, therefore, would not entertain a motion for delivering up the *postea* to the plaintiff's attorney, that he might proceed to taxation before the Master, the plaintiff being dead, and the *postea* having been indorsed more than two terms previously. *Hodgkins v. Lander*, 2 Law J. (N.S.) K.B. 28.

To debt for twenty years' rent, at 80*l.* a year upon a lease, the defendant pleaded the Statute of Limitations; and further as to 1,420*l.*, part of the demand, that seventeen and three-quarter years ago the plaintiff by deed assigned his reversion, and that no part of the 1,420*l.* had accrued before the assignment: verdict for the plaintiff upon the first issue, and for the defendant upon the second:—Held, that the defendant was entitled to the *postea*. *Paddon v. Bartlett*, 4 Law J. (N.S.) K.B. 65, s.c. 4 N. & M. 321; but, see s.c. in error, 4 Law J. (N.S.) Exch. 333, s.c. 5 N. & M. 383; 3 Ad. & E. 884.

#### (R) JUDGMENT.

[See ANNUITY, and see JUDGMENT.]

#### (S) EXECUTION.

[See EXECUTION.]

#### (T) TERMINATION OF SUIT.

[See MALICIOUS AND VEXATIOUS ARREST.]

Where a writ has been sued out against a party, and no declaration filed within a year from the Digest, 1831—35.

time of suing out the writ, the cause is out of court; and this is sufficient proof of the "end and determination" of the suit to satisfy the averment in a declaration for a malicious arrest. *Pierce v. Street*, 1 Law J. (N.S.) K.B. 147, s.c. 3 B. & Ad. 397.

Discharging a jury by consent, does not terminate the suit, but is the same in this respect as withdrawing a juror. And where the plaintiff, instead of going on with such suit, brought a new action for a cause admitted to be the same, the Court stayed the proceedings, but would not grant the defendant his costs of the latter suit. *Everett v. Youells*, 3 B. & Ad. 349.

#### (U) MOTIONS, RULES AND ORDERS.

[See ATTORNEY, Striking off the Roll—INTERPLEADER—COSTS, Motions and Rules.—And, see, *ante*, Declaration, Form of.]

If a party against whom a rule is granted, obtains its enlargement, he cannot afterwards object that it was not personally served. *Cartwright v. Blackworth*, 1 Dowl. P.C. 489.

A rule cannot be served at the last place of an attorney's abode, unless it appears to be that stated in the residence-book, or that none is there stated. *Re Sandys*, 1 Dowl. P.C. 362.

Service of a rule on an attorney, by leaving it with a landress at his chambers, who stated that she was authorized to receive notices and papers for him, is insufficient. *Dodd v. Drummond*, 1 Dowl. P.C. 381.

What will be circumstances sufficient to dispense with personal service of a rule. *Englehart v. Morgan*, 1 Dowl. P.C. 422.

Special service of rule. See *Stout v. Smith*, 1 Dowl. P.C. 506.

Service of a rule *nisi* to compute, on the mother of the defendant at his residence, held sufficient. *Warren v. Smith*, 2 Dowl. P.C. 216.

Service of a rule *nisi* to compute, on the defendant's landlady, is not sufficient. *Gardener v. Green*, 3 Dowl. P.C. 343.

Service of a rule *nisi* to compute, by putting it under the door of the defendant's chambers, is not sufficient, although the landress states that the defendant will probably have the rule in the course of the day. *Stratton v. Hawkes*, 3 Dowl. P.C. 25.

Service of a rule *nisi* to compute at a house where the defendant's family were still living, though he himself had gone away—held, sufficient without the leave of the Court. *Pagett v. Hill*, 2 Dowl. P.C. 688.

Service of a rule *nisi* at the office of an attorney, by leaving it with the landress's servant, held insufficient. *Smith v. Spurr*, 2 Dowl. P.C. 231.

An affidavit of the service of a rule *nisi* at the chambers of an attorney, by leaving it with a landress there, held insufficient, because it did not state that the deponent believed her to be the defendant's servant. *Kent v. Jones*, 3 Dowl. P.C. 210.

An affidavit of service by leaving a rule at the defendant's chambers, with a female servant there—held, insufficient. *Alanson v. Walker*, 3 Dowl. P.C. 258.

In serving a rule for payment of costs, it is not necessary that the original rule should be placed in the hands of the defendant: if it is shewn to him, so

that he can read its contents, it is sufficient. *Calvert v. Redfearn*, 2 Dowl. P.C. 505.

Service of a rule by sticking it up in the office, will not be allowed upon an affidavit that the attorney's residence is unknown, unless it is also sworn that the party's residence is unknown. *Wright v. Gardiner*, 3 Dowl. P.C. 657.

Where, on account of the defendant's residence being unknown, the Court gives leave to serve him in a particular manner, they will not make a prospective rule, that service of future rules, &c. may be effected in the same way. *Martin v. Colville*, 2 Dowl. P.C. 694.

Where an attorney has been served with process at chambers, from which he afterwards goes away to an unknown residence, a rule to compute may be served, by leaving a copy at those chambers, (they being his last place of abode,) and sticking another up in the King's Bench Office. *Sealey v. Robertson*, 2 Dowl. P.C. 568.

Where, in an action on a joint promissory note against several defendants, they have suffered judgment by default, service of the rule on one is service on all. *Figgins v. Ward*, 3 Law J. (N.S.) Exch. 135, s. c. 2 C. & M. 424.

Mistakes in the terms of rules may be amended on motion to open them, made within the same term, or perhaps that following; but where more time has elapsed, the affidavits which were used on the occasion of making the first rule absolute, cannot be referred to in order to open it, unless the new motion is made, and the new rule drawn up on reading them. *Lord v. Hope*, 5 Tyr. 487.

An undertaking to indemnify an execution creditor, if he will allow the sheriff to delay selling, cannot be made a rule of court, even by consent, where the person who so undertakes is neither party nor attorney in the suit. *Lyll v. Lamb*, 4 B. & Ad. 468.

A party had obtained from a prerogative court, a general order to put an administration bond in suit against the surety, on the sole ground that the principal had not paid over the residue. On *non est factum* being pleaded, the plaintiff suggested breaches, not only for not paying over the residue, but on several other distinct parts of the condition. The Court of Exchequer refused to compel him to strike out the breaches on the other part of the condition, or to allow the defendant to let judgment go by default, and pay nominal damages on those breaches. *Archbishop of Canterbury v. Robertson*, 1 C. & M. 181, s. c. 3 Tyr. 390.

Defendant in an action for words, after notice of trial, signed a paper, in which, after reciting that plaintiff had consented on defendant's paying the costs, and making an apology, to stay proceedings, he made such apology:—Held, that this was a positive undertaking by defendant to pay the costs. Plaintiff in such a case having stayed proceedings, but defendant not paying the costs, the Court will enforce performance of the agreement on his part by rule. *Tardrew v. Brook*, 5 B. & Ad. 880, s. c. 2 N. & M. 835.

*Quare*—as to the power of the Court to restrain a party from taking an objection to evidence at Nisi Prius—s. g. the production of an unstamped agreement. *Travis v. Collins*, 1 Law J. (N.S.) Exch. 244, s. c. 2 C. & J. 625; 2 Tyr. 726.

Where the copy of a rule served upon a plaintiff, is entitled in no cause, his appearance by counsel to take this objection, does not operate as a waiver of the irregularity; but the rule will be discharged with costs. *Wood v. Critchfield*, 2 Law J. (N.S.) Exch. 2, s. c. 1 C. & M. 71; 3 Tyr. 235.

Appearing to oppose a rule, does not waive an objection to the affidavit, on which the rule was obtained. *Barham v. Lee*, 4 Mo. & Sc. 327.

In the King's Bench the Court may look at the record, on discussing a motion for a new trial, although the rule is not drawn up on reading it, therefore the Court may look at the record on an application to set aside an award, pursuant to an order of Nisi Prius, although the rule is not drawn up on reading it. *Sherry v. Oke*, 3 Dowl. P.C. 349.

By the practice of the Court of King's Bench, a side bar rule does not operate to charge a person as in execution, unless he be in custody in the particular suit when the rule is taken out. Where, therefore, A was, in 1821, in custody at the suit of B & C, (who had obtained a judgment against A in another suit,) took out a side-bar rule for the Marshal to acknowledge A in custody, and in May 1835, A was brought up in custody by *habeas corpus*, and charged in execution at the suit of C:—Held, that A had not been properly charged in execution previously to May 1835, and that he was not then properly charged in execution, as it did not appear that C had either revived his judgment by *scire facias*, or taken out execution within a year after he had signed judgment. Such proceeding by side-bar rule is not only irregular, but void and inoperative, and is not set up by waiver or by lapse of time. In a record of commitment, it is alleged, that B was brought up and charged in execution at the suit of A:—The form of the record is the same, whether the party is charged in execution, by side-bar rule, or by *habeas corpus*. B is not estopped from saying that he was not brought up by *habeas corpus*. *Smith v. Sandys*, 5 N. & M. 59.

A Judge's order for returning a writ, cannot in the King's Bench be made a rule of court, and an attachment for disobedience thereto obtained on one motion. *Strainland v. Ogle*, 3 Dowl. P.C. 99. (*Contra*, in the Court of Exchequer, *Howell v. Bulleel*.)

One motion is sufficient for making a Judge's order to bring the defendant into court, or to return a writ, a rule of court, and for an attachment against the sheriff for not obeying such order. *Howell v. Bulleel*, 3 Law J. (N.S.) Exch. 1, s. c. 2 C. & M. 339; 3 Dowl. P.C. 99.

One rule is sufficient to make a Judge's order for returning a writ in vacation a rule of court, pursuant to Reg. Gen. Michaelmas term, 3 Will. 4, No. 13, and also to call on a sheriff to shew cause, why an attachment should not issue against him for disobeying such order. *Kensit v. Bulleel*, 4 Tyr. 59.

A rule absolute may be drawn up during term on an order of a Judge, dated in vacation. *Swaine v. Stone*, 4 Mo. & Sc. 584.

The Court refused to open a rule that had been made absolute without cause shewn, upon an affidavit by the attorney, alleging that he had understood the rule to be absolute in the first instance. *Charlton v. Burfitt*, 1 Mo. & Sc. 450.

After a motion for a new trial has been granted on certain points, it is irregular to make another mo-

tion upon another point, respecting the same cause, to come on at the same time. *Robertson v. Barker*, 2 Dowl. P.C. 39.

A rule moved, on 8 & 9 Will. 3, c. 11, s. 6, against an execution, for a *scire facias* to shew cause why damages should not be assessed and recovered on an interlocutory judgment, signed twenty years ago against the defendant, his testator, who had since died, is a rule *nisi* only. *Brown v. Evans*, 2 Tyr. 389.

An application for a review of a Master's certificate of taxation, on the ground that certain items had been improperly allowed, is not regular by way of motion. *Attorney General v. Brown*, 1 M. & K. 567.

If there is a defect in entitling affidavits produced on shewing cause against a rule, the Court will allow the rule to be enlarged, in order that the title may be amended. *Anderson v. Ell*, 3 Dowl. P.C. 73.

A party cannot shew cause against a rule until he has taken an office copy of the affidavits upon which the rule was obtained. *Brown v. Probert*, 2 Law J. (n.s.) Exch. 162, s. c. 1 Dowl. P.C. 659.

A party who had obtained a rule *nisi*, which was afterwards enlarged, upon the terms of filing the affidavits in answer before a certain day, was permitted to move to make his rule absolute, although he had omitted to take office copies of such affidavits. *Pitt v. Coombes*, 4 Law J. (n.s.) K.B. 83, s. c. 4 N. & M. 535.

If a rule is drawn up to shew cause in one term, it cannot be made absolute in the next term without enlarging, but it may be revived. *Smith v. Collier*, 3 Dowl. P.C. 100.

A rule drawn up in one term to shew cause in another, is put into the peremptory paper; and parties ought to be prepared to shew cause on the day for which the rule is up, and not on the following day, as in other cases. *Warner v. Wood*, 3 Dowl. P.C. 262.

An application to make a Judge's order a rule of court, and for an attachment for disobeying it, may be made on the same motion. *Henchcliffe v. Jones*, 4 Dowl. P.C. 86.

The plaintiff having signed judgment as for want of a plea, and sued out writs of execution, although a plea had been filed in time at the Judge's chambers, a Judge's order was obtained for setting aside the judgment and execution, and "commanding the sheriff to restore possession:"—Held, that the latter part of the order was wrong; that it ought to have directed the party to restore.

Writs of restitution, sued out upon a Judge's order before it was made a rule of court, which were not signed, and for which there was no *præcipe*, held irregular. *Doe d. Williams v. Williams*, 4 Law J. (n.s.) K.B. 39, s. c. 2 Ad. & E. 381; 4 N. & M. 259.

*Semble*, that the Court will not entertain a motion made for collateral purposes, and affecting the interests of third parties. *Faircloth v. Gurney*, 2 Law J. (n.s.) C.P. 61, s. c. 9 Bing. 456.

*Quære*—If the 74th rule, Hilary term, 2 Will. 4, applies to issues upon demurrer:—it would appear not. *Farley v. Briant*, 4 Law J. (n.s.) K.B. 246, s. c. 5 N. & M. 42, 57; 3 Ad. & E. 839.

An order to exempt an executor plaintiff from costs after a verdict for the defendant, is a matter within the discretion, either of a single Judge, or of the whole Court; and if a single Judge has made an order, such order cannot be reviewed,—the de-

cision, either of the whole Court, or of a single Judge, being final. *Maddocks v. Phillips*, 5 N. & M. 370.

On an application to a Judge at chambers, under the Interpleader Act, an order was made, by consent of all parties, to refer the cause, on certain terms, to a barrister, instead of an issue being directed. The Court refused to grant a rule *nisi* for varying the order, by introducing a fresh term into the reference, in consequence of information which one of the parties (an administratrix) had obtained, since the hearing at chambers.

Accordingly A received a sum of money from B & C, to pay over to an intestate's estate, but before paying it over, B & C countermanded that direction, and sued A for it. The administratrix claiming it, an order was made by a Judge, with the consent of all parties, to refer it to an arbitrator, to determine whether the money was due to the estate or not. The Court refused to vary this order, and direct the arbitrator to inquire whether A had not made himself, at all events, liable to the administratrix, on an affidavit by her, that she had discovered that he had really entered it in his accounts to the credit of the estate. *Drake v. Brown*, 4 Law J. (n.s.) Exch. 313, s. c. 2 C. M. & R. 270.

The Court will not, as a matter of course, review an order made by a Judge at chambers. *Re v. Archbishop of York*, 1 Ad. & E. 394, s. c. 3 N. & M. 463.

A Judge's order to stay proceedings, obtained by a mis-statement, is a nullity. *Woomam v. Pryce*, 2 Law J. (n.s.) Exch. 115, s. c. 1 C. & M. 352; 3 Tyr. 375.

A Judge's order, although acted upon, cannot be enforced by attachment until it is made a rule of court. *Baker v. Rye*, 2 Law J. (n.s.) Exch. 169, s. c. 1 Dowl. P.C. 689.

A Judge's order, made in vacation, cannot be made a rule of court of the previous term. *Re v. Price*, 3 Law J. (n.s.) Exch. 36, s. c. 2 C. & M. 212; 4 Tyr. 60.

*Semble*, that a motion may be made to rescind a Judge's order without making it a rule of court. *Spicer v. Todd*, 1 Law J. (n.s.) Exch. 59, s. c. 2 C. & J. 165; 2 Tyr. 172; 1 Dowl. P.C. 306.

A judgment may be set aside by a Judge's order without a rule of court. *Wilson v. Northop*, 4 Law J. (n.s.) Exch. 290.

A Judge at chambers has no authority to give a defendant a longer time than is allowed by law for payment of the costs directed to be paid in an order to stay proceedings. *Kirby v. Ellison*, 3 Law J. (n.s.) Exch. 63, s. c. 2 C. & M. 365; 4 Tyr. 239.

To a declaration on a bill of exchange, indorsee against acceptor, the defendant pleaded, that the bill was accepted by him in blank, and afterwards filled up, and that he had received no consideration for the acceptance, and the plaintiff was aware of these facts. A Judge at chambers having in vacation, upon an affidavit of the falsity of the plea, ordered that the plaintiff should be at liberty to sign judgment, the plea appearing to be bad for duplicity, the Court of Exchequer set aside that order. *Miley v. Walls*, 2 Law J. (n.s.) Exch. 170, s. c. 1 Dowl. P.C. 648.

Orders to the number of eleven of different Judges, enlarging the time for making an award, were made a rule of court by a single rule. *In re Tribe*, 3 Ad. & E. 295.

An order for time to answer after attachment sealed, irregular.

A party obtaining an order for an attachment is to use his best endeavours to execute it without delay. *Farnell v. Tulloch*, 2 Law J. (N.S.) Chanc. 103.

The Court will not order an attorney to deliver up deeds, which he swears were delivered to him for a special purpose, which he has fulfilled. *Smith v. Cottrell*, 4 Doug. 205.

#### (V) PROCEEDINGS.

##### (a) Where set aside.

[See LACHES—MISNOMER—OUTLAWRY—And see *ante*, Declaration; and PROCESS, Irregularity.]

Obtaining time to compromise after an erroneous decision of a Judge, is no waiver of an irregularity.

Therefore, where a Judge on summons decided that a defendant was not entitled to an imparlance, and consequently that a judgment and writ of inquiry were regular, and it was thereupon agreed to postpone the execution of the writ of inquiry for some time, that the defendant might consider whether he would accept terms, and it turned out that the defendant was entitled to an imparlance, and the judgment irregular:—It was held, that the defendant's consent to the postponement was no waiver of the irregularity. *Whalley v. Barnett*, 2 Law J. (N.S.) Exch. 5, s. c. 3 Tyr. 239; 2 Dowl. P.C. 33.

The defendant, after a notice to appear, by mistake, on the day of the teste of the writ, applied to settle the action, mentioning the return day of the writ, and agreed to give a cognovit and pay costs, which he afterwards refused to do, and obtained a rule to set aside the service and process for irregularity:—the Court discharged the rule, on the condition of the plaintiff's taking a cognovit. *Wiggins v. James*, 2 Law J. (N.S.) Exch. 81.

If a party proceed under the statute 11 Geo. 4, and 1 Will. 4, c. 70, and deliver a declaration in vacation as of the preceding term, it is no objection at Nisi Prius, that the right of entry accrued before the term; and therefore it is not a case within that statute: it is ground only for an application to the Court, or to a Judge at chambers, to set aside the proceedings for irregularity. *Doe d. Rankin v. Brindley*, 2 Law J. (N.S.) K.B. 7, s. c. 1 N. & M. 1; 4 B. & Ad. 84.

In order to set aside the service of process and subsequent proceedings for irregularity, it is not enough for the defendant to deny that he has been served personally, but he must also deny that the process has come to his possession or knowledge. *Phillips v. Ensell*, 3 Law J. (N.S.) Exch. 338, s. c. 1 C. M. & R. 374; 4 Tyr. 812.

The Court will not set aside a judgment, signed for want of a sufficient plea, without an affidavit of mistake or merits. *Williams v. Beaumont*, 2 Law J. (N.S.) C.P. 254, s. c. 10 Bing. 260; 3 Mo. & Sc. 706.

A defendant cannot wait until the ensuing term to take advantage of an irregularity in the service of process in the vacation; but he is bound to apply promptly to a Judge at chambers. *Cox v. Tulloch*, 2 Law J. (N.S.) Exch. 233, s. c. 1 C. & M. 531; 3 Tyr. 578; 2 Dowl. P.C. 47.

In an action by executors, a plea of release *quis*

*darrens continuos*, by co-executors, who are not co-plaintiffs, will not be set aside, unless upon a strong case of fraud. *Herbert v. Piggott*, 3 Law J. (N.S.) Exch. 79, s. c. 2 C. & M. 384; 4 Tyr. 285.

Where the writ is in "trespass," but is indorsed for a debt, and the declaration in an action of "trespass on the case on promises," the declaration and writ will both be set aside for irregularity, although no objection has been taken to the writ until the declaration has been filed. *Edwards v. Dignum*, 3 Law J. (N.S.) Exch. 60, s. c. 1 C. M. & R. 346; 4 Tyr. 213.

The Court will not set aside a writ of *copias*, for irregularity therein, at the instance of the bail.

Where a writ stated the cause of action to be an action on the case upon promises, it was held to be irregular, but not void; and therefore, where a defendant, in an action on a bail-bond, had pleaded that no sufficient writ issued, whereon the party could be arrested, and a writ was produced with that irregularity in it, it was held that the plaintiff was entitled to the verdict. *Gurney v. Hopkinson*, 4 Law J. (N.S.) Exch. 6, s. c. 1 C. M. & R. 587; 5 Tyr. 211.

Where the writ of summons was expressed to be in an action of trespass on the case, and a notice of declaration and a bill of particulars were served, which disclosed a cause of action either in assumpsit or debt, the Court refused to set aside the writ for irregularity. *Davis v. Jones*, 4 Law J. (N.S.) Exch. 2, s. c. 1 C. M. & R. 582; 5 Tyr. 182.

In an action by the assignees of a bail-bond, it is no irregularity that the writ is general, and the declaration special as assignees.

Neither is it irregular to issue a writ against, and enter an appearance for two of the parties, and to declare against one only; *secus*, if the plaintiff declare severally against both. *Knowles v. Johnson*, 3 Law J. (N.S.) Exch. 215.

An affidavit made for the purpose of setting aside proceedings in the cause, in which the defendant alleged that he had not been personally served with process or copy, without negating the fact of the process or copy coming to his hands, will not be sufficient, such process or copy having been left with his assistant at his house. The rule granted upon such affidavit will be discharged with costs. *Hodges v. Ormond*, 3 Law J. (N.S.) C.P. 232.

A motion for setting aside a declaration for irregularity is, it seems, too late after a lapse of seven days. *Fyson v. Kemp*, 3 Law J. (N.S.) Exch. 206.

The defendant was arrested and held to bail upon a writ indorsed, "Bail by Affidavit," and specifying the amount of the sum sworn to. The præcipe did not state the amount of the debt, nor did it refer to the affidavit:—Held, that such difference between the præcipe and the writ was unimportant and immaterial; and that the latter should not, therefore, be set aside. *Usborne v. Pennel*, 3 Law J. (N.S.) C.P. 174, s. c. 10 Bing. 531; 4 Mo. & Sc. 431.

Where the plaintiff obtained an order to amend his declaration, with liberty for the defendant to plead *de novo*, which he served, but afterwards gave notice of the trial and tried the cause, without amending the declaration or rescinding the order,—held regular. *Black v. Sangster*, 4 Law J. (N.S.) Exch. 4, s. c. 1 C. M. & R. 521; 5 Tyr. 171.

The fact of the Statute of Limitations having run since the debt accrued, is no ground for setting

aside the plaintiff's proceedings. *Potter v. Macdonel*, 3 Dowl. P.C. 543.

An application to set aside proceedings must be made in a reasonable time, even in the case of a prisoner. *Primrose v. Baddeley*, 2 C. & M. 468.

A motion to set aside the service of a writ of summons, on the ground of an irregularity in the indorsements thereon, and that it is directed to a different county from that into which the *distingas* is issued, must be made within a reasonable time after the service thereof.

*Semble*—that eighteen days is an unreasonable delay in this respect, provided the defendant might have come earlier. *Wright v. Warren*, 3 Mo. & Sc. 163.

The Court will not entertain objections to the regularity of proceedings, where the party has neglected to avail himself of opportunities to urge them at an early period, even though they amount to error on the face of the record. *Graves v. Walter*, 1 Sc. 310.

Proceedings were commenced on a bill of exchange against the drawer, and also against the defendant as acceptor: the former paid the bill and costs, and it was delivered up to him; and notice was given to the defendant, that proceedings against him were abandoned. His costs, however, were not paid; and as he disputed his liability as acceptor, he ruled the plaintiff to declare, who then applied to a Judge to stay proceedings, and obtained an order for that purpose: the Court set the order aside. *Lewis v. Dalrymple*, 3 Dowl. P.C. 438.

Judgment of *respondent ouster* having been given on a plea of peerage, and a verdict having afterwards been obtained for the plaintiff, the Court refused to set aside, upon an affidavit of peerage, a writ of *ca. sa.* issued against the defendant. *Digby v. Alexander*, 1 Law J. (N.S.) C.P. 42, 122, s. c. 2 Bing. 412.

Awaiting for time for a defendant, does not waive an irregularity in the plaintiff's last proceeding. *Anon.* 1 Dowl. P.C. 23.

An interlocutory judgment having been set aside, with costs against the plaintiff, by a Judge at chambers, and an attachment having issued for the non-payment, another Judge at chambers ordered, that the defendant should have three days to rejoin, after the plaintiff should have purged his contempt. The Court refused to set this order aside, it not appearing that the plaintiff was in custody, or had paid the costs, or was unable to pay them. *Wenham v. Downes*, 3 Ad. & E. 450.

An appearance was entered for the defendant in due time on the 10th of January, but not being found in the appearance-book on the search by the plaintiff's attorney, he entered a common appearance for him on the 21st, and proceeded to file his declaration, and gave notice of that step to the defendant on the 26th. He signed judgment on the 4th of February, and levied execution thereon on the 19th. The defendant's attorney then said, that he had entered an appearance for the defendant:—Held, that though that entry of appearance made the demand of plea necessary, yet, as the plaintiff's attorney was suffered to remain in ignorance of it, after he committed the first irregularity consequent on that ignorance, viz. in giving notice of declaration filed on the 26th of January, the judgment

must stand. *Rutty v. Auber*, 3 Tyr. 691, s. c. 2 Dowl. P.C. 36.

Where the declaration was delivered as of Michaelmas term, and the plea was delivered on the 11th of January, being the first day of Hilary term, and the issue was afterwards made up and delivered as of Michaelmas term, the Court refused to grant a rule for setting aside the issue, it not appearing that the plea had not been delivered before the sitting of the Court on the first day of term, or that any damage had resulted to the defendant therefrom. *Dickenson v. Reynolds*, 2 C. & M. 474, s. c. 4 Tyr. 374.

Unless it is perfectly clear that an action is brought for goods sold and delivered before the stipulated credit has expired, the Court will not set aside the writ on motion. *Lamb v. Pegg*, 1 Dowl. P.C. 447.

Where a plaintiff has been non-prossed in replevin, and he afterwards brings trespass for the same cause, the Court will not set aside the proceedings in the second action on motion. *Liversidge v. Goodge*, 2 Dowl. P.C. 141.

If a defendant seeks to set aside proceedings, on the ground of not having been served with process, it must appear by his affidavit that he is the defendant in the cause. *Johnson v. Smallwood*, 2 Dowl. P.C. 588.

The Court set aside a Judge's order for better particulars of set-off, on the ground that plaintiff's attorney's clerk had, without authority, altered the date of the jurat of the affidavit on which the order had been obtained. *Finnerty v. Smith*, 1 Bing. N.C. 649, s. c. 1 Sc. 743.

Where a rule nisi is obtained for setting aside proceedings for irregularity, there can be no stay of proceedings, unless notice of the motion has been given to the opposite party. *Fortescue v. Jones*, 1 Dowl. P.C. 524.

Where the writ was in trespass on the case, and the particulars of demand claimed a debt, and an application was made to set aside the writ as irregular before it appeared that a declaration had been actually filed, the Court refused a motion for setting the writ aside, as being too early. *Addis v. Jones*, 3 Dowl. P.C. 164.

When judgment was signed against a defendant, which was afterwards set aside on the terms of paying costs; but the defendant having died before the rule was made absolute, the plaintiff got that rule set aside, and commenced an action of *sci. fa.* on the judgment, the Court allowed the administrator to come in and defend in the name of the original defendant, and set aside all proceedings subsequent to the declaration, on payment of costs, except those of the rule to rescind. *Cash v. Cook*, 2 Dowl. P.C. 3.

It is no ground for setting aside a declaration that it has been delivered in defiance of an injunction of a court of equity, restraining the plaintiff from proceeding at law. *Horne v. Took*, 4 Mo. & Sc. 183.

It is irregular to sue out process on a bail-bond after the rule for allowance of bail has been served, although the bail-bond has been forfeited, and an assignment has been written for before the justification of the bail. In making the rule to set aside such proceedings absolute, the Court directed the

costs of taking an assignment of the bail-bond, which had been occasioned by the defendant's default, to be allowed to the plaintiff, and to be deducted from the costs of the rule. *Ellis v. Bates*, 2 C. & M. 143, s. c. 4 Tyr. 58.

The plaintiff obtained a verdict at the Spring Assizes; the defendant died on the 18th of April, (the fourth day of Easter term,) the costs were taxed on the 21st; final judgment signed on the 22nd, and a *fi. fa.* issued on the same day, tested on the first day of the term. The Court refused to set aside the *fi. fa.* for the irregularity in issuing it after the death of the defendant without a *sci. fa.*, the writ being warranted by the judgment, which the motion did not impeach. *Watson v. Maskell*, 4 Mo. & Sc. 461.

The plaintiff issued two writs, one out of the Court of Common Pleas, which was never served, the other out of the Exchequer, on which he proceeded to declare. The defendant pleaded to the action in the Exchequer, another action pending for the same cause in the Court of Common Pleas. The plaintiff replied *nul tiel record*, and served the defendant with a rule to produce. The defendant made up a roll from the precept on the file of the Court of Common Pleas:—the Court ordered it to be cancelled, with costs. *Kirby v. Siggers*, 4 Mo. & Sc. 481.

The improper insertion of venue in a declaration, contrary to the new rules, is not an irregularity, for which the declaration can be set aside; the course is to apply to a Judge at chambers to strike it out. *Townsend v. Gurney*, 1 C. M. & R. 590, s. c. 5 Tyr. 214.

Where a writ of *sci. fa.* has not lain in the office the proper number of days, the motion should be to set aside the proceedings thereon, and not the writ itself. *Williams v. Brown*, 3 Mo. & Sc. 218.

A cause was referred at the assizes, and, by consent, a verdict was entered for the plaintiff; damages 50*l.*, costs 40*l.*, subject to the award of an arbitrator. The time for making the award expired without an award being made. The time was further enlarged by consent, and the enlarged time having also expired without an award being made, the plaintiff gave notice of trial, and proceeded to the trial, and obtained a verdict. A Judge's order having been previously obtained for altering the record in the *distringas*, the clerk of assize, at the trial, erased the indorsement of the previous verdict, and entered the new record in the usual way. The Court set aside the latter verdict for irregularity. *Evans v. Davies*, 3 Dowl. P.C. 786.

Where a defendant moves to set aside proceedings on the ground of irregularity, as for not giving notice of the execution of a writ of inquiry, it is not necessary to swear to merits. *Williams v. Williams*, 2 C. & M. 473, s. c. 4 Tyr. 368.

(b) *Where stayed.*

[See ATTORNEY, Connexion between, and Client—BAIL, Proceedings against—EJECTMENT—PENAL ACTION. And see, *ante*, Pleading several Pleas.]

An application to set aside, or to stay proceedings for irregularity, must be made promptly, and is too late where the opposite party is prejudiced by the delay.

Thus, where defendant's goods were seized, under a *fi. fa.*, issued on the 10th or 11th of June, on a judgment signed irregularly on the 9th, and on the 6th of July, the assignees, chosen on the 5th, under a commission of bankruptcy against the defendant, made an application to a Judge at chambers to stay proceedings, and proceedings were accordingly stayed until the fourth day of Michaelmas term, when a rule nisi was obtained, on the part of the assignees, to set aside the judgment and execution, for irregularity; the Court discharged the rule, on the ground, that the delay in making the application at chambers prevented the plaintiff from curing the irregularity, by waiving the first, and signing a new and regular judgment, and issuing execution thereon, before the bankruptcy. *Routledge v. Giles*, 1 Law J. (N.S.) Exch. 60, s. c. 2 C. & J. 163.

In trover for title-deeds against a mortgagee by the heir-at-law, the Court refused to allow the deeds to be brought into court and stay the proceedings, on the ground that the real subject of dispute was as to the validity of a devise made by the mortgagor long subsequent to the mortgage. *Smith v. Wheeler*, 4 Law J. (N.S.) Exch. 293.

The non-payment of costs, for not proceeding to trial, is no stay of further proceedings, unless the payment of costs is made a condition precedent by the rule. *Wilson v. Collins*, 1 Law J. (N.S.) C.P. 117, s. c. 8 Bing. 374; 1 Mo. & Sc. 518.

A declaration delivered as attorney to the plaintiff, by a person whose name is not on the roll or entered in the books of the Court of Exchequer, and who has not taken out any certificate, cannot be treated as a nullity; but the course is to stay proceedings until a proper attorney be appointed. *Bayley v. Thompson*, 3 Law J. (N.S.) Exch. 216, s. c. 2 C. & M. 673; 4 Tyr. 955.

A plaintiff who sued the hundred for damage done to his house by a riotous assembly, commenced his action in the King's Bench. He afterwards brought another for the same cause, in the Exchequer, but forbore to proceed in it, waiting to see the result of the former; and merely bringing the second action to be within the time limited by the statute. The Court of King's Bench, on motion, made a rule for him to elect, within a given time, in which action he would proceed; and that the other should be thereupon discontinued. *Miles v. the Inhabitants of the City of Bristol*, 1 Law J. (N.S.) K.B. 193, s. c. 3 B. & Ad. 145.

Where the cause of action arose within the jurisdiction of a county court, and a sum of money under 40*l.* was paid into court, under a rule to stay proceedings, omitting the usual undertaking by the defendant to pay the costs, and the defendant offered to give the plaintiff judgment within the first four days of the term after the assizes, for the amount paid into court, in order that the question of costs might be decided by the Court, and also required the plaintiff's attorney to inform him whether he intended to proceed for a larger sum, to which an evasive answer was returned, and the plaintiff proceeded to trial, and recovered nominal damages:—the Court set aside the verdict, and stayed the proceedings, directing the costs subsequent to the offer to be paid by the plaintiff. *James v. Owen*, 1 Law J. (N.S.) Exch. 181, s. c. 2 C. & J. 476; 2 Tyr. 452.

A summons and order to tax an attorney's bill without an undertaking to pay what shall be found to be due, do not operate as a stay of proceedings, so as to prevent the attorney from suing out a writ after the order is obtained. *Williams v. Roberts*, 4 Law J. (N.S.) Exch. 78, s. c. 1 C. M. & R. 676; 5 Tyr. 421.

Although, where it is clear that a writ of *audita querela* will lie, the Court will interfere summarily on motion and stay execution, yet they will not do so where there is any doubt as to the facts or the law of the case; and, therefore, where a plaintiff recovered damages for slander, and after verdict, and before judgment, was tried and convicted of the felony which had been imputed to him, the defendant in the action being a witness against him on that prosecution, the Court declined to interfere summarily, inasmuch as questions of doubt might arise on the *audita querela*, as to the effect of the forfeiture and the rights of the Crown.

No objection can be made to the conviction if produced to prove the fact of the attainer, on the ground that the defendant, for whose benefit it may be produced, was a witness on the prosecution. *Symons v. Blake*, 4 Law J. (N.S.) Exch. 259, s. c. 2 C. M. & R. 416.

An application to stay proceedings on payment of debt and costs, must be made within four days after service of process. *Bowdidge v. Staney*, 2 Bing. N.C. 142, s. c. 2 Sc. 197.

Where an injunction had issued against the defendants in an equity suit, restraining them from disposing of the estate of their testator, the Court refused to stay proceedings against them in an action in which the debt was not admitted, observing that the injunction might be a ground for applying to stay execution. *Davis v. Salter*, 2 C. & J. 466.

Where several actions were brought on the same bail-bond, it is too late, after verdict, to move to stay proceedings on payment of the costs of one action only. *Johnson v. Mackdonald*, 2 Dowl. P.C. 44.

Plaintiff having allowed defendant to retain a sum of money under an order of Court, obtained by her for taxation of his costs,—Held, she could not afterwards sue him for the amount. *Kendall v. Aiken*, 10 Bing. 438.

The Court will not stay proceedings in an action, on the ground that the money recovered will be held by the plaintiff in trust for the defendant. *Barlow v. Leeds*, 5 N. & M. 426.

In an action commenced by bailable process, the Court will not stay proceedings until after the trial of an indictment for perjury founded on the plaintiff's affidavit of debt. *Johnson v. Wardle*, 3 Dowl. P.C. 550.

A plaintiff being called upon for his place of residence gave Peel's Coffee House, Fleet Street:—Held, not sufficient, and proceedings were stayed till he gave a better place of residence. *Hodson v. Gamble*, 3 Dowl. P.C. 174.

The Court will stay proceedings in an action, if it appears to be doubtful whether the action is brought with the knowledge and consent of the plaintiff. *Doe d. Baker v. Roe*, 3 Dowl. P.C. 496.

Where a second action was brought for the same cause whilst a former one was pending, the Court discharged a rule for staying the proceedings in the second action, upon the affidavit of the plaintiff

disclaiming the act of his attorney in bringing the first action. *Souter v. Watts*, 2 Dowl. P.C. 263.

Payment of the debt and costs after a peremptory undertaking given, is a ground for having it discharged; but the plaintiff cannot be compelled to enter a *stet processus*. *Shrimpton v. Carter*, 3 Dowl. P.C. 648.

Where the plaintiff indorses on the writ a larger sum than is due, by which the defendant is misled and prevented from settling the action, the Court will stay the proceedings, on payment of the real debt, with the costs of the writ only, provided the application is made promptly. *Elliston v. Robinson*, 2 C. & M. 843.

In an action against the sheriff for taking insufficient pledges in a replevin bond, the Court will not stay the proceedings on an affidavit that the cause was referred without the consent of sureties; that being matter of defence at the trial. *Dale v. Gordon*, 2 Mo. & Sc. 532.

A defendant being served with a writ of summons, obtained an order for particulars, before declaration. After waiting three months, the plaintiff refused to go on with the action, or to enter a *stet processus*: the Court refused an application to compel him to do so. *Kirby v. Snowden*, 4 Dowl. P.C. 191.

The plaintiff obtained a Judge's order, with the usual undertaking for the taxation of a bill of costs due from her son to the defendant.

Held, that it was not competent to her afterwards to bring an action against the defendant to recover back the money paid by her in pursuance of that order in the absence of proof of fraud or misrepresentation by the defendant; the Court therefore stayed the proceedings. *Kendall v. Allen*, 4 Mo. & Sc. 319.

A defendant who moves to stay proceedings on payment of debt and costs, is not entitled to a rule for that purpose as a matter of right, but must submit to such reasonable terms as the Court in its discretion may think proper to grant. *Jones v. Shepherd*, 3 Dowl. P.C. 421.

The Court will not stay proceedings in an action for a debt, though it clearly appears, by affidavit, that there is no debt due. *Smith v. Curtis*, 2 Dowl. P.C. 223.

Notice to stay proceedings in the Exchequer is a two days' notice. *Hannah v. Wyman*, 3 Dowl. P.C. 673.

In the King's Bench a rule *nisi* for setting aside proceedings for irregularity, may be drawn up, with a stay of proceedings, although notice of motion has not been given. *Stratton v. Regan*, 2 Dowl. P.C. 585.

By a deed of lease it was stipulated that the lessees should be at liberty to retain a rent of 1100*l.* a year, or any part thereof, upon giving the lessor a bond to pay whatever was so retained, at the end of seventeen years, with interest. The lessees having omitted to pay the rent, or give a bond, and the lessor having sued for the rent, the Court refused to stay proceedings on affidavit, that since the commencement of the suit, the lessees had executed and tendered to the lessor, a bond for the amount retained and to be retained. *Jones v. Winkfield*, 10 Bing. 308, s. c. 3 Mo. & Sc. 846.

An action having been brought against an attorney for negligence, in which action the jury gave a

verdict for the plaintiff, finding also that the attorney had been guilty of gross negligence; and then the attorney brought an action for his bill of costs, the Court refused to interfere, to stay proceedings in the latter action. *Smith v. Rolt*, 2 Dowl. P.C. 62.

Where two actions were brought by and against the same parties, in the first of which the defendant obtained an award in his favour, and in the other the plaintiff obtained a verdict with damages; the Court refused to stay proceedings in the first action, until an action for a new trial in the other was disposed of, in order that the damages and costs in the action might be set off against the costs of the other. *Johnson v. Lakeman*, 2 Dowl. P.C. 646.

#### (W) ARGUMENT.

On the argument of cases from the equity side of the Court of Exchequer, one counsel only for each party will be heard. *Smith v. Masterton*, 3 Law J. (N.S.) Exch. 42.

Practice as to hearing only one counsel to argue a case from the equity side of the Court of Exchequer. *Byne v. Currey*, 3 Law J. (N.S.) Exch. 177, s.c. 2 C. & M. 600; 4 Tyr. 478.

#### (X) DEATH OF PARTIES.

If a defendant dies in execution, a writ of *fi. fa.*, tested and returnable while he was alive and in execution, and returned by the plaintiff's attorney, will support a *testatum* issued under the 21 Jac. 1, c. 24, s. 2, into a foreign county. *Farncombe v. Kent*, 2 Dowl. P.C. 464.

Where three causes stood over by adjournment from one sitting day in term to another, and before they were tried the defendant died, the Court refused to name a special adjournment day in term for the trials of the causes to prevent the suits abating. *Natham v. Budge*, 3 Dowl. P.C. 207.

A cause was in the paper, for the sittings in term, and the Judge not having reached it in the list, the sittings were adjourned to another day in term, previous to which the defendant died. The Judge adjourned the sittings on this day, to the last day of term. But the Court decided, that the trial could not take place on that day, as the public business could not be so much interfered with, and they could give no relief to the plaintiff. *Johnson v. Budge*, 4 Law J. (N.S.) Exch. 31, s.c. 1 C. M. & R. 647; 5 Tyr. 197.

### 2. IN EQUITY.

#### (A) BILLS.

##### (a) In general.

*Semble*—That a plaintiff who is entitled to relief, cannot obtain it in a suit in which he has associated himself with a co-plaintiff who has no title to relief. *Bill v. Cureton*, 4 Law J. (N.S.) Chanc. 98, s.c. 2 M. & K. 503.

Where a party, having no interest in the matters of the suit, is joined as a co-plaintiff, the other plaintiffs cannot obtain any relief in a suit so constituted, and the bill must be dismissed.

*Semble*, that the bill would be dismissed, without prejudice to another suit, and without costs. *Wade v. Cox*, 4 Law J. (N.S.) Chanc. 106.

Where a party, who is not entitled to any relief, is joined in a suit as a co-plaintiff with others, and the objection is taken by the answer; the bill will be dismissed with costs at the hearing, as against all the plaintiffs, notwithstanding some of the plaintiffs might be entitled to a decree of suing separately. *Goodyear v. Robinson*, 4 Law J. (N.S.) Chanc. 174.

On a motion on behalf of the defendants to take a bill off the file for misdescription of the plaintiffs' character as a corporate body, and the title of the alleged corporation to that character appearing doubtful, an issue was directed to the Court of King's Bench to try the question. *Corporation of Rotherham v. Adams*, 4 Law J. (N.S.) Chanc. 167.

To open a settled account, the bill must state specific errors, or allege circumstances of fraud, &c. [If this be not done, the plaintiff will not be allowed to prove them at the hearing.]

A statement in a bill, that a jury had found one of the parties who had signed a settled account, to be and to have been a lunatic, from a time previous to the settlement of the account, not sufficient of itself to impeach the account, without an allegation in the bill to that effect. *Pimer v. Parr*, 3 Law J. (N.S.) Chanc. 47.

##### (b) Of Discovery.

A bill praying discovery, and concluding with the prayer for general relief, is a bill for relief. But if words adapted to a bill for relief are used in the prayer of process only, it is a bill of discovery. *Angel v. Westcomb*, 6 Sim. 30.

Defendant brought an action, for a libel, against the plaintiffs; the plaintiffs pleaded a justification, and filed a bill for discovery, and a commission to examine witnesses abroad, in support of their plea. The defendant pleaded, to the bill, that he had discontinued the action. Plea overruled, as defendant might commence another action. But, upon defendant afterwards undertaking not to bring any other action, and to pay the costs of the suit, all further proceedings were stayed. *Wilmet v. Maccabe*, 4 Sim. 263.

##### (c) Of Revivor.

Executor of a deceased plaintiff filed a bill of revivor, but did not obtain an order to revive. Motion, by defendant, that the executor might revive, within a given time, or both bills be dismissed with costs, to be paid by the executor. Motion granted, as to the bill of revivor only. *Froward v. Bingham*, 4 Sim. 463.

A, and B an infant, file a bill; B attains twenty-one, and gives notice to the parties that he repudiates the suit, and then dies. A revives the suit. The defendants answer the bill of revivor, and insist that B, having repudiated the suit, it ought not to be revived; and they then move to discharge the order of revivor, for irregularity. Motion refused, because the defendants ought to have pleaded to, and not answered the bill of revivor. *Codrington v. Houlditch*, 6 Sim. 286.

Motion, before decree, by the executor of a deceased defendant, that the plaintiff might revive the suit against him, or that the bill might be dismissed, as against the deceased, granted. *Burnell v. the Duke of Wellington*, 6 Sim. 461.



On the death of one of two tenants in common, defendants, the suit must be revived; it cannot be made perfect at the hearing by dismissing the bill as to those defendants. *Fraser v. Elder*, 4 Law J. (n.s.) Chanc. 38.

(d) *Supplemental.*

If a plaintiff, when his cause is in such a state that he cannot amend his bill, discovers new matters which may tend to shew that he is entitled to the relief prayed by his bill, he may file a supplemental bill, for the purpose of putting the new matter in issue. *Crompton v. Wombwell*, 4 Sim. 628.

The consideration of a particular question had been omitted at the hearing, and the cause was brought on by petition of rehearing. The Court gave leave to file a supplemental bill upon payment of costs. *Parker v. Downing*, 4 Law J. (n.s.) Chanc. 198.

One decree was taken in two suits, for the administration of the same estate; and a supplemental bill having become necessary,—held, that a separate supplemental bill must be filed in each suit. *Barrow v. Hobhouse*, 4 Law J. (n.s.) Chanc. 218.

Where a decree had been obtained in a suit against the defendants, and persons having an interest in the matters in that suit, at the time of the decree, were not made parties, and the decree was on that account erroneous: the persons so interested cannot come in to obtain the benefit of the decree in that suit, by a supplemental bill, praying the benefit of the proceedings under the original bill, but must file a new bill, and prove by evidence in that suit the same case which was made under the original bill. *Cluns v. Crafts*, 3 Law J. (n.s.) Chanc. 112.

A plaintiff cannot alter the equity which he has at the time of filing his bill; and all matters subsequent to the time of filing the original bill are to be introduced into the cause by a bill of supplement raising a new equity.

Where a defendant, by his answer, claims the same right of objection as he could have had by plea or demurrer, the objection is not thereby waived.

Where a defendant, by his answer to an amended bill, objected to matters introduced into it, as being posterior to the date of the original bill, and claimed the benefit of the objection at the hearing, and then proceeded to answer the new matters, which were of a criminatory character, the bill was dismissed against the defendant at the hearing, and with costs, inasmuch as the defendant was at liberty to clear his character by answering matters which were scandalous.

Proceedings under a decree for the dismissal of a bill with costs, cannot be suspended, as to the payment of those costs, on the ground of the pendency of an appeal. *Wray v. Hutchinson*, 3 Law J. (n.s.) Chanc. 62, s. c. 2 M. & K. 285.

(e) *Interpleader.*

[See PLEADING.—Equity, Bill.]

It is irregular in a bill of interpleader, to obtain the common injunction. *Moore v. Usher*, 4 Law J. (n.s.) Chanc. 194.

Foreign iron was deposited by R with C in a bonded warehouse; an order was afterwards brought to C signed by R for the delivery of the goods, but not stating to whom they were to be delivered; a

verbal message to deliver the iron to T was, however, left at the time. Subsequently (upon the application of T) C, after communication with R, made an entry in his books of the transfer of the goods into T's name, and wrote also to T acknowledging that the iron was held at his disposal: D afterwards claimed the iron, insisting that R had deposited the iron as his agent. Both claimants, D and T, subsequently brought actions of trover against C, and C filed a bill of interpleader. The Court allowed a demurrer to this bill, on the ground that the letter written by C to T had given him a right, such as the Court ought not to deprive him of. *Craushay v. Thornton*, 4 Law J. (n.s.) Chanc. 177.

A deposited goods with B, a warehouseman, to await his directions. Afterwards A directed B to transfer the goods to C, and to hold them at his disposal, and B made the transfer accordingly: the goods were then claimed by D, as having been consigned by him to A:—Held, that B was entitled to file a bill of interpleader against C and D. *Pearson v. Cardon*, 4 Sim. 218.

Where a principal has created a lien in favour of another person, on funds in the hands of his agent, the agent may file a bill of interpleader against his principal and the other claimant. *Smith v. Hammond*, 6 Sim. 10.

(f) *Amended.*

If, after replication filed, the plaintiff has, on special leave, amended his bill, in such a manner as to call for answer, he may afterwards obtain, as of course, a further order to amend, at any time before the answer to the amended bill is put upon the file. *Wharton v. Swann*, 2 M. & K. 362.

(g) *Cross.*

In a case of cause and cross cause, where the plaintiff in the former is abroad or cannot be found, the proper course is to stay the proceedings in that suit until the plaintiff has answered the cross bill, and not to order the subpoena to answer the cross bill to be served on his clerk in court in the original cause. *Craft v. Waterton*, 5 Sim. 502.

A demurrer to the relief will not extend to the discovery sought by the bill, although the specific relief prayed may be improper, if the bill states a clear case for equitable relief, to which the discovery sought may be ancillary, and likewise concludes with a prayer for general relief.

An information having been filed by the Attorney General against A, for an account of his dealings and transactions with the government as an army agent, A pleaded, in bar of the information, a settled account, by means of certain clearing warrants. This plea having been overruled, A filed his cross bill against the Attorney General and the Secretary at War, alleging that the clearing warrants had been invariably treated as a settled account, but that he had only recently, and since the plea, been acquainted with the proceedings at the War Office, by which the clearing warrants were rendered conclusive. The bill, then, charging that the defendants had divers papers, &c., by which the truth of the several matters alleged would appear, prayed for a discovery, for a declaration that the clearing warrants amounted to a settled account, and for a perpetual quietus from all proceedings by the defendants. To this bill the defendants

having demurred, on the ground that they were public officers, and also for want of equity, the demurrer was overruled. *Deare v. Attorney General*, 1 Y. & C. 197.

Proceedings in the original cause stayed, until the plaintiff had appeared to and answered the cross bill. *Bourne v. Hall*, 5 Sim. 552.

The plaintiffs in a cross bill having put in a full and sufficient answer to the original bill, which is subsequently amended, obtain an order for a month's time to plead, answer, or demur to the amended bill, after the plaintiff therein should have answered their cross bill; that order is held good, and is accordingly affirmed. *King of Spain v. Hullet*, 1 C. & F. 333.

Where a defendant, in a title suit, denies the title of the rector, he cannot obtain a discovery of the rector's title by means of a cross bill; and exceptions to the answer of the rector, who refuses to set forth his title, and the conveyances under which he claims, will be overruled. *Bellwood v. Wetherall*, 4 Law J. (N.S.) Exch. Eq. 28, s. c. 1 Y. & C. 211.

#### (h) Taken Pro confesso.

[See CONTEMPT.]

Mode of proceeding to take a bill *pro confesso*, against a defendant in contempt for want of answer, and who is in custody of the warden of the Fleet. *Bilton v. Bennett*, 4 Sim. 17.

Course of proceedings to take a bill *pro confesso*; under 11 Geo. 4. & 1 Will. 4, c. 36, against a sole defendant, who has absconded. See *Baker v. Keen*, 4 Sim. 498.

A cause may be advanced, in order to take a bill *pro confesso*. *Barwick v. Ward*, 3 Law J. (N.S.) Chanc. 58, s. c. 5 Sim. 676.

On application to discharge an order, obtained by the plaintiff, to take a bill *pro confesso*, and to permit an answer to be filed, the Court will consider the circumstances, and impose terms on the defendant. *Lowell v. Hicks*, 4 Law J. (N.S.) Exch. Eq. 32, s. c. 1 Y. & C. 230.

Where a defendant, who is the only defendant, absconds, the bill cannot be taken *pro confesso* against him, under 11 Geo. 4. & 1 Will. 4, c. 36, on motion, but the cause must be set down for hearing. *Turner v. Turner*, 4 Sim. 497.

Where a bill is ordered to be taken *pro confesso*, the decree may be made subsequently, although it is usually taken at the same time. *Woollams v. Baker*, 6 Sim. 316.

#### (i) Filing and taking from the File.

The Court, upon a motion of a defendant, supported by affidavits, suggesting that the bill had been filed without any authority from the person named as the plaintiff, such person being so imbecile as to be unable to give any authority for the purpose, and that the suit was instituted for litigious purposes in the name of the plaintiff, but by another defendant in the suit, referred it to the Master to inquire whether any authority was given by the plaintiff for the filing of the bill, and whether the institution of the suit was for his benefit, and whether it was for his advantage that the same should be prosecuted. On the Master's reporting in the negative, and that the bill was filed under the authority of one of the defendants, the Court

ordered the bill to be taken off the file, and the costs of the other defendants to be paid by the defendant who had instituted the suit. *Blake v. Smith*, 1 Yo. 594.

#### (k) Dismissing.

Threatening defendants who have not answered, with an attachment, without issuing one, is not using due diligence to get in their answers, so as to prevent another defendant from moving to dismiss. *Gully v. Bodicoats*, 4 Law J. (N.S.) Chanc. 51, s. c. 5 Sim. 668.

A defendant may move to dismiss, after the expiration of two months from the time when his answer was to be deemed sufficient, although, owing to the answers of the other defendants not being filed, the time for amending the bill has not expired. *Gully v. Van Bodicoats*, 5 Sim. 668.

In computing the time within which a bill may be dismissed, on the ground of no proceedings having been taken since the answer was filed, the intervals mentioned in the nineteenth amended order, are not to be reckoned. *Attorney General v. Jones*, 5 Sim. 246.

Course of proceeding to be followed by a defendant, where the plaintiff, after serving a subpoena to rejoin, does not proceed with the cause. *Anonymous*, 5 Sim. 497.

Motion to dismiss a bill for want of prosecution, refused with costs, where it was within the knowledge of the solicitor of the party moving, that the plaintiff had a good answer to the motion, the answers of all the defendants not being in, and the plaintiff having used due diligence. *Partington v. Baillie*, 4 Law J. (N.S.) Chanc. 40.

The Court will not dismiss a bill after decree, even with the consent of all the parties. The proper course is to obtain an order for staying all proceedings on the decree. *Smart v. Dousson*, 4 Law J. (N.S.) Chanc. 256.

The 17th of Lord Lyndhurst's new orders does not apply, except in cases where the plaintiff requires a commission to examine witnesses. The old practice remains where such commission is not required. *Platell v. Morley*, 4 Law J. (N.S.) Chanc. 218.

The solicitor for some of the defendants was agent for the rest. The former were entitled to move to dismiss, and they moved accordingly; but no order could be made, as the time for the other defendants to answer the amendments had not expired.—Motion refused, with costs, as the solicitor must have known that the motion could not succeed. *Partington v. Baillie*, 5 Sim. 667.

Plaintiff, who under circumstances had been ordered to give security for costs, by reason of his insolvency, but who had not complied with the order, was ordered to give that security within ten days, or his bill to be dismissed. *Tredwell v. Byrch*, 1 Y. & C. 480.

#### (B) NEW SURE.

In a suit for administration of assets of obligors in a common money-bond, the Master, under an order of reference made by consent, enabling him to inquire into the consideration, and all the circumstances relating to the bond, reported that it was a voluntary bond, given as a bounty to the obligee. The representatives of the obligors, and the

obligee, took exceptions to the report; the former alleging that it was a bond of indemnity, the obligee claiming it partly for money advanced, and partly for services performed. The Court below refused leave to withdraw the obligee's exceptions, and directed issues to try whether the bond was given for money and services, or as a gift, or for indemnity. The House of Lords, on appeal, reversed that order, and remitted the case to the Court below to decide the questions on the evidence before it. The Court below decided accordingly upon a new hearing, and declared the bond to be partly for counter-security, partly as gift for services. The House, upon appeal, reversed that decision also, and ordered the Master's report to be confirmed. The Court below, subsequently, upon the hearing of counter-petitions, one presented by the representative of the obligee, praying payment of the bond and interest,—the other by the representative of the obligors, praying for leave to institute a new suit to impeach the bond, on the ground that a gift from a principal to an agent was invalid in equity, decreed for such suit, and granted an injunction against any proceedings on the bond in the meantime. The House, upon appeal, reversed that decree, holding that, as the respondent omitted to take advantage of any of the opportunities of raising that objection to the bond in the preceding inquiries, it was not now competent for him to harass the other party by a new suit, in which no new evidence could be produced. *Nicol v. Vaughan*, 1 C. & F. 495, s. c. 7 Bligh, n.s. 395.

## (C) PROCESS.

*Quære*—whether 2 Will. 4, c. 33, extends to Scotland. If it does, the act is discretionary only; and in this case the Court refused to extend it. *McMaster v. Lomas*, 4 Law J. (n.s.) Chanc. 28, s. c. 2 M. & K. 32.

The acts of 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82, extended the service of process to Scotland. *Cameron v. Cameron*, 4 Law J. (n.s.) Chanc. 28, s. c. 2 M. & K. 289.

Service of subpoena upon defendant residing in Scotland, who refuses to appear, deemed good service under 2 Will. 4, c. 33. *Taylor v. Whitmore*, 4 Law J. (n.s.) Exch. Eq. 61.

An order obtained by the plaintiff in the cross cause, making service on the clerk in court of the plaintiff in the original cause (defendant), discharged for irregularity. *Waterton v. Craft*, 4 Law J. (n.s.) Chanc. 7.

Order made for service of subpoena in Scotland. Practice in serving subpoena in foreign countries. *Parker v. Lloyd*, 4 Law J. (n.s.) Chanc. 29, s. c. 5 Sim. 508.

Subpoena and notice of motion must be taken together: acceptance of the notice of motion alone, by the solicitor of a defendant out of the jurisdiction, and upon whom, therefore, no subpoena had been served, will not entitle counsel to be heard in behalf of that defendant. *Borradaile v. Brickwood*, 4 Law J. (n.s.) Exch. Eq. 11, s. c. 1 Y. & C. 60.

Where the defendant has been served with a subpoena under 2 & 3 Will. 4, c. 33, personal notice must be given to him before any subsequent process is applied for. *Hasluck v. Stewart*, 6 Sim. 321.

The defendant had been taken under an attachment for want of answer, but, on his paying the sheriff 40*l.*, to be repaid on putting in his answer, the sheriff at the request of the plaintiff's agent discharged him. Motion for a messenger to take the defendant, who had not put in his answer, refused. *Swindell v. Swindell*, 6 Sim. 295.

## (D) APPEARANCE.

[See APPEARANCE.]

## (E) ANSWER.

## (a) In general.

After an order for taking a bill *pro confesso*, a defendant not allowed to put in his answer, and discharge the order, on payment of costs. *Carr v. Paulett*, 4 Law J. (n.s.) Chanc. 1.

After an answer had been put in, admitting liability to account for prize-moneys—on the subsequent bankruptcy of the defendant, his assignees were not permitted to object to the taking of the account, on the ground of the illegality of the transaction. *Lord Dundonald v. May*, 4 Law J. (n.s.) Chanc. 83.

The King of Spain having filed a bill in the Court of Chancery against H and W, charging them with receipt of money from his agents, a demurrer was filed to the bill, on the ground that a sovereign prince could not sue in England. The demurrer having been overruled, the defendants filed a cross bill against the King of Spain, seeking discovery and relief, and put in an answer to the same effect as the cross bill, upon which it became necessary for the plaintiff to amend his bill; and having so amended his bill, the defendants obtained an order for the usual time to answer the amended bill, after the original plaintiff should have answered the cross bill.

Whereupon a motion, supported by affidavit, was made on behalf of the King of Spain, that he might answer the cross bill by deputy, &c. submitting that it should have the same effect in all respects, as if put in upon oath, or that the answer might be taken without oath or signature. This motion was refused by order of the Court below, and the order affirmed upon appeal. *The King of Spain v. Hullett*, 7 Bligh, n.s. 359.

Information filed against churchwardens and vestry clerk, to establish a charity. Vestry clerk demurred generally:—Held, that he was bound to answer, as being the officer of those representing the parish, although no relief prayed against him. *Attorney General v. the Churchwardens of St. Margaret's, Westminster*, 1 Law J. (n.s.) Chanc. 127.

## (b) Supplemental.

Liberty to file a supplemental answer granted, in order to put a new fact in issue, not inconsistent with the statements in the former answer; viz. the domicile of a testator. *Tidwell v. Bowyer*, 3 Law J. (n.s.) Chanc. 236.

The defendant, an attorney, moved for leave to file a supplemental answer to deny admissions in his answer, that went to establish the plaintiff's case, on the ground of having, on examining his books, discovered that the admission ought not to have been made. Motion refused. *Greenwood v. Atkinson*, 4 Sim. 54.

Leave given to file a supplemental answer for the purpose of stating facts, which the defendant had wished to state in his original answer, but had been prevailed upon to omit, by the mistaken advice of his solicitor. *Nail v. Punter*, 4 Sim. 474.

(F) DEMURRER.

[See DEMURRER.]

(G) GENERAL ORDERS.

[See CONTEMPT.]

The orders of the Court are to be considered as laying down general rules, but not as being so imperative, as that they can, under no circumstances, be departed from.

The time allowed by the 12th order for procuring the report as to the insufficiency of an answer, extended, the drawing up of the order having been delayed by the offices being closed, and the plaintiff having, through inadvertence, omitted to obtain the Master's certificate, that further time was necessary to enable him to make his report. *Burrell v. Nicholson*, 6 Sim. 212.

The Lord Chancellor has authority, in any particular case, to make an order altering the practice of the Court of Chancery. *Dicas v. Lord Brougham*, 6 C. & P. 249. [Lyndhurst.]

The jurisdiction of the Court to make orders upon motions of course, is not taken away by the operation of the 3 & 4 Will. 4, c. 94, ss. 13 & 14, and the new orders founded thereupon. *Cullingworth v. Grundy*, 2 M. & K. 369.

The 17th order does not apply to a commission to examine witnesses abroad. *The King of Spain v. Mendizabal*, 5 Sim. 596.

The 17th order of 1831, does not apply except in cases where the plaintiff requires a commission: in other cases, the old practice remains unaltered. *Williams v. Janaway*, 6 Sim. 77.

The 21st of the last new orders does not alter the former practice in respect of the third application for time, where the Master gives no special direction. *Judd v. Wartnaby*, 2 M. & K. 813.

Under the 10th order of 1833, the common injunction cannot be obtained on an amended bill, until five weeks after appearance, and, if the defendant is then in default, the application must be made according to the old practice. *Lee v. Ravenscroft*, 6 Sim. 474.

The 12th of the new orders applies to affidavits in bankruptcy, which have been referred for scandal and impertinence. *Ex parte Chester, re Yates*, 4 Sim. 12.

The whole fund in court being only 440*l.*, a decree was made, ordering 160*l.* costs to be paid, and out of the remainder of the fund, 100*l.* to A, and 200*l.* to B. This decree allowed to be altered thus:—one-third to A and two-thirds to B, on petition under the 46th new order of 1828. *Dodd v. Rice*, 2 Law J. (N.S.) Chanc. 190.

According to the 51st order, the Master, as soon as a decree is brought into his office, must decide whether he will proceed upon affidavit or interrogatories. *Gibbs v. Payne*, 3 Law J. (N.S.) Chanc. 40.

An issue was directed by the Vice Chancellor, and the order on appeal was affirmed by the Lord Chancellor. The application for a new trial ought, under the 47th order, to be made to the Vice

Chancellor. *Ward v. Pomfret*, 4 Law J. (N.S.) Chanc. 241.

The fourth of Lord Lyndhurst's orders relates to exceptions for insufficiency only. *Bradbury v. Booker*, 4 Sim. 325.

The 15th order does not apply to an amendment, by adding parties only. *Brattle v. Waterman*, 4 Sim. 125.

(H) MOTIONS AND ORDERS.

The Court will not, on motion, make any material alteration in a decree.

Thus, where a contract was decreed to be specifically performed, nothing being said as to interest on the purchase-money, and the Court afterwards, on motion, referred it to the Master to settle a conveyance; a subsequent motion to direct the Master to calculate and charge interest on the purchase-money, and to give particular directions as to the mode of settling the conveyance, was refused. *Byfield v. Provis*, 4 Law J. (N.S.) Chanc. 214.

After a subpoena to rejoin is served, a defendant cannot move to dismiss for want of prosecution. *Booth v. Smith*, 3 Law J. (N.S.) Chanc. 239; and *Ward v. Smith*, ib. 240.

Motions before the Lord Chancellor, to discharge *ex parte* orders on petition at the Rolls, not to be allowed. *Eastwood v. Glenton*, 3 Law J. (N.S.) Chanc. 147, s. c. 2 M. & K. 280.

An order, if obtained irregularly by petition, may be discharged on motion. *Less v. Nuttall*, 3 Law J. (N.S.) Chanc. 124, s. c. 2 M. & K. 234.

A party having paid the sum of 100*l.* instead of 20*l.* for fees upon sales before the Master, and which sum had been carried to the "Suitors' fee-fund account," an order for repayment was made on motion, supported by the affidavit of the Master's clerk. *Iles v. Dixon*, 4 Law J. (N.S.) Chanc. 171.

The Court still has jurisdiction to make an order for time to answer on the overruling of a demurrer. *Waterton v. Croft*, 6 Sim. 481.

In this court it is a motion of course to withdraw a voluntary replication; but a motion to withdraw a replication filed in discharge of an order to dismiss the bill for want of prosecution, is a special application requiring notice. Where an injunction obtained for want of answer, is dissolved on the merits, and the bill is afterwards amended, a motion for an injunction for want of an answer to the amended bill, is a special application requiring notice, notwithstanding the defendant may be in contempt. *Chimelli v. Chauvett*, 1 Yo. 560.

The Court will not make an order for the publication of depositions taken in a suit, to perpetuate testimony, whilst the witnesses are alive. *Barndale, v. Lowe*, 2 R. & M. 142.

A person claiming an order to produce the tenant for life under this statute must shew, first, that he is entitled in remainder; secondly, that he has good reason to believe that the tenant for life is dead; and, thirdly, that such death is concealed. *Ex parte Fletcher re Jobbarns*, 4 Law J. (N.S.) Chanc. 219.

An order nisi for an answer to interrogatories to be put in within four days, &c., obtained before the filing of the Master's certificate, discharged for irregularity. *Frisby v. Stafford, Davenport v. Charlesworth*, 4 Law J. (N.S.) Chanc. 114.

A motion to discharge the common order to revive for irregularity, because it contained a statement of special circumstances, relating to the taxation of costs in the Master's office, refused. *Tucker v. Wilkins*, 4 Law J. (n.s.) Chanc. 157.

A party who is entitled to an order, is bound to see that it is properly drawn up in the registrar's office; and if he obtain an irregular order, he must pay the costs of discharging it. *Landers v. Allen*; 4 Law J. (n.s.) Chanc. 18.

Order made in a cause after the bill had been dismissed, that the receiver should pass his accounts, and pay the balance to the defendant. *Pitt v. Bonner*, 6 Sim. 577.

An order for payment to the husband, of money to which his wife is entitled, cannot be inserted in the order on further directions, but must be obtained by petition, although the wife consents. *Campbell v. Harding*, 6 Sim. 288.

#### (I) PETITIONS.

After a residuary fund had been paid into the Exchequer, under a decree establishing the right of the Crown, parties setting up a title to the fund were permitted, upon petition in the cause, and with the leave of the Crown, to go before the Master, for the purpose of making out their claim. *Monkton v. Attorney General*, 2 R. & M. 147.

Petition to tax a solicitor's bill which had been paid. An affidavit not shewing specific overcharges, insufficient to support it. *Wharton v. Horne*, 3 Law J. (n.s.) Chanc. 182.

The plaintiff presented a petition at the Rolls to confirm the Master's report, and the defendants presented to the Lord Chancellor a petition, by way of exceptions to the same report, which was of course carried to the Vice Chancellor's paper. The Master of the Rolls, under these circumstances, declined proceeding on the petition, the exceptions not having been then disposed of; but it afterwards appearing that the plaintiff had, under these circumstances, served his petition on the defendants previous to their presenting the petition to the Lord Chancellor, His Honour proceeded on the petition to confirm. *Attorney General v. Lubbock*, 4 Law J. (n.s.) Chanc. 218.

#### (K) COMMISSION.

A defendant who has joined in commission, cannot obtain a new commission, except upon a special application and with notice. *Bond v. Bond*, 4 Sim. 518.

Plaintiff obtained an order for a commission, but did not take it out:—Held, that, under the 17th order of 1831, the defendant was entitled to take out a commission. *Rattenbury v. Fenton*, 6 Sim. 368.

Leave given to plaintiff, before answer, to sue out a commission in a suit to perpetuate testimony, the defendant having been attached, and still refusing to answer. *Lancaster v. Lancaster*, 6 Sim. 439.

#### (L) EXAMINATION.

[*Hood v. Pimm*, 2 Dig. Law J. 282, s. c. 4 Sim. 101.]

The affidavit in support of a motion to examine witnesses abroad, if there is a *prima facie* necessity

upon the bill, need not name the witnesses, nor the points to which they are to be examined. *Antonio de Boman y Carbonell v. Besell*, 2 Law J. (n.s.) Chanc. 73.

Liberty given to plaintiff to re-examine one of his witnesses to part of an interrogatory, as to which the examiner had omitted to take down the deposition. *Bridge v. Bridge*, 6 Sim. 352.

After the depositions on a state of facts carried in under a decree, have been published, no other person, whether a party to the cause or not, can be examined as a witness, without an order of court, warranted by special circumstances. *Wispenny v. Courtney*, 5 Sim. 554.

A defendant may obtain an order, as of course, to examine a co-defendant after a decree, saving just exceptions. *Van v. Corps*, 6 Law J. (n.s.) Chanc. 208, s. c. 3 M. & K. 269.

Where in an examination put in by two co-executors, it was stated, that their receipts had been joint, but it appeared, by affidavit, that that statement was made through mistake and inadvertence; and that one of the executors had, in fact, received nothing,—liberty was given to him to put in a supplemental examination, to correct the mistake. *Heves v. Heves*, 4 Sim. 1.

An action having been brought against the plaintiffs, whose witnesses were about to leave England for New York, they applied to the Chief Justice of the King's Bench, under 1 Will. 4, c. 22, for a commission to examine their witnesses before the trial; but his Lordship ordered them to be examined *ad vocem*, before a gentleman of the bar, with liberty to the defendants to attend and cross-examine them. The plaintiffs took no proceedings under the order, but their witnesses having shortly afterwards gone to New York, they filed a bill in Chancery, and afterwards moved for a commission to examine their witnesses there. Motion granted. *Gusnell v. Cobbold*, 4 Sim. 546.

#### (M) INTERROGATORIES.

Where the Master refuses to allow interrogatories, the proper mode of objecting is by excepting to his certificate of disallowance, and not to wait until the general report. *Weall v. Rice*, 4 Law J. (n.s.) Chanc. 17.

#### (N) PUBLICATION.

Application may be made to the Court to enlarge publication, the Master having refused to do so, though no minute of his refusal is made. *Nash v. Cockrane*, 4 Law J. (n.s.) Chanc. 29.

Rule to pass publication before the expiration of three months from the service of the subpoena to rejoin, discharged for irregularity. *Flight v. Jones*, 4 Law J. (n.s.) Chanc. 68.

#### (O) EXHIBITS.

A paper, containing the observations of a surveyor at the time of making a survey, and to the substance of which he had deposed before the commissioners who examined him, not admissible in evidence, as an exhibit. *Twort v. Jefferies*, 1 Law J. (n.s.) Chanc. 218.

#### (P) CAUSE, RESTORING TO PAPER.

Where a cause is ordered to stand over generally,

it is the practice to strike it altogether from the list of causes, and the Court will not afterwards restore it to its place in the paper. *Culleford v. Parnell*, 4 Law J. (N.S.) Chanc. 280.

#### (Q) DECREES.

[See COGNOVIT. And see, *post*, (Y) Appeal.]

There is no rule preventing the enrolment of a decree, which, among other things, directs the taking of accounts.

An order to enrol a decree *nunc pro tunc* is irregular, if the petition on which the order is made does not set forth the date of the decree to be enrolled. *Parker v. Downing*, 1 M. & K. 634.

The enrolment of a decree after an intimation given on the part of the defendants to the plaintiff's solicitor of their intention to appeal forthwith, and a statement by the solicitor, in reply, that he was open to any fair offer of arrangement, to prevent the necessity of an appeal, does not amount to such a surprise as will induce the Court to vacate the enrolment. *Balguy v. Chorley*, 1 M. & K. 640.

#### (R) MINUTES.

Registrar's minutes not allowed to be altered without a rehearing. *Wain v. Rice*, 3 Law J. (N.S.) Chanc. 14.

#### (S) REHEARINGS.

As a general rule, after a cause has been once heard before the Chancellor, as a rehearing or appeal from the Court below, there cannot, of right, be a rehearing before him; but it is in the discretion of the Court to grant a rehearing or not. *Duke of St. Albans v. Duchess of St. Albans*, 1 Law J. (N.S.) Chanc. 26.

Under circumstances stated in a petition, verified by affidavit, this Court will grant a rehearing, notwithstanding the general order of the 13th of November 1731, which requires such applications to be made within six months. *Halford v. Halford*, 4 Law J. (N.S.) Exch. Eq. 57, s. c. 1 Y. & C. 270.

Money paid under a decree of the Court will be ordered to be refunded, in case the decree under which the money was paid should be reversed; and this may be done on the petition for rehearing; and *semble*, that the Court may, in a supplemental suit for that purpose, order trustees, to whom money has been paid by order of the Court, and which has been applied by the trustees according to the trusts, to be replaced by them. But, whether this can be done on the petition of rehearing—*quære*. *Kidd v. Kidd*, 2 Law J. (N.S.) Chanc. 178.

The common order for rehearing will be discharged for irregularity, if not obtained until six months after a decree made: but the Court will grant a rehearing, though the ordinary time for making the application has expired, upon a petition, stating special circumstances, and verified by affidavit. *MacLachlan v. Robt.*, 4 Law J. (N.S.) Exch. Eq. 40, s. c. 1 Y. & C. 267.

On an appeal, none but the parties to the appeal can be heard, but, on a rehearing, all parties, although they do not join in the petition of rehearing, are entitled to be heard. *Hughes v. Turner*, 4 Law J. (N.S.) Chanc. 141.

#### (T) REFERENCES.

##### (a) Where directed.

Reference directed under the 1 Will. 4, c. 60, in a case where the *causis que trust* making the application claimed in respect of interests devised in remainder after the determination of prior estates tail which had failed. *In re De Clifford Estates*, 2 M. & K. 624.

##### (b) Impertinence and Scandal.

Defendant, after putting in his answer, became bankrupt. Plaintiff, before the assignees were brought before the Court, obtained an order to refer the answer for scandal and impertinence:—Held, that the order was regularly obtained. *Bent v. Smith*, 5 Sim. 639.

Where the Master has allowed a number of exceptions to an answer, and the defendant takes one general exception to the report, if the Court think the Master right in allowing any one of the exceptions, the general exception covers too much, and will be overruled. But the Court will allow the exceptions to be amended.

Prolivity in an answer, is impertinence, but is a question of degree depending upon circumstances.

Setting forth answers to interrogatories in columns. *Gompertz v. Best*, 4 Law J. (N.S.) Exch. Eq. 17, s. c. 1 Y. & C. 114.

##### (c) Proceedings.

The Court refused to grant, as prayed, an order to the Master, particularizing various points of his duty in regard to a previous order of reference, of which, it was alleged, that he was proceeding contrary to the intent; but to remove doubt, the Court made a declaration, as instructions to the Master, for his true understanding of such previous order. *Morison v. Morison*, 1 Law J. (N.S.) Chanc. 12.

Where a matter is referred to the Master, and the rule gives no express authority to him to hear the testimony of witnesses *videlicet*, by the practice of his office he can only receive the testimony of witnesses by affidavit; and if it is desired that he should hear oral testimony, a special power to that effect must be reserved to the Master, by the order of reference. *Noy v. Reynolds*, 4 Law J. (N.S.) K.B. 108, s. c. 2 Ad. & E. 461; 4 N. & M. 483.

If the Master does not decide at the time appointed for considering the decree, to admit affidavits as evidence, he cannot afterwards receive them, unless by consent. *Gibbs v. Payne*, 4 Sim. 554.

Where a decree in a cause in which previous references have been made, directs a reference to the Master in rotation, the decree will be carried to the Master to whom the previous references were made. *Attorney General v. Shore*, 6 Sim. 460.

##### (d) Report.

In taking accounts of a testator's estate, the Master had disallowed the executor's receipt of a sum due to the estate from a firm of which he was a partner, and which sum the executor took credit for, as having received it from the firm; there had been no evidence before the Master that money had actually passed, but there had been *prima facie* evidence that the payment had been made:—*ex-*

ception to his report allowed. *Feabrooke v. Balguy*, 3 Law J. (N.S.) Chanc. 20, s. c. 1 M. & K. 226.

A Master directed to suspend his report upon a third answer, which had been referred for insufficiency, another answer having been put in. *Russell v. Dight*, 3 Law J. (N.S.) Chanc. 162, s. c. 6 Sim. 430.

Parties to a cause must except to a report, whether it be separate or general. Persons not parties must petition. *Dwyer v. Maudesley*, 4 Law J. (N.S.) Chanc. 162.

In computing the eight days within which cause must be shewn against confirming a report absolutely, the day on which the order nisi was served, must be reckoned; but, if the eighth day is a holiday, one day more will be allowed. But see the note at the end of the case. *Manners v. Bryan*, 5 Sim. 147.

The order for confirming absolutely a Master's report as to a purchase when served, operates from the day on which it was pronounced. *Aberdeen v. Watkins*, 6 Sim. 146.

In taking accounts directed by the decree, certain payments, which had been made by A and B jointly, were represented and reported by the Master to have been made by B separately. After the report had been absolutely confirmed, and B had become bankrupt, the Court, on the petition of A, discharged the order to confirm the report, and referred it back to the Master to review his report. *Prentice v. Mensal*, 6 Sim. 271.

In a suit by children entitled to portions against the executor of their father's will, whose estate was charged with the portions, the executor being guardian of the children, and also a creditor upon the father's estate, which suit was continued against his representative, certain sums were, by the Master's report, found due to the estate of the executor, &c.: the report of the Master proceeded upon an account stated and settled between the executor and some of the children entitled to portions, and signed by them, but not signed by the plaintiffs in the suit. The report, however, was confirmed; and, after various proceedings in the suit, upon application of the plaintiffs, leave was given to take proceedings for reviewing the matter of the report, upon the condition that the plaintiffs should pay the costs of the proceedings, or otherwise that the matter of the report should stand confirmed:—Held, on appeal, that the plaintiffs, not having complied with the conditions, were not entitled to relief. *Bouchier v. Dillon*, 5 Bligh, N.S. 688.

The eight days given in the order nisi for shewing cause against confirming a report, include the day on which the order is served; and the circumstance that the last of the eight days happens not to be an office day, does not entitle the party to shew cause on the next day on which the office is open. *Manners v. Bryan*, 1 M. & K. 453.

A debt of 2,400l. having been found due by the Master's report, to which no objections nor exceptions were taken, and no error appearing upon the face of the report:—Held, that the report could not, by order made upon further directions, be reviewed. *Morgan v. Evans*, 8 Bligh, N.S. 777.

#### (U) EXCEPTIONS.

[*Nichol v. Vaughan*, 2 Law J. Dig. 234, s. c. 2 D. & Cl. A.C. 420; 5 Bligh, N.S. 805.]

An objection cannot be taken advantage of on a bill of exceptions, unless it were made at the trial of the cause. *Taylor v. Williams (in error)*, 1 Law J. (N.S.) K.B. 17, s. c. 2 B. & Ad. 345.

#### (a) Answers.

Where exceptions to an answer are set down to be argued, the defendant may obtain the previous order two days before they are actually argued, and need not obtain the order two days before the day for which they are set down to be argued. *Jadis v. Ruscoe*, 1 Yo. 538.

Where exceptions are taken to separate answers, which are substantially the same, one previous order is sufficient.

*Semble*, that defendant obtaining the previous order, need not also take out an order nisi for dissolving the injunction. *Taylor v. Sheppard*, 1 Y. & C. 99.

A party does not waive his right to except to the answer of a defendant for insufficiency, by a formal amendment by adding parties.

A defendant answered part, and demurred to the remainder of the bill. The demurrer was overruled; but a demurrer at bar on terms, for want of parties, was allowed, and the plaintiff amended by adding the proper parties, and afterwards filed exceptions to the answer, which referred to that part of the bill which was covered by the demurrer:—Held, regular. *Foster v. Fisher*, 4 Law J. (N.S.) Chanc. 237.

#### (b) Reports and Certificates.

Where a number of exceptions to an answer allowed by the Master, are enumerated *seriatim*, and the defendant takes one general exception to the Master's report, alleging that all the before-mentioned exceptions ought to have been disallowed; if the Court is of opinion that the Master was right in allowing any one of the exceptions, the general exception to the Master's report covers too much, and will be overruled. *Pearson v. Knapp*, 1 M. & K. 312; see also 4 Law J. (N.S.) Exch. Eq. 17, s. c. 1 Y. & C. 114.

Exceptions to the report of the Master must be exceptions to the conclusions, and not to the statements or facts, on which the report is founded. *Hartley v. Hewitt*, 3 Law J. (N.S.) Chanc. 120, s. c. 3 M. & K. 28.

The Master allowed four interrogatories for the examination of a defendant, who excepted to his certificate, by one general exception, "for that the Master had allowed the four interrogatories, (stating them,) when he ought not to have allowed such interrogatories." The Court, being of opinion that the Master was right as to three of the interrogatories, but wrong as to the fourth, allowed the general exceptions.

Whether, in the examination of executors in the Master's office, any other than the common interrogatories ought to be allowed, where there are no special directions in the decree—*quære*. *Moore v. Langford*, 4 Law J. (N.S.) Chanc. 228, s. c. 6 Sim. 323.

Exception to a Master's report on matters concerning which he goes beyond the order of reference, disallowed, because any matter put into a report, not included in the order, is mere surplussage. *Jenkins v. Briant*, 3 Law J. (N.S.) Chanc. 169.

The 22nd order does not render it imperative on a party to take exceptions to the Master's report of scandal, &c., within four days from the filing of his report; he may therefore except to the report, at any time before the scandalous matter has been actually expunged. *Evans v. Owen*, 4 Law J. (N.S.) Chanc. 64, s.c. 2 M. & K. 382.

The plaintiff, under the decree, carried in interrogatories for the examination of the defendants; the Master allowed some of the interrogatories, and disallowed others; the plaintiffs, before the Master had made his certificate, moved that he might be ordered to approve of the interrogatories, which he had disallowed, or to receive others for the same purpose. Motion refused, the proper course being to wait till the Master has made his certificate, and then to except to it. *Chennell v. Martin*, 4 Sim. 840.

Motion to discharge a Master's certificate of the sufficiency of the defendant's examination under a decree, refused; the proper course being to except to the Master's certificate. *Chalk v. Thompson*, 4 Sim. 350.

On the hearing of exceptions to a Master's report, no parts of the answer can be read, except those which were read before the Master. *Randa v. Pushman*, 6 Sim. 46.

#### (V) SALE BY THE MASTER.

[See VENDOR AND PURCHASER.]

Upon a sale, by the Master, in lots, the proper fee to be paid, according to the schedule annexed to the orders in Chancery, issued under the 3 & 4 Will. 4, c. 94, is 5*l.* where the whole produce of the sale does not exceed 2,000*l.*, and 5*s.* on every 100*l.* beyond that sum, without regard to the number of lots or purchasers. *In re Allen's Charities*, 2 M. & K. 627.

#### (W) DETERMINATION OF THE SUIT.

A cognovit was given, with a condition, that, if the ultimate decision of certain Chancery suits between the parties, should be for the plaintiff, the defendant should pay him 500*l.* within one month after such decision, or else execution should issue. The Vice Chancellor made his decree in those suits for the plaintiff, who, at the end of a month, issued execution, the 500*l.* being unpaid. The decree had not been passed by the registrar, though the minutes had been settled; and the defendant had lodged a *caseat*, intending, as he stated, to appeal to the Lord Chancellor:—Held, that the Chancery suits had not been ultimately decided within the meaning of the condition, and that the execution, consequently, was irregular. *Dummer v. Pitcher*, 3 B. & Ad. 347.

#### (X) COSTS.

[See COSTS, Security for. And, *ante*, Bill, Filing.]

Mode of proceeding under the 13th order, 1838. *Taylor v. Bailey*, 3 Law J. (N.S.) Chanc. 238.

A defendant cannot, as against a co-defendant, read any part of the plaintiff's evidence, even as to a question of costs. *Thompson v. Chapman*, 4 Law J. (N.S.) Chanc. 20.

Where defendant in a suit obtains an issue, and the jury find a verdict against him, the Court will order him to pay the costs of the suit, as well as of the issue. *Barnes v. Stuart*, 4 Law J. (N.S.) Exch. Eq. 25, s.c. 1 Y. & C. 119.

Where an equitable lease of tithes, having a right to call for the conveyance to him of the legal interest, had neglected to do so previously to instituting a suit for the recovery of part of those tithes, and upon the refusal of the rector to join as co-plaintiff in the suit, had made him a co-defendant:—Held, that he was not entitled to the costs arising from the rector's refusal to join, and that the rector was entitled to his costs. *White v. Gardner*, 1 Y. & C. 385.

Where a report of scandal or impertinence has been excepted to, the Master cannot tax the costs of the reference, under the 22nd order of 1833, without further order. *Desanges v. Gregory*, 6 Sim. 472.

#### (Y) APPEAL.

After a petition of appeal had been presented, complaining only of one order of the Court below, leave was given to extend the appeals to other orders. *Beuchier v. Dillon*, 5 Bligh, N.S. 688.

If there be an accidental omission of form in the drawing up of a decree in the Vice Chancellor's Court, and that decree be appealed against, the Lord Chancellor may supply the omission. *Newdigate v. Newdigate*, 2 C. & F. 691, s.c. 8 Bligh, N.S. 734.

The books and papers belonging to a company are deposited in the hands of the company's solicitor. A bill is filed against the company; some of the directors demur to the bill, and the demurrer is allowed; and one puts in an answer, admitting the possession of the documents by the solicitor:—a motion to stay the execution of an order for the production of these documents pending an appeal from the decree on the demurrer, refused with costs. *Walburne v. Ingilby*, 3 Law J. (N.S.) Chanc. 21, s.c. 1 M. & K. 61.

The answer of the Lord Chancellor to a petition of appeal relates to the day on which the petition was presented.

Where, therefore, a petition of appeal was presented within twenty-eight days after notice had been given of a docket of the decree having been presented for signature, and, the Lord Chancellor being in Scotland, the petition was not answered until after the expiration of the twenty-eight days, the enrolment of the decree was vacated. *Richards v. Wood*, 2 M. & K. 621.

#### 3. IN THE ECCLESIASTICAL COURTS.

[See CONTEMPT—RATE, Church-rate. And see WILL, Proof, in Ecclesiastical Courts.]

An appellant suing not as a pauper in the court below, admitted a pauper in the Court of Delegates. *Grindall v. Grindall*, 4 Hag. Ec. 1.

On appeal from, refusing the prayer of a petition, the appellant, who originally prayed to be heard on his petition, begins. *Hughes v. Turner*, 4 Hag. Ec. 47.

The Court will not delay the hearing of a case on an affidavit, that a true bill has been found against a material witness for perjury in her evidence in such cause. *Quare*, whether a conviction would be evidence. *Kenrick v. Kenrick*, 4 Hag. Ec. 133.

Inspection, by the registrar, of depositions (taken abroad) not allowed prior to publication. *Swift v. Swift*, 4 Hag. Ec. 144.



Upon an application for a prohibition *propter defectum triationis*, the Court of Arches had been enjoined from proceeding as to a custom till an issue was tried; the record of the judgment, setting forth a verdict finding a custom for parishioners to repair the channel, is conclusive evidence in the Ecclesiastical Court of the existence and validity of the custom. *The Bishop of Ely v. Gibbons and Goody*, 4 Hag. Ec. 166.

It is a rule of the Court that, in cases of pedigree, a party has no right to see the adverse plea till he has set out his own pedigree. *Rutherford v. Maule*, 4 Hag. Ec. 238.

A protest against an appeal, on the ground that a party, by bringing in an exceptive allegation, subject, as alleged, to a condition that the question as to the admission should be reserved to the hearing of the cause, had perempted his right of appeal, overruled; and, on the merits, the decree of the Court below reserving the question as to the admission affirmed, the party having a right to appeal, if at the hearing the plea should be improperly rejected. *Wargent v. Hollings*, 4 Hag. Ec. 246.

The rule of taking the libel as true, applies only to averments of fact, not to inferences, which ought to be sparingly introduced. *Neeld v. Neeld*, 4 Hag. Ec. 266.

The contents of, or extracts from, written documents, must not be pleaded without annexing the same, and even if the adverse counsel do not object to the non-annexation, the Court must take the objection. *Ib.* 272.

Under 55 Geo. 3, c. 184, schedule, part 1, and 5 Geo. 4, c. 41, schedule, part 2, a protocol of appeal, being a notarial act, requires a 5s. stamp; and the Court of Arches having decided on that ground against the validity of an appeal from the Consistory, the defect is not cured by a stamp affixed, previous to the hearing in the Court of Delegates on an appeal from that decision. A seal is unnecessary to the validity of a notarial act. *Semble*, that an inhibition does not remain in force, so as to prevent the inferior Court from proceeding on the same, and also on additional facts in a subsequent suit, the original suit having been dismissed in the Court of Appeal by consent of parties. *Smyth v. Smyth*, 4 Hag. Ec. 72.

A suit for cruelty and adultery, brought by the wife, was appealed from the Consistory Court of London to the Arches, and in 1828, was there alleged to be agreed, and the husband dismissed; but the inhibition to the Consistory was not relaxed. In 1831, a suit for cruelty and adultery was again brought by the wife in the Consistory; the husband appeared under protest, the Judge having directed the wife's libel (which referred to, and prayed leave to invoke the proceedings in the former suit, and also pleaded new facts) to be brought in, overruled the protest; but, on the ground that the inhibition was still in force, did not assign the husband to appear absolutely, nor did it dismiss him, nor admit or reject the libel. The wife appealed; that appeal was dismissed for irregularity, and the cause remitted: the Judge below, as still inhibited, refused to proceed: the wife again appealed; and the Court of Arches held, that the agreement and consequent dismissal of the husband put an end to the former

suit, and, consequently, to the inhibition; and the Judge of the Consistory Court was bound to proceed in the cause. *Ib.* 509.

The libel, in a suit for cruelty and adultery, disclosing the existence of a former suit, between the same parties, partly on the same facts; and that such former suit was appealed, and, in the superior Court, dismissed, by consent, before sentence:—Held, that the inferior Court cannot hear on the admissibility of such libel, the inhibition in the former suit not having been expressly relaxed. *Ib.* 516.

A suit for a divorce, brought by a wife against her husband in the Consistory Court of London, was appealed against to the Arches Court, and there dismissed against the husband by an agreement in 1828; but the inhibition to the Consistory Court was not relaxed. In 1832, another suit for the same purpose was brought by the wife against the husband in the Consistory Court, and the Judge allowed the libel to be brought in, and overruled the husband's protest, but refused to order him to appear, on the ground that the inhibition in the former suit was in force. An appeal by the wife against this decree, having been dismissed for irregularity, and the cause remitted, the Judge of the Consistory Court refused to receive additional articles to the libel; the Arches Court, on appeal, admitted them, holding that the agreement, putting an end to the former suit, was tantamount to a former relaxation of the inhibition:—Held, by the judicial committee, that the Arches Court ought not to have admitted the additional articles before the husband had appeared to the suit; but they retained the cause, ordered the husband to appear absolutely to it, and declared, on his appearance, they would assign to hear on the original and additional libel and exhibits. *Smyth v. Smyth*, 3 Kn. 48.

The proctor of an executor, cited to take probate, having alleged that he is ready so to do, the Court is bound to decree probate; nor is the proctor, though assigned, compellable to exhibit a proxy, as the act of taking probate would confirm the proctor's allegation. *Fullerton v. Dixon*, 4 Hag. Ec. 402.

Facts collateral to the point in issue, cannot be pleaded in exception to the character of a witness. *Sergeant v. Sergeant*, 1 Curt. 4.

Specific facts cannot be pleaded, in order to support the character of a witness whose testimony has been impeached on the ground of general bad conduct. *Lambert v. Lambert*, 1 Curt. 7.

#### 4. IN THE HOUSE OF LORDS.

[See FOREIGN JUDGMENT.]

[*Maccabe v. Hussey*, 2 D. & Cl. 440, s. c. 2 Law J. Dig. 235; 5 Bligh, n.s. 715.]

*Semble*—if two Courts have been of the same opinion on any point, and their judgments are appealed from, and affirmed,—the House of Lords will give costs on the affirance. *Duvergier v. Fellowes*, 1 C. & F. 30, s. c. 6 Bligh, n.s. 87.

The House will not receive, from the agent of a plaintiff in error, a petition to refer a case to the Judges, to consider the points of law, which, in his petition, such plaintiff states to be involved in the case; but if counsel do not appear to argue for him, will proceed, on the motion of the counsel for the

defendant in error, to affirm the judgment of the Court below. *Ricketts v. Lewis*, 2 C. & F. 100, s. c. 8 Bligh, n.s. 158; 1 Bing. N.C. 196.

Upon appeal, and cross appeal, the House of Lords being of opinion that the appellant in the original appeal, as mortgagee, ought to have obtained the decree, with costs, in the court below, gave him costs in the cross appeal, upon the principle of indemnity. *Morgan v. Evans*, 8 Bligh, n.s. 777.

The Judges will decline answering a question put by the House of Lords, if that question is not confined to the strict legal construction of the existing law. *In re Westminster Bank*, 2 C. & F. 191.

The House of Lords will not postpone the hearing and decision of any appeal on account of the absence of counsel, but will call on the counsel on either side, in attendance, to proceed with the argument. *Mellish v. Richardson*, 1 C. & F. 224, s. c. 6 Bligh, n.s. 70.

*Sembla*—the House of Lords will, under peculiar circumstances, hear two counsel for a respondent, although to hear but one on each side may be part of the order made on advancing the appeal, on the petition of the appellant.—*Sembla*, also, that although it is usual, according to the orders of the House, to insert in the printed cases all the documents that are to be relied on, except the parties, to save expense, come to an understanding to refer only to some, yet the House will hear the documents so referred to read at length at the table of the House, or by counsel at the bar; the opposite counsel being at liberty to examine and observe upon them. *Dillon v. Parker*, 1 C. & F. 303.

If the appellant, in the House of Lords, does not appear to support his appeal, the respondent's counsel are not compellable to go on, but the appeal may be dismissed, and the House will afterwards exercise their discretion as to the costs. *Gardiner v. Simmons*, 1 C. & F. 35, s. c. 6 Bligh, n.s. 60.

## 5. IN THE PRIVY COUNCIL.

[See APPEAL—COSTS.]

The judicial committee will not send back a case to a court below for further investigation, on the ground that further evidence might now be produced before it, when the party has had opportunity of bringing forward that evidence below, of which he has not availed himself. *Rajah Row Jeurats v. Nanagowdy Soomah*, 2 Kn. 259.

When a Court below has decided upon a case, depending upon questions of fact alone, the Privy Council will not advise a reversal of their judgment, unless there appears some clear distinct point in which they are wrong, although doubts may be entertained as to its correctness. *Baboo Uluck Sing v. Huse Persad*, 2 Kn. 283.

The fact of a witness having been convicted of perjury in his evidence, in a cause under appeal, cannot be used as a ground for reversing the judgment of the Court below upon it. *Caneps v. Larior*, 2 Kn. 270.

The judicial committee is not bound by the decision of a Court below, upon a question of evidence, although it will in general follow it. *Ibid.*

The judicial committee are bound to take notice of the law of the country from which the appeal

comes, and to decide according to it, although it has not been noticed in the Court below. When, therefore, a Court below had decided upon the ground of evidence of which they had cognizance in another suit, but which was not legally before them in the suit in question, their decree was supported on the ground that the appellant, who was the plaintiff before them, had, according to the law of the country, no right to sue. An adopted son, according to the Hindu law, is entitled to succeed to his collateral, as well as his direct relations by adoption. *Sumboo Chander Chowdry v. Nakhais Dibe and Ramkishor*, 3 Kn. 55.

The prerogative of the Crown, with regard to aliens, must be determined by the laws of the particular colonies in which the questions arise, and not by the law of England, which is only to be looked at in order to determine who are, and who are not aliens.

The *droit d'aubaine* became the law of Lower Canada, with regard to aliens, on the ancient French law being established there, by the 14 Geo. 3, c. 83.

The judicial committee will not notice any alteration of rights that may have taken place between the parties in consequence of an act of the provincial legislature, but which do not appear on the record. *Donegani v. Donegani*, 3 Kn. 63.

*Quere*—Whether an appellant, who wishes to avail himself of evidence not produced before the Court below, must not, either in his petition of appeal, or by a special petition for that purpose, pray that it may be received before the judicial committee. *Jephson v. Reira*, 3 Kn. 136.

## 6. IN CRIMINAL PROCEEDINGS.

[See EVIDENCE—INDICTMENT—WITNESS.]

The Judges (before the late act) held, that, if a prisoner is indicted for felony, after a previous conviction, the proof of the previous conviction is to be given before the prisoner is called on for his defence. *Rez v. Jones*, 6 C. & P. 391. [Park]

The statute 7 & 8 Geo. 4, c. 28, s. 2, authorizing the Court to direct a plea of not guilty to be entered for a party who stands mute of malice, or will not answer directly to an indictment, applies to a case of a party who refuses to plead, on the ground that he has previously pleaded to another indictment for the same offence, but which indictment was not valid, in consequence of its having been found, upon the testimony of witnesses, not duly sworn to give evidence before the grand jury. *Rez v. Bitton*, 6 C. & P. 92.

A person who has pleaded to an indictment which was invalid, on account of its having been found upon the testimony of witnesses not duly sworn to give evidence, may be required to plead to another indictment for the same offence, without the first indictment being quashed by the Court. *Rez v. Chamberlain*, 6 C. & P. 95. [Littledale and Vaughan]

On an indictment for felony, removed by *certiorari*, the Court, under special circumstances, ordered that the defendants should be at liberty to plead by a clerk in court, and that they and the prosecutor should be restrained from bringing error on account of the pleas being so taken. But in the

same case the Court refused to allow a suggestion to be entered for the purpose of removing the trial from Cornwall into another county, on the alleged ground that titles to duchy property were likely to come in question, with respect to which prejudices existed in Cornwall, and that an impartial trial could not be had there. *Rex v. Pen-grasse*, 4 B. & Ad. 573, s.c. 1 N. & M. 312; and see *Rex v. Blackburns*, ib. 575, *Rex v. Russell*, ib. 576.

As to passing sentence at the Assizes, see *Rex v. Lloyd*, 2 Law J. (N.S.) K.B. 214, s.c. 5 B. & Ad. 185.

### PREBEND.

[See CHURCH—PRESENTATION.]

An archdeacon of Rochester, when instituted and inducted into that office, is, *ipso facto*, inducted into the prebend annexed to it by royal grant, and may claim to be sworn in as prebendary, without being installed. *Rex v. Dean and Chapter of Rochester*, 3 B. & Ad. 95.

### PRECEDENCY.

The Attorney General of England has precedence over the Lord Advocate of Scotland, in all matters in which they may appear as counsel at the bar of the House of Lords. *Attorney General v. Lord Advocate*, 2 C. & F. 481.

### PREROGATIVE.

[See ALIEN—EJECTMENT, Where maintainable—PRACTICE, In the Privy Council.]

Where, by a charter under the great seal, instituting a court in a conquered colony, it is provided that the laws of England shall be the measure of justice between the parties, and the Court is empowered to hold pleas of what nature and kind soever, and to issue warrants of execution for putting parties into possession under its decrees:—Held, that the English law of real property was substituted for the ancient law of the conquered colony, and that a widow was entitled to dower out of lands of her late husband accordingly.

The law of a conquered country may be altered by the King by proclamation, or letters patent under the great seal, and not solely by means of an order in council. *Jephson v. Rivera*, 3 Kn. 130.

### PRESCRIPTION.

[See EVIDENCE.]

Act for shortening the time of. 2 & 3 Will. 4, c. 71; 10 Law J. Stat. 196.

Statute 2 & 3 Will. 4, c. 71, does not give a title to a right of way over lands held under a lease for lives granted by a bishop, by reason of an adverse user for twenty years during the lease, either as against the bishop, the lessee, or those claiming under the lessee.

A declaration for the disturbance of such right of way, alleging that the plaintiff was possessed of a certain wharf, close, and premises, and by reason thereof ought to have had, and still of right ought to have, a certain way from the said wharf, close, and premises, into, &c. as to the said wharf and premises belonging and appertaining:—Held good. *Bright v. Walker*, 3 Law J. (N.S.) Exch. 250, s.c. 1 C. M. & R. 211; 4 Tyr. 502.

Trespass for breaking and entering one close of the plaintiffs, called the Railroad, and one other close formerly used as a railroad, and damaging the soil of the last-mentioned close. Pleas, among others, that the close was a railway made by the plaintiffs under an act of parliament—that the defendants were the owners of the adjoining closes containing minerals; and, according to the custom of the country, the minerals could only be conveyed conveniently or properly by means of a tram-road laid across the plaintiff's railway, and that the defendants constructed the tram-road across the closes for that purpose, and for the convenient and necessary occupation of their closes. Replication, *de injuria*. Other pleas alleged, that the occupiers of the adjoining closes had, for twenty years, of right and without interruption, been accustomed to use the privilege and easement of passing and repassing, and laying down tram-roads across the plaintiffs' railroad. Replication, traversing the claim of right in the language of the plea. New-assignment of other and different purposes. Plaintiffs in their particulars complained of a trespass in a certain close which now is or was heretofore a rail or tram-road, and destroying the plates of the same, and laying down another upon it. It was proved that the plaintiffs' railway ran through the defendants' works and premises; that the latter, having diverted the railway and carried it over their own land, constructed a transverse tram-road across the new one and the site of the old one:—Held, that the particulars applied to the old railroad.

There being contradictory evidence as to the necessity and convenience of the tram-road for the use and occupation of the defendants' land; and evidence having been given on the one side, and answered on the other, to shew that the defendants had laid it down for the purpose of connecting their works with another canal:—Held, that it was competent for the Judge to direct the jury, in determining whether the tram-road was necessary or convenient for the occupation of the adjoining closes, to consider, whether it had been made *bona fide* for that purpose, or to carry into effect another and different plan totally unconnected with the occupation.

Held, also, upon the issue raised on the pleas justifying under the twenty years' uninterrupted enjoyment of the right, that the plaintiffs might shew that the defendants had from time to time applied for leave to make the cross tram-roads; and that it was not necessary for them to reply specially such licence, under 2 & 3 Will. 4, c. 41, s. 5. *The Monmouthshire Canal Company v. Harford*, 4 Law J. (N.S.) Exch. 43, s.c. 1 C. M. & R. 614; 5 Tyr. 68.

## PRESENTATION.

An advowson belongs to a prebendary in right of his prebend: the church became vacant, and prebendary dies without having presented; the presentation belongs to his personal representative, according to the opinion of six Judges out of eight, delivered in the House of Lords. *Mirhouse v. Rennell*, 8 Bing. 490, s. c. 1 Mo. & Sc. 683.

## PRESUMPTION.

[See RELEASE—TITHES—EVIDENCE, Presumption.]

## PRINCIPAL AND ACCESSARY.

[See RAPE—STOLEN GOODS.]

On an indictment against an accessory, a confession by the principal is not admissible, in evidence, to prove the guilt of the principal; it must be proved *alibis*, especially if the principal be alive.

*Semble*—a conviction of the principal upon a plea of guilty, will not be evidence against the accessory to prove the principal guilty. Nor, *semble*, will a conviction on a plea of not guilty. *Rez v. Turner*, 1 M. C.C. 347.

A was indicted for larceny, as principal, B being charged, in the same indictment, with having received the stolen property from A. B was tried at the Clerkenwell Sessions for the receiving, and was convicted and sentenced to be transported. A was afterwards tried at the Old Bailey as the principal, and acquitted. Held, that, although B was imprisoned in Newgate, in pursuance of his sentence, the Judges at the Old Bailey had no jurisdiction to order his discharge. *Ex parte Palmer*, 6 C. & P. 122. [Littledale and Bosanquet]

If a woman takes poison with intent to procure a miscarriage, and dies of it, she is guilty of self-murder, whether she was quick with child or not; and a person who furnished her with the poison for that purpose, will, if absent when she took it, be an accessory before the fact only: and as he could not have been tried as such before 7 Geo. 4, c. 64, s. 9, he is not triable for a substantive felony under that act. An accessory before the fact to the crime of self-murder was not triable at common law, because the principal could not be tried. And he is not now triable under 7 Geo. 4, c. 64, s. 9, for that section is not to be taken to make accessories triable, except in cases in which they might have been tried before. *Rez v. Russell*, 1 M. C.C. 356.

A, a lad, who was a clerk in a banking-house, robbed his employers, and, after doing so, he went to the lodgings of B, who was much older than himself, and who had relations in America: A stayed twenty minutes at B's lodgings, and after that, on the same night, A & B started together by the coach, and went from Reading to Liverpool, intending to embark for America:—Held, that, on this evidence, B might be convicted as an accessory after the fact, in harbouring, receiving, and maintaining the principal felon. *Rez v. Lee*, 6 C. & P. 536. [Williams]

It is not essential that there should have been any direct communication between an accessory

before the fact, and the principal felon; it is enough if the accessory direct an intermediate agent to procure another to commit the felony; and it will be sufficient even if the accessory does not name the person to be procured, but merely directs the agent to employ some person. *Rez v. Cooper*, 5 C. & P. 535. [Parke]

## PRINCIPAL AND AGENT.

[See BILL OF EXCHANGE, Indorsement—BROKER—FACTOR—INTERPLEADER.]

- (A) PRINCIPAL.
  - (a) Rights.
  - (b) Liabilities.
- (B) AGENT.
  - (a) Authority.
  - (b) Liabilities.
- (C) ACCOUNTING.
- (D) EVIDENCE.

## (A) PRINCIPAL.

## (a) Rights.

[See FACTOR.]

It was agreed between A and B, that B should take A's horse to graze at 5s. a week, and B was also to get the horse blistered, which he did—buying the ointment of the defendant:—Held, that A could maintain an action on the case against the defendant on an implied contract that the ointment was fit for that purpose. *Phillips v. Wood*, 2 Law J. (n.s.) K.B. 100, s. c. 1 N. & M. 434.

## (b) Liabilities.

[See MASTER AND SERVANT.]

Where an agent, without declaring his principal, purchases goods, the vendor, on discovering the principal, may sue him, though he has debited the agent, and though the principal has remitted money to his agent to discharge the debt. *Wilson v. Powell*, 3 Doug. 410.

A landlord distraining, is *prima facie* liable for the act of his bailiff in taking goods privileged from distress, though they never come to his hands. But if, when he knows the circumstances, he disclaims and repudiates the act, he is not bound by it. *Hurry v. Rickman*, 1 M. & Ro. 126. [Littledale]

A salesman sent goods, brought to him by the servant of the consignee, to a purchaser, by the same servant, and remitted the price, without having received it, to the consignee. The servant was swindled out of the goods:—Held, that the salesman was entitled to recover the money back, for that the servant continued the consignee's agent. *Gingell v. Glascock*, 1 Law J. (n.s.) C.P. 41, s. c. 8 Bing. 86; 1 Mo. & Sc. 125.

Where goods were sold to an agent of a known principal, and the seller gave credit to the agent, who afterwards ran away, after which the principal (who had received the goods) acknowledged his liability to the vendor:—Held, that the vendor could recover against the principal, in an action for goods sold and delivered. *Wilding v. Collyer*, 1 Law J. (n.s.) C.P. 60.

(B) AGENT.

(a) Authority.

[See BILL OF EXCHANGE, DRAWER—WARRANTY.]

An agent employed to sell an estate, has not, as such, authority to receive payment. *Myns v. Jolliffe*, 1 M. & Ro. 326. [Littledale]

If brokers alter an invoice of the owner of goods from the name of one purchaser to another, and send it to the latter with a letter, saying, that, to simplify the transaction, they had transferred the seller's invoice to him, such invoice will amount to a contract of sale. *Pauli v. Simes*, 6 C. & P. 506. [Lyndhurst]

If a party receiving an invoice does not object to it on the ground of its brevity and incompleteness, the party furnishing it will be bound by it. *Ibid*.

In an action against the East India Company by the holder of a forged imitation of one of their promissory notes, issued by the Governor General in Council at Calcutta,—held, that the Company were not bound, by the acknowledgment of it as genuine by a clerk in their Accountant General's office, who was authorized by the Accountant General to compare all such notes with the register, but not authorized to certify their genuineness, although it appeared that it was his practice to do so. *Bank of Bengal v. East India Company*, 2 Kn. 245.

The defendants' confidential clerk had been accustomed to draw bills and cheques for them by procuration; and it was proved that, in one instance, he had authority to indorse; and, in two other instances, that the defendants had received money obtained by his indorsing in their name:—Held, sufficient evidence to warrant a jury in finding that the clerk had a general authority to indorse.

Letters forged by such clerk, purporting to contain an authority to indorse upon another occasion,—held, irrelevant, and not admissible to shew he had no authority to make the indorsement in question. *Prescott v. Flinn*, 1 Law J. (N.S.) C.P. 145, s. c. 9 Bing. 19; 2 Mo. & Sc. 18.

In an action for use and occupation of lands by the sufferance and permission of the plaintiffs, it appeared that the lands were let by auction by the plaintiffs to E and T, who were auctioneers, to the defendant, under conditions which stated the letting to be "by E & T, auctioneers." One of the conditions was, "The rent is to be paid into the hands of E & T, auctioneers, or to their order, at two payments," &c. At the foot of the document was written, "Approved by me, David Jones." Jones was the tenant at the time of the sale. Nothing else appeared in the conditions to shew on whose behalf the letting was. The plaintiffs gave evidence to shew that Jones, being indebted to them, had authorized them to let the lands as above, pay the rent due to Jones's landlord, and retain any surplus in satisfaction of their own debt. Evidence to a contrary effect was given for the defendant. The Judge, in summing up, left it to the jury, whether the plaintiffs had let the lands on their own behalf, and as creditors of Jones, or merely as his agents. The jury found a letting by the plaintiffs on their own behalf:—Held, that the conditions imported a letting by Jones, E and T acting as his agents; and that the document ought to have been so explained

to the jury, and the Judge not having so explained it, a new trial was granted. *Evans v. Evans*, 3 Ad. & E. 132.

In an action by the vendee against the vendor, on a contract made through a broker, it is sufficient for the vendee to produce the bought note handed to him by the broker, and to shew the employment of the latter by the vendor. If the sold note vary from the bought note, it lies on the vendor to prove that variance, by producing the sold note.

When a contract is made through a broker, the bought and sold notes delivered to the parties constitute the contract—not the entry made by the broker in his book. Especially, when by the usage of trade, the bought and sold notes are looked upon as the contract. *Hawes v. Forster*, 1 Mo. & Ro. 368. [Denman]

(b) Liabilities.

[See MONEY HAD AND RECEIVED.]

Where two persons jointly do an act which in itself is wrongful and illegal, and an action is brought, and judgment obtained against the two, but execution is had against one only, he cannot maintain an action for contribution against his co-tortfeasor. So, if a principal order his agent to do that which is in itself a wrongful act, and the agent in consequence has an action brought against him, he cannot recover from his principal for the damage which he has sustained. But, if the act which the principal desires his agent to do, be such as may or may not be a wrongful act, according to circumstances, and the agent, in consequence, sustains damage, there is an implied promise on the part of the principal to indemnify the agent against the consequences of his act.

Thus, where the defendant had employed the plaintiffs, who were carriers and wharfingers, to convey ten hogsheads of acetate of lime to N & W, and two hogsheads had been delivered, but the remainder were still in the possession of the plaintiffs when N & W became bankrupts; and the defendant had, in consequence of the bills of N & W (which were drawn for the payment of the ten hogsheads) not being accepted, expressly ordered the plaintiffs to deliver the remainder to the order of another person, which they did, and the assignees afterwards brought an action of trover against the plaintiffs, which action, after notice to the defendants, they settled:—Held, that, from the order of the defendant, an implied promise arose to indemnify the plaintiffs against the consequences of acting upon it, and that they were entitled to recover from the defendant the sum which they had paid the assignees to settle the action, together with the costs. They were not bound to exercise a judicial opinion as to whether the right of stoppage *in transitu* had ceased to exist or not.

The same exception applies to actions for contribution as to actions for indemnity. *Betts v. Gibbins*, 4 Law J. (N.S.) K.B. 1, s. c. 2 Ad. & E. 57; 4 N. & M. 64.

If an agent employed to purchase an estate, becomes the purchaser for himself, he is to be considered as a trustee for his principal. Affirmed on appeal. *Lees v. Nuttall*, 2 M. & K. 819.

Where an agent employed to sell property, purchases it himself, he is bound to shew that there

was no concealment or unfair representation, and that in purchasing himself, the same advantages were afforded to his principal as if the property had been sold to a stranger.

A steward and agent, being employed to sell an estate, purchased part of it himself at an undervalue, and secretly, in the name of another person. All actions and matters of difference between the parties were afterwards submitted to arbitration; an award was made, and mutual releases executed. The Court, forty-seven years after the purchase, and twenty-eight years after the award, set aside the purchase,—holding, *first*, that the principal having been kept ignorant of the fraud, was not bound by the lapse of time; and *secondly*, that he was not bound by the award and release, on the ground, that the deception had been continued, and that the purchase and the fraudulent circumstances relating to it, had not been brought under the consideration of the arbitrator. *Trevelyan v. Charter*, 4 Law J. (N.S.) Chanc. 209.

An auctioneer was employed to sell goods by auction, and for ready money only. He sold them by private contract, and took a bill drawn and indorsed by the purchaser generally. His employer at first refused to take the bill, but afterwards, and before it was due, did take it, and placed it with his bankers to be discounted. It was dishonoured when due, but notice was not given in time to the parties to the bill, nor to the auctioneer. The jury having found that the seller did not take the bill in payment of the furniture:—Held, that though, if the seller had really been guilty of laches, and the auctioneer had sustained any injury thereby, he might be responsible in an another action, yet that this was no answer to his present action against the auctioneer for negligence, in selling improperly. *Earl Ferrers v. Robins*, 4 Law J. (N.S.) Exch. 178, s.c. 2 C. M. & R. 152.

The defendant was employed by the plaintiff to sell as auctioneer certain goods, then in the plaintiff's possession. Before the sale a notice was given to the defendant by the assignees of an insolvent, that the goods were their property as such assignees, and that they had been fraudulently removed by collusion between the plaintiff and the insolvent. The defendant after that notice sold the property, and rendered an account of the sale of it to the plaintiff. But in the result on an indemnity being given to him by the assignees, he refused to pay over to the plaintiff the money arising from the sale; and on an action for money had and received being brought against him by the plaintiff, he set up in defence the right of the assignees.

At the trial the jury found that the plaintiff obtained possession of the goods by a fraud between him and the insolvent:—Held, that the jury were properly directed to find for the defendant. *Hardman v. Wilcock*, 9 Bing. 382.

Commission on all goods sold, the principal to be responsible for all bad debts, and to allow the agent to draw his commission on *bad* as well as on *good* debts, notwithstanding a custom of the trade to the contrary. An award stating alleged sales by an agent to himself to be "expedient," to enable the agent to meet deficiencies in his accounts with the principal, implies that such sales are fictitious, and that the amount of the sales has

been received by the agent to the principal's use. *Bower v. Jones*, 1 Law J. (N.S.) C.P. 31, s.c. 8 Bing. 65; 1 Mo. & Sc. 140.

A having directed his agent B to invest for him 1,850*l.* at five per cent., so that he might call in 1,100*l.* of it ready at any time, and B having, after A's death, brought forward a mortgage security to himself for 2,600*l.*, and a deed-poll, executed by himself, declaring 1,850*l.* of it to be the money of A:—this was held not to discharge him, and he was ordered to pay the money into court. *Essey v. Mould*, 1 Law J. (N.S.) Chanc. 23.

In an action by a party who has bargained with a broker for the sale of goods belonging to a third person, for assuming the right to sell without having authority, in order to make out a contract for the sale, it is not necessary, in point of law, that there should be bought and sold notes. *Paak v. James*, 6 C. & P. 606. [Lyndhurst]

#### (C) ACCOUNTING.

[*Rothschild v. Brookman*, 7 Law J. Chanc. 162, s.c. 2 D. & Cl. 188; 2 Law J. Dig. 238, s.c. 5 Bligh, N.S. 165.]

#### (D) EVIDENCE.

In an action by indorsee against indorser of bills of exchange, accepted for the accommodation of the drawer, proof by the drawer, of his delivery of the bills in question to the father-in-law of the plaintiff, to be cashed, who retained a portion of the amount far beyond the legal interest, does not affix usury on the plaintiff, there being no evidence to shew that the father-in-law was acting as the agent of the plaintiff in the transaction:—Held, also, that under such circumstances, notice to plaintiff to prove consideration given for the bills, was not sufficient to impose such burden upon him. *Bassett v. Doughty*, 2 Law J. (N.S.) C.P. 359, s.c. 10 Bing. 40; 3 Mo. & Sc. 417.

The receipts of a steward or agent empowered to receive rents, are not evidence against the principal, if the steward or agent can be produced as a witness. *Gibbons v. Pattison*, 3 Law J. (N.S.) Exch. 138.

If A, without the authority of B, pledges his property with C, a joint action of detinue is maintainable by B, against both A and C. Whether in such an action a verdict may be taken against one defendant only? Statements made by the shopman of a pawnbroker, who is left in the shop in his master's absence, can only be received in evidence in an action against the master, when they relate to transactions which are strictly within the business of a pawnbroker; and are not receivable if they relate to an advance of money, not within the terms of the Pawnbroker's Act. If the jury, in such a case, are satisfied that B held out A as a person authorized to pledge his property for the purpose of raising money, they may find a verdict for both the defendants. *Gerth v. Howard*, 5 C. & P. 346. [Tindal]

A sent to B's agent a list of prices at which he would do work; B wrote a letter to his agent, stating that he would agree to the prices, if A would consent to be paid at stated periods, the first payment to be "in November." The agent shewed his letter to A, and said that he might consider the 100*l.* to be paid on the 1st of November. A after-

wards did the work for B. It was left for the jury to say, whether that which the agent said to A formed a part of the actual contract between the parties, or whether it was a mere observation by the agent himself. *Knapp v. Harden*, 6 C. & P. 745. [Gurney]

# PRINCIPAL AND SURETY.

[See BOND—GUARANTEE.]

An annuity bond was executed by two brothers, one as principal, the other as surety. By agreement afterwards, between them and a third brother, for the settlement of their several claims and debts, and for the apportionment of property to meet the latter, the annuity bond was included.

The surety in that bond was afterwards compelled to pay; and his representative brought an action against their principal to be reimbursed:—Held, that the agreement was an accord, in respect of the annuity bond; and that as third parties were bound by that agreement, the surety was also bound, and that the action could not be maintained. *Cartwright v. Cooke*, 1 Law J. (N.S.) K.B. 261, s. c. 3 B. & Ad. 701.

A and B, partners in trade, executed a joint and several bond to C: A died; B took a new partner, D; the new firm, by deed, covenanted with the executors of A to assume the debts of the old firm, and to indemnify them, and C was made acquainted with the fact, that the new firm had become the principal debtors. Before the time at which the bond was payable, C, unknown to the executors of A, but without any intention of releasing A's estate, agreed with B and D, that the payment of the bond should be suspended for three years:—Held, that C knowing that the estate of A was liable as surety only, the original character of the estate of A as a principal, was changed into that of surety; and such estate was, by the giving of time by C to the new firm, discharged from all liability to C in respect of such bond. *Pasheller v. Hammett*, 1 Law J. (N.S.) Chanc. 204.

A gave a promissory note to B, (for which A had received no consideration), as a security for goods to be sold to B on credit, and B indorsed the note over to the creditors. B afterwards executed a deed of composition with the creditors, by which he undertook to pay his debt to them by instalments, and it was stipulated that they should not be prevented by that arrangement from suing on any securities which they held, and that on any default in paying the instalments the deed should be void:—Held, that the delay granted to B by this agreement, did not discharge A. *Nichols v. Norris*, 3 B. & Ad. 41.

B gives A a cognovit, by the terms of which the debt and costs are to be paid by instalments, and in case of any default the whole to be leviable; C, as surety, undertaking that B shall attend at a certain place within seven days after any notice requiring such attendance, so that in the event of any instalment not being discharged before the time appointed for such attendance, a *ca. sa.* may be executed. Default being made and notice given, B attends and offers to surrender, but obtains time from A for the payment of the instalment then due:—Held, that the undertaking of C is discharged. *Turner v. Pyne*, 3 N. & M. 354.

If an action be brought against the surety in a replevin bond, on breach by the principal, and he plead that the plaintiff in replevin, and the party by whom the distress was made, had referred the cause to arbitration, without his, the surety's, privity or knowledge, the statement of such reference as a *plea*, will not have the effect of discharging the surety.

*Semble*—such statement would have the effect of discharging the surety in equity, or upon an application to the equitable jurisdiction of the Court. *Alldridge v. Harper*, 2 Law J. (N.S.) C.P. 274, s. c. 10 Bing. 118; 3 Mo. & Sc. 518.

A release given by a creditor to the principal debtor, is a release to the surety generally; but where the surety has given a security for part of the debt, there the release to the principal debtor will not release the surety. *Hall v. Hutchins*, 3 Law J. (N.S.) Chanc. 46, s. c. 3 M. & K. 426.

Where A joins as surety for B's debt, the mere circumstance of a balance, to the amount of the debt, being owing from the creditor to B in other transactions, is no discharge to A from his suretyship. *Harrison v. Nettleship*, 3 Law J. (N.S.) Chanc. 26, s. c. 2 M. & K. 423.

Where an obligee has put it out of his power to proceed against the principal debtor, he will be restrained from proceeding against the surety. Mere giving of time without any consideration, will amount to nothing; but where no fixed periods for paying interest are stated in the bond, and the obligee pays interest by anticipation, to a particular time, that is sufficient to suggest a contract. *Blake v. White*, 4 Law J. (N.S.) Exch. Eq. 48, s. c. 1 Y. & C. 420.

A was clerk to B from the year 1822. In 1832, C gave a bond for the faithful conduct of A as such clerk. After that, B dismissed A, and after his dismissal A made an admission of various sums that he had not accounted for:—Held, that in an action on the bond, this admission was not evidence against C, as A was living at the time of the trial, and might have been called as a witness.—Held, also, that it appearing that one item in the admission was of a sum received by A before the date of the bond, C would not be liable to the amount of the admission, although it had been shewn to him, and he had said that B must get what he could of A, and he (C) would pay the rest. *Smith v. Whittingham*, 6 C. & P. 78. [Gurney]

## PRINTER.

Where a printer has been employed to print a work, of which the impression is to be a certain number of copies, if a fire break out and consume the premises before the whole number have been worked off, the printer cannot recover anything, although a part have actually been delivered. *Adlard v. Booth*, 7 C. & P. 108. [Tindal]

## PRIORITY.

[See CHARGE.]

## PRISONS.

Provisions respecting the uniformity of practice in the government of. 5 & 6 Will. 4, c. 38; 13 Law J. Stat. 68.

The rule of Trinity term, 21 Geo. 3, which empowers the marshal of the King's Bench to regulate the admission of persons to visit the prisoners, does not authorize him at his pleasure to prevent an attorney from visiting his client in the prison, but he must have some ground to shew for so doing; provided the attendance of such attorney is on his client's business, and necessary to, or required by him. *Ex parte Matanle*, 4 B. & Ad. 365.

## PRISONER.

[See ATTORNEY — BAIL, Notice of — VENUE, Changing.]

- (A) PRIVILEGES.
- (B) WARRANT OR COGNOVIT EXECUTED BY.
- (C) DISCHARGE.
  - (a) *In general*.
  - (b) *Under the Lords' Act, and 48 Geo. 3, c. 123.*
- (D) DECLARING AGAINST.
- (E) DETAINER.
- (F) CHARGING IN EXECUTION.
- (G) EXTORTION.

## (A) PRIVILEGES.

Attornies are entitled to be admitted to the interior of the King's Bench prison, when they have occasion to go there for the benefit of clients confined in the prison, or when they are sent for by such clients. But the Court will not make a general order upon the marshal to permit an attorney to go into the interior at all times to visit his client. *In re Jones, Marshal of the King's Bench Prison*, 1 N. & M. 128.

The Court of King's Bench has no power to grant a day-rule to prisoner, whilst the office of marshal is vacant. *Anonymous*, 3 Law J. (N.S.) K.B. 152.

A constable who apprehends a prisoner, has no right to take away any money which he has about him, unless it is in some way connected with the offence with which he is charged, as he thereby deprives him of the means of making his defence. *Hez v. O'Donnell*, 7 C. & P. 138. [Patteson]

## (B) WARRANT OR COGNOVIT EXECUTED BY.

Where a cognovit is executed by a prisoner, the Court require it to be proved, that the attorney who attends on his behalf was expressly named by him, according to the rule, Hil. 2 Will. 4, c. 72, and will not be satisfied with a mere inference therefrom.

But where a defendant in custody was about to execute a cognovit, and the plaintiff's attorney suggested another attorney to act for him, (his own not being in the way), to whom the defendant made no objection, but went to his office, and being asked by that attorney if he wished him to attest the execution of his attorney, answered in the affirmative: Held, that this was an express naming of the

attorney, within the meaning of the rule. *Bligh v. Brewer*, 4 Law J. (N.S.) 49, s. c. 1 C. M. & R. 651; 5 Tyr. 222.

A debtor, being arrested, offered a warrant of attorney; the plaintiff's attorney, who had also advised the defendant, in previous stages of the business, came at his request to the place where he was in custody, and proposed another attorney whom he brought with him to read over the warrant of attorney, to the defendant, and attested it on his behalf. The defendant acquiesced; but the attorney so introduced was not known to, or sent for by him:—Held, that this was not a compliance with the rule, Easter, 4 Geo. 2, (and see Reg. Hilary term, 2 Will. 4, i. 72), which declares, that no warrant of attorney executed by a person in custody of the sheriff, &c. shall be valid, unless there be present an attorney on his behalf, to be expressly named by him, and attending at his request, to witness it; and the warrant of attorney and proceedings thereon were set aside for irregularity. *Walker v. Gardner*, 4 B. & Ad. 371.

## (C) DISCHARGE.

(a) *In general*.

[See COGNOVIT—INSOLVENT, Privileges.]

Where a defendant was arrested in Ireland, and afterwards put in special bail there, which bail were discharged on entering a common appearance for a defect in the affidavit of debt:—Held, that the defendant was entitled to be discharged out of custody, where he had been again arrested in England, in an action on the judgment in the former action. *Gunn v. McClinton*, 3 Law J. (N.S.) Exch. 201, s. c. 2 C. & M. 668.

If a writ of execution on which a defendant is charged in custody is a nullity, the lapse of time does not waive his right to apply for his discharge. *Mortimer v. Piggott*, 2 Dowl. P.C. 615.

The Court will not discharge on common bail a defendant held to bail on a Judge's order, granted upon the copy of an affidavit of the debt made at Hamburg, authenticated by the magistrates of that city, and corroborated by the affidavit of persons here to the credit of the party making the affidavit. *Bovara v. Bessetti*, 3 Doug. 336.

Where a prisoner is supersedeable, he may be detained by the same plaintiff for another cause of action, but, if in his affidavit the plaintiff includes the cause of action on which the defendant is supersedeable, the Court will discharge the defendant on filing common bail. *Cookson v. Forster*, 3 Doug. 254.

If the debt and costs in an action are paid to the plaintiff, no matter by whom, the defendant is entitled to be discharged out of custody. *Semble*,—that the sheriff has no right to detain a defendant in custody, although he has been compelled to pay the debt and costs under an attachment. *Rimmer v. Turner*, 3 Dowl. P.C. 601.

The Court will not discharge a prisoner out of custody on a *testatum ca. sa.*, on the ground of the want of an indorsement on the *ca. sa.* pursuant to the rule of Hilary, 2 & 3 Geo. 4. *Davidson v. Dunne*, 4 Dowl. P.C. 119.

After the lapse of two terms, the Court will not discharge the defendant out of custody, on the ground that his addition and place of abode are not



indorsed upon the writ of *ca. sa.* *Constable v. Pothergill*, 2 Dowl. P.C. 591.

Where the arrest was on the 22nd of May,—held, that it was too late on June 4, to obtain the defendant's discharge on the ground of a defect, in the affidavit, the sheriff having in the meantime been ruled to return the writ, and mark his return. *Firley v. Rallett*, 2 Dowl. P.C. 708.

Plaintiffs having obtained a verdict against defendant under an award in King's Bench, the Court of Chancery, upon bill filed, and matter appearing on the award itself, granted an injunction to stay further proceedings. Plaintiffs nevertheless signed judgment, and took defendant in execution. On application to the Court of King's Bench for a rule nisi to discharge defendant out of custody, (it being stated amongst other things, that the plaintiffs could not be met with for the purpose of attaching them by process out of Chancery), the Court refused to interfere. *Foreman v. Jeyes*, 5 B. & Ad. 835.

Where a prisoner will be discharged from an attachment for non-payment of money, the process being irregular. *Ex parte Malachy*, 1 M. & A. 257.

A bailable writ having been issued against a defendant upon an affidavit of debt, for the amount of several bills of exchange, the defendant's attorney gave an undertaking for the defendant who was not arrested; an agreement was then made, by which the plaintiff forbade any one to proceed in his name without his authority, and he agreed to give three months' notice before he proceeded on the bill transactions between them, and that agreement was to set aside any writ or writs then issued against the defendant. The plaintiff's attorney afterwards gave three months' notice, that he should proceed, and a new writ was subsequently issued upon a fresh affidavit, upon which the defendant was arrested. Upon a motion to stay proceedings, and that the defendant might be discharged:—Held, that the second writ was regularly issued without discontinuing the first action, as nothing had been done upon the first writ, and sixteen months had elapsed since it was issued, but that the agreement meant that the defendant should have three months' notice from the plaintiff himself, and that a notice given by the attorney was insufficient; and on the latter ground the defendant was discharged out of custody. *Ryves v. Bunning*, 3 Dowl. P.C. 817.

If a plaintiff gives notice of trial, and sets down his cause in the third term inclusive after declaration, he has complied sufficiently with 1 Reg. Gen. Hil. 2 Will. 4, s. 85, and the defendant is not super-seizable. *Myers v. Cooper*, 2 Dowl. P.C. 423.

Where a prisoner petitioned the Insolvent Court to be discharged, but did not file his schedule within fourteen days, or give notice to the creditors of the filing of the petition pursuant to the 7 Geo. 4, c. 57, and the plaintiff did not declare against him before the end of the second term:—Held, that he was not entitled to be discharged out of custody. *Molineux v. Browne*, 1 C. & M. 858, s. c. 3 Tyr. 817; 2 Dowl. P.C. 84.

(b) *Under the Lords' Act, and 48 Geo. 3, c. 123.*

[See COSTS, On Rules and Motions.]

It is too late to move to bring up an insolvent under the compulsory clause of the Lords' Act, on DROST, 1831—35.

the seventh day of term. *Acraman v. Harrison*, 8 Bing. 154, s. c. 1 Mo. & Sc. 240.

The 32 Geo. 2, c. 28, (the Lords' Act) in its compulsory clause (16th), authorizes a creditor, on giving twenty days' notice in writing to his debtor, to compel the debtor to give in upon oath a true account in writing of all his real and personal estate, &c. within the first seven days of the term which shall next ensue the expiration of the said twenty days:—Held, that such seven days are to be computed from the first day of the term which shall next ensue the expiration of the said twenty days, and not from the time in which the twenty days' notice to the debtor may expire; and a motion to bring up the insolvent after the expiration of the first seven days in such term, will be refused. *Rogers v. Peckham*, 4 Law J. (N.S.) C.P. 10, s. c. 1 Sc. 121.

A prisoner brought up under the compulsory clause of the Lords' Act, will be allowed time, if it appears that he had petitioned the Insolvent Debtors Court, and is fairly endeavouring to make a distribution of his property amongst his creditors. *Evans v. James*, 1 Law J. (N.S.) C.P. 79, s. c. 1 Mo. & Sc. 309.

Where a debtor was brought up under the Lords' Act, and had his sixty days allowed, but did not file his schedule, and in the meantime petitioned the Insolvent Court,—the Court of Exchequer enlarged the time for filing his schedule, until after the day when he was to be brought before the Insolvent Court. *Parrott v. Deane*, 2 C. & M. 318, s. c. 4 Tyr. 319. [Denman]

A prisoner brought up under the compulsory clause of the Lords' Act, allowed time on an allegation that he had petitioned the Insolvent Debtors Court. *In re Payne*, 8 Bing. 194.

The service of the notices required to be given by a creditor, who seeks to bring up a debtor under the compulsory clause in the Lords' Act, 32 Geo. 2, c. 28, s. 16, may be proved by a witness *vide voce*, and need not be proved by affidavit. *Secus*, with respect to the notice to be given by the prisoner. *Ex parte Rolph*, 6 C. & P. 406.

The compulsory clause (s. 3) of the Lords' Act, 35 Geo. 3, c. 5, can be enforced only where the sum for which the party is in execution amounts to no more than 300*l.*, costs included. A judgment creditor, under a warrant of attorney, took out execution for 253*l.*, consisting of 250*l.* debt, and 3*l.* costs, and also for interest on 250*l.* from a day named till the day of payment. The defendant was taken in execution, and detained till the debt and interest, with the addition of costs, (but not without,) exceeded 300*l.*:—Held, that the compulsory clause could not be enforced. *Robins v. Cresswell*, 2 Ad. & E. 23, s. c. 4 N. & M. 307.

The twenty days' notice required to be given before bringing up a prisoner, under the compulsory clauses of the Lords' Act, must expire before the first day of the term in which he is brought up. *Hayward v. Priest*, 3 Mo. & Sc. 388.

Where a defendant has been discharged, under the Lords' Act, for five years, it is too late, at the end of that period, to apply to set aside the order for the discharge. *Hawkins v. Pring*, 2 Dowl. P.C. 401.

An affidavit of service of all the creditors of a

prisoner is necessary to support a motion to bring up a prisoner, and compel him to deliver in an account of his property under the Lords' Act.

Where the prisoner is to be brought up before the Court from which the process has issued, the notice given to him by the creditor need not require him to give in an account upon oath.

Whether the act applies where a prisoner is in execution for some debts under 300*l.*, and others respectively above that amount—*quære*. *Grove v. Parker*, 3 Law J. (N.S.) Exch. 209.

Where a prisoner, brought up under the compulsory clause of the Lords' Act, is not prepared with her schedule, and she refuse to claim her sixty days, the Court is bound to allow them to her. *Pierce v. Davidson*, 1 Dowl. P.C. 496.

The title of an assignee, under the compulsory clause of the Lords' Act, 32 Geo. 3, c. 28, s. 16, only commences from the time when the insolvent was brought up and discharged.

A person had, by his marriage settlement, covenanted to pay 1,000*l.* to his children at any time during the coverture, or within a month after his wife's death. After her death he went to prison for debt, and, while in prison, he gave an authority to his son and to his daughter's husband to sell all his property towards paying that sum. They did so, and received 346*l.*; after that the person was brought up, under the compulsory clause of the Lords' Act, and executed an assignment:—Held, that, on these facts, the assignee, under the Lords' Act, could not recover this sum of 346*l.*; and that, in an action for money had and received, brought against the daughter's husband, the defendant might go into this defence under the general issue, and need not plead specially. *Moore v. Eddowes*, 7 C. & P. 203. [Coleridge]

A defendant remaining in execution twelve successive calendar months, for the nominal damages in ejectment, is entitled to his discharge under the 48 Geo. 3, c. 123, s. 1, although the property recovered in the action is of considerable value. *Doe v. —*, 1 Dowl. P.C. 69.

A defendant in custody on an attachment for non-payment of costs under 20*l.* more than twelve months, is not entitled to his discharge under the 48 Geo. 3, c. 123. *Doe d. Upton v. Benson*, 1 Dowl. P.C. 15.

Where a defendant had given a warrant of attorney for debt and costs to an amount exceeding 20*l.*, though the original debt was less, and had remained in execution for that amount twelve successive calendar months:—Held, not entitled to his discharge under the 48 Geo. 3, c. 123. — *v. White*, 1 Dowl. P.C. 19.

The Court will discharge a debtor, who has lain in prison for the space of twelve successive calendar months, for a debt not exceeding 20*l.* under the 48 Geo. 3, c. 123, s. 1; although he has been brought up under the compulsory clauses of the Lords' Act, and has refused to deliver in his schedule. *Ex parte White*, 1 Dowl. P.C. 66.

The possession of considerable property by a debtor who has lain in prison twelve months, under an execution for a debt not exceeding 20*l.*, is no ground for opposing his discharge, pursuant to 48 Geo. 3, c. 123. *Stacey v. Fieldsend*, 2 Law J. (N.S.) Exch. 104, s. c. 1 Dowl. P.C. 700.

Where a defendant has been charged in execution on the 26th of November, 1830, for a debt not exceeding 20*l.*, and has continued in prison until the 25th of November following, he is entitled to his discharge under the 48 Geo. 3, c. 123, on that day. *Anon.* 1 Dowl. P.C. 150.

On applying to discharge a prisoner under the 48 Geo. 3, c. 123, the name of the cause stated in the notice must correspond with the name of that in which he is in execution. *Kelly v. Dickinson*, 1 Dowl. P.C. 537.

Where a prisoner applies for his discharge under the 48 Geo. 3, c. 123, his notice must be served on the plaintiff; and, therefore, service on his attorney is not sufficient. The application must be made to the Court in term time, and cannot be disposed of at chambers. *Ib.* 546.

Where a plaintiff's residence cannot be found, the defendant who applies for relief under 48 Geo. 3, c. 123, may serve the notice required by that statute on the plaintiff's attorney. *Wilson v. Mokler*, 1 Dowl. P.C. 549.

On motion to discharge a defendant, who had been more than twelve months in custody for a sum under 20*l.*, the Court will only grant a rule nisi, if no notice of motion has been given; and they will not, even on the last day of the term, grant a rule to be drawn up for shewing cause at chambers in the vacation, the act 48 Geo. 3, c. 123, directing the application to be made to the Court in term time. *Jones v. Fitzaddams*, 1 C. & M. 855, s. c. 3 Tyr. 904; 2 Dowl. P.C. 111.

An affidavit in support of a motion to discharge a prisoner under 48 Geo. 3, in execution for a debt not exceeding 20*l.*, should state the sum for which judgment was obtained. *Anon.* 3 Law J. (N.S.) Exch. 203.

The statute 48 Geo. 3, c. 123, for the discharge of persons in execution upon any judgment for any debt or damages not exceeding 20*l.*, applies to persons in execution for damages in actions of assault. *Winter v. Elliott*, 1 Ad. & E. 24, s. c. 3 N. & M. 315.

A prisoner charged in execution for a debt exceeding 20*l.*, though the excess be made up of interest upon a sum originally less than 20*l.*, is not entitled to his discharge after being in custody twelve months under the statute 48 Geo. 3, c. 123. *Cooper v. Bliss*, 3 Mo. & Sc. 797.

If a prisoner seeking his discharge under 48 Geo. 3, c. 123, for a debt not exceeding 20*l.*, has not given ten days' notice of his application, the rule for his discharge will be only nisi in the first instance. *Moore v. Clay*, 4 Dowl. P.C. 5.

A person who has lain in prison twelve months under an execution, sued out on a judgment for a less sum than 20*l.*, is entitled to his discharge under the statute 48 Geo. 3, c. 123, although he had sufficient property at the time of the application to satisfy the judgment, and although several other detainers were lodged against him by other creditors. *Maner v. Piercy*, 3 M. & Sc. 558.

Though the judgment is in debt for 100*l.*, yet, if the execution against the defendant is for less than 20*l.*, the defendant may be discharged out of custody after being in prison twelve months, without reducing the judgment. *Harris v. Parker*, 3 Dowl. P.C. 451.

An application under the 48 Geo. 3, c. 123, must be made to the Court out of which the process issues. That act does not apply to attachments. *Pitt v. Eeans*, 3 Dowl. P.C. 649.

#### (D) DECLARING AGAINST.

The Court will grant a *habeas corpus* to bring up a defendant in the criminal custody of the marshal of the King's Bench, to be charged with a declaration. *Eas v. Smith*, 2 Law J. (N.S.) Exch. 168, s. c. 3 Tyr. 363.

Where one of two defendants was in custody on a criminal charge, the Court allowed him to be brought up to be charged with a declaration. *Williams v. Smith*, 1 Dowl. P.C. 703.

Since the statute 2 Will. 4, c. 39, s. 8, it is not necessary to remove, by *habeas corpus*, a prisoner in the custody of the marshal of the King's Bench to the custody of the warden of the Fleet, in order to declare against him in the Court of King's Bench, where the action is commenced by writ of summons or *copias* under the authority of that act. *Millard v. Millman*, 3 Mo. & Sc. 63.

Where a prisoner has been served with a rule to plead, the omission of an indorsement of notice to plead, on the declaration, will not render irregular a judgment signed for want of a plea. *Clementson v. Williamson*, 1 Bing. N.C. 356, s. c. 1 Sc. 267.

Where a defendant is detained in the custody of the warden on process issuing out of the King's Bench, the declaration should state him to be in the custody of the warden; and it is not necessary to bring him up by *habeas corpus* to charge him with a declaration. *Burnett v. Harris*, 2 Dowl. P.C. 186.

A prisoner in the custody of the marshal, if detained on process from the Common Pleas, need not now be removed into the custody of the warden, in order to be charged with a declaration. *Millard v. Millman*, 2 Dowl. P.C. 723.

#### (E) DETAINER.

The provision of the Uniformity of Process Act, as to the indorsement on a writ of detainer of the amount for which the defendant is to be detained, is compulsory, and not merely directory. *Jones v. Price*, 2 Dowl. P.C. 410.

A writ of detainer, directed "to the marshal of our prison of the Marshalsea," instead of "the marshal of the Marshalsea of our Court before us":—Held, irregular, and the defendant was discharged out of custody. *Storr v. Mount*, 2 Dowl. P.C. 417.

#### (F) CHARGING IN EXECUTION.

##### [See EXECUTION.]

Where a defendant is in custody in a county gaol, under process in another suit, the plaintiff cannot, as a matter of right, charge him in execution by *habeas corpus ad satisfaciendum*.

And the Court will compel a plaintiff removing a prisoner by such a writ, to pay the costs of his removal and return, if the writ appear to have been improperly sued out. *Williams v. Jones*, 1 Law J. (N.S.) Exch. 230, s. c. 2 C. & J. 611.

The order of commitment of a prisoner charged in execution, need not be lodged with the warden of the Fleet on the day of commitment; nor is three

days an unreasonable delay in lodging such order, although he is prevented by reason thereof from making a return to a *habeas corpus cum causa* issued on the same day, and returnable immediately. *Blandy v. Webb*, 2 Law J. (N.S.) Exch. 24, s. c. 3 Tyr. 225.

A defendant who has become supersedeable, for want of being charged in execution, cannot afterwards be charged in execution on the same judgment.

Therefore, he is entitled to a *supersedeas*, although he has been charged in execution before he applies to the Court.

A notice by a defendant, who has taken out a summons before a Judge at chambers for a *supersedeas*, that he will not proceed with the summons, is no waiver of his right to apply to the Court to be superseded. *Hewitt v. Melton*, 2 Law J. (N.S.) Exch. 214, s. c. 1 C. & M. 579; 3 Tyr. 503; 2 Dowl. P.C. 71.

Where a writ is directed to the coroner of the county, it need not appear upon the face of it that the sheriff was a party to the suit.

A writ directed to the coroner was delivered to the keeper of the county gaol, in whose custody the defendant was:—Held, sufficient to charge the defendant in execution, in the hands of the coroner, without a warrant from the coroner to the keeper of the county gaol. *Bastard v. Trutch*, 4 Law J. (N.S.) K.B. 214, s. c. 5 N. & M. 109; 3 Ad. & E. 451.

On a warrant of attorney subject to a defeazance, stating that the warrant is given to secure a certain sum to be paid by instalments, after the defendant has been taken in execution for one instalment, he may be brought up by *habeas corpus*, and charged further in execution, with the second instalment, without a rule to shew cause why he should not be so charged. *Davis v. Gompertz*, 2 N. & M. 607.

Where a defendant is arrested on a *ca. sa.*, and is afterwards removed from the custody of the sheriff on process from the Court of Chancery into the Fleet, he is sufficiently charged in execution in the Fleet on the *ca. sa.*, without bringing him up by *habeas corpus*, and charging him again in execution. *Leavey v. Johnson*, 1 Dowl. P.C. 334.

Where, in consequence of the death of the marshal of the King's Bench prison, there was no one at the gaol who would receive a prisoner charged in execution, the Court enlarged the time. *Harris v. Davies*, 2 Dowl. P.C. 624.

Where a defendant has been taken in execution on a *ca. sa.*, and afterwards removes himself into the custody of the marshal, the plaintiff is neither obliged to carry in the roll nor to charge him in execution. *Deemer v. Brooker*, 3 Dowl. P.C. 576.

A prisoner in custody of the marshal cannot be brought up to be charged in execution on an attachment, but it must be lodged with the sheriff, who will take him upon it as soon as he is out of the custody of the marshal. *Boucher v. Sims*, 2 C. M. & R. 392.

#### (G) EXTORTION.

The Court will not interfere, under 32 Geo. 2, c. 28, s. 11, to relieve a debtor from alleged extortion, unless a *prima facie* case of extortion is made out on the part of the petitioner. *Ex parte Tighe*, 2 Dowl. P.C. 148.

## PRIVILEGE.

[See ABATEMENT—PARLIAMENT.]

Writ and bail-bond set aside against a defendant, who had voted as a Scotch peer, at elections of Scotch peers to sit in parliament, although there had been a protest by two peers against his right of voting; and the House of Lords had not recognized his right, nor the Lord Chancellor nor His Majesty had acknowledged his title. *Digby v. Alexander*, 1 Law J. (N.S.) C.P. 42, s.c. 8 Bing. 416; 1 Mo. & Sc. 559.

Where a person, having privilege of parliament, has been sued by bill and summons before the Uniformity of Process Act passed, and, after the commencement of the action, he loses his privilege, the process should be continued by *distringas*, treating him as an M. P., in order to avoid the Statute of Limitations. *Taylor v. Duncombe*, 2 Dowl. P.C. 401.

## PRIVILEGED COMMUNICATIONS.

[See EVIDENCE, Confidential Communications. And see LIBEL—SLANDER.]

## PRIVY COUNCIL.

[See MANDAMUS—PRACTICE.]

Privy Council, Act for the better administration of Justice in. 3 & 4 Will. 4, c. 41; 11 Law J. Stat. 95.

## PRIZE.

In joint captures, only the actual force present shares in the prize; therefore when a tender of one ship was joint captor with another ship, the prize was shared proportionally between the capturing ship and the tender, but the tender's share, under the order in council, 30th of June, 1827, is distributable among the whole of the ship's company. *Zepherina* (Lima), 2 Hag. 317.

Two warrants for bounties, each for a distinct capture made by the same two vessels jointly, were made out in the joint names of their respective agents, and the proceeds paid on their joint receipts; each agent took possession of a portion of bounties, but no regular severance or appropriation was made; one of the agents became a bankrupt with the proceeds of one warrant in his hands; the other agent is bound to distribute the proceeds of the other warrant between the two vessels. *Vecua* (Gomez), 2 Hag. 346.

A and B being joint prize-agents, A is imposed on by persons falsely pretending to be sailors, to whom he pays a sum of money, which he is subsequently compelled to pay again to the persons really entitled. B is not bound to contribute to the sum so paid. *McIlraith v. Margetson*, 4 Doug. 278.

The prize-money, gained by an apprentice serving on board a letter of marque ship, does not belong to the master of the apprentice; the usage being proved to be that such money is the property of the apprentice. *Carsan v. Watts*, 3 Doug. 350.

A captain in the army sent with his company on board a man-of-war, (by order of the admiral of the fleet with which they were sailing,) and there act-

ing as marines: is not entitled to share prize-money as captain of marines; if he were so entitled, he might maintain an action in a court of law to recover the prize-money. *MacKenzie v. Mayor*, 4 Doug. 3.

An admiral who supersedes another admiral, and takes him under command, is entitled to one-eighth part of prizes captured after such command, but under orders issued by the admiral who has been superseded. *Pigot v. White*, 4 Doug. 302.

A seaman enters on board of a privateer under an agreement to receive prize-money instead of wages, and that, unless he continue on board six months, he shall forfeit his right to prize-money. During the six months he is impressed on board a king's ship; and after being impressed enters on board that ship, and receives bounty:—Held, that this is no forfeiture of the prize-money, to which he had become entitled during his service on board the privateer. *Paul v. Eden*, 4 Doug. 280.

## PROBABLE CAUSE.

[See MALICIOUS AND VEXATIOUS ARREST—PLEADING, Plea—OUTLAWRY.]

## PROBATE.

[See WILL.]

## PROCESS.

[See PRACTICE.]

Act for uniformity of, in personal actions, at Westminster. 2 Will. 4, c. 39; 10 Law J. Stat. 86. Act of 2 Will. 4, c. 39, amended. 3 & Will. 4, c. 67; 11 Law J. Stat. 115.

Effectuation of service of, from Chancery and Exchequer in England and Ireland. 2 Will. 4, c. 33; 10 Law J. Stat. 48.

The sheriff's return to a *distringas* of *non est inventus* and *nulla bona*, is not alone sufficient to entitle the plaintiff to enter an appearance for the defendant, and the Court cannot listen to hearsay evidence of the efforts made to execute the writ. *Daniels v. Varsity*, 3 Dowl. P.C. 26.

## PROCESSIONS

In Ireland, Act to restrain, in certain cases, for five years. 2 & 3 Will. 4, c. 118; 10 Law J. Stat. 286.

## PROCTOR.

If money is improperly in the hands of a proctor, the Consistory Court may order him to refund it. *Morris v. Gardner*, 1 Dowl. P.C. 524.

## PRODUCTION AND INSPECTION OF DEEDS, BOOKS, AND PAPERS.

- (A) OF A PUBLIC NATURE.
- (B) OF A PRIVATE NATURE.
- (C) PARISH BOOKS.
- (D) COURT ROLLS.
- (E) CORPORATION BOOKS.

(A) OF A PUBLIC NATURE.

An attorney and steward of a lord of a borough is bound to produce under a *subpoena duces tecum*, public documents relating to the borough; but he is not bound to produce documents relating to the lord's interest in the borough. *Rea v. Woodley*, 1 M. & R. 390. [Denman]

(B) OF A PRIVATE NATURE.

A party, claiming by a title paramount to that of the defendant, has no right to call for the production of papers, &c. connected with such subsequent title, unless they shew the title of the plaintiff, or certain admissions, tending to prove the plaintiff's case.

A, before his bankruptcy, assigned a legacy to B, who afterwards commenced a suit against the assignee, to obtain the benefit of the assignment. The assignee, by his answer, insisted on the invalidity of the assignment, and admitted that he had in his possession the proceedings in the bankruptcy:—Held, that the plaintiff was not entitled to their production without first making out a special case. *De Tastet v. Smith*, 4 Law J. (n.s.) Chanc. 126.

The Court will not order a defendant to produce documents before the examiner, unless he has by his answer admitted them to be in his possession.

Thus, where a defendant had in another cause deposited documents in the hands of his clerk in court, and a motion was made in the second cause for their production, for proof before the examiner, it was refused with costs, on the ground that possession of the documents had not been admitted by the defendant. *Pitt v. Bonner*, 4 Law J. (n.s.) Chanc. 161.

The defendant by his answer set forth the effect of certain deeds and fines, under which he derived his title, and referred to them, as follows—"as by the said fines, &c. to which for greater certainty, this defendant craves leave to refer, when produced will appear;" and in a subsequent part of his answer, he denied that they made out the plaintiff's title:—Held, that he was bound to produce them. *Hardman v. Ellames*, 4 Law J. (n.s.) Chanc. 181, s.c. 2 M. & K. 732.

Where documents have been impounded for the purposes of a suit, this Court will, under circumstances, order their production at a trial at law, on the application of the defendant in the action, to assist him in his defence, although his name does not appear as a party to the suit. *Taylor v. Sheppard*, 4 Law J. (n.s.) Exch. Eq. 20, s.c. 1 Y. & C. 284.

A plaintiff is not entitled to the production of letters, which have passed between the solicitor of the defendant and a stranger, relative to the subject of the suit, after the commencement of the litigation. *Curling v. Perring*, 4 Law J. (n.s.) Chanc. 80, s.c. 2 M. & K. 380.

A motion after a decree for the production of documents, admitted by the defendant's answer to be in his possession, dismissed with costs. *Brown v. Roe*, 4 Law J. (n.s.) Chanc. 68.

The Court will not make an order for the production of papers described in the defendant's answer as a "bundle of papers marked G," on the ground that they are not sufficiently identified. *Phelps v. Olive*, 4 Law J. (n.s.) Chanc. 167.

The object of the suit was to set aside certain long leases granted in 1740, and which became vested in the defendant, who made family settlements of them, which he admitted to be in his custody:—Held, that the plaintiff was entitled to the production of those settlements. *Attorney General v. Ellison*, 4 Sim. 238.

Though a defendant in a suit is not compellable to produce letters, and copies of letters between himself and his solicitor, subsequently to the institution of the suit, and in relation thereto; yet, where there are more defendants than one, they are bound to produce letters, and copies of letters, which have passed between them with respect to their defence of the suit. *Whitbread v. Gurney*, 1 Y. 541.

Although a bill contain a charge that the defendant has in his custody divers deeds, papers, and documents, by which the truth of the several matters in the bill contained would appear, yet, if it contain no specific allegation to which the charge will apply, the charge need not be answered. *Baldwin v. Peck*, 1 Y. & C. 453.

Where a document is in the custody of an officer of a court of equity, the Court will, on grounds of public policy, order the production of that document at the trial of an indictment against any individual, whether he be a party to the suit in which the document is in evidence, or not. *Taylor v. Sheppard*, 1 Y. & C. 280.

Defendant to a bill of discovery in aid of action, ordered to produce, at the trial, documents set forth, in the schedule to his answer, as being in his custody. *Rowley v. Perkins*, 5 Sim. 532.

A deed in the custody of a purchaser for valuable consideration, which the bill impeached for fraud, ordered under special circumstances to be produced. *Kennedy v. Green*, 6 Sim. 6.

Motion by a defendant for the production of a document, admitted by the plaintiff to be in his custody, refused. See *Mulligan v. Mitchell*, 6 Sim. 186.

Where a defendant appears to be a bare trustee for the plaintiff, and offers no explanation to the contrary, the Court will compel the production of deeds and documents admitted, by his answer, to be in his possession.

The Court will not, upon motion before the hearing, compel an incumbrancer to produce, at the hearing, deeds which are admitted by his answer, but which are his title deeds, even though the plaintiff may have an interest in such deeds; but, under circumstances, the Court will direct them to be proved before the examiner.

The mere circumstance of a defendant incorporating a deed in his answer, whether by referring to the schedule or otherwise, is not a ground for compelling its production, if, in other respects, such compulsion would be inequitable. *Sparks v. Montross*, 1 Y. & C. 103.

To a bill for a discovery of stock standing in the name of the plaintiff's late father, either alone or jointly for twenty years before and at his death, and for an inspection of the Bank books containing the entries of such stock; the Bank, in their answer, set forth an account of the stock, but declined to set forth a list of the books containing the entries:—Held, that they were not exempted from the production of their books, and therefore ought

to set forth a list of them. *Heslop v. the Bank of England*, 6 Sim. 192.

If two parts of an agreement be interchangeably executed between landlord and tenant, in an action upon the agreement, by a purchaser of the premises, the Court will not compel the tenant to produce his part to be stamped, unless such purchaser has applied to the vendor, or used every endeavour, without success, to find him. *Travis v. Collins*, 1 Law J. (N.S.) Exch. 244, s. c. 2 C. & J. 625; 2 Tyr. 726.

The Court will not, on the motion of the defendant, order a third person, a stranger to the suit, to produce upon the trial a certain deed, to which the defendant is not a party, and which he, the third person, holds as trustee for many others, although the defendant alleges that he is interested in the deed, and although his interest may be really affected by the deed by operation of law; neither will the Court exercise its summary jurisdiction, and compel an attorney to produce a deed or document, unless such deed or document come into his possession by virtue and in consequence of his character of attorney for the party applying for its production, or one claiming through such party. *Cocks v. Nash*, 2 Law J. (N.S.) C.P. 129, s. c. 9 Bing. 723; 3 Mo. & Sc. 164.

The Court will allow the grantee of an annuity to inspect and take a copy of the annuity deed, to enable him to declare against the grantor; where the deed had been left with the agent of both parties, who had authority to receive the current payments, but who received, without knowledge of the grantee, the money for repurchase of the annuity, and delivered up the deed to the grantor's bankers to be cancelled, and afterwards went off with the repurchase-money. *Devenogs v. Bouserie*, 1 Law J. (N.S.) C.P. 1, s. c. 8 Bing. 1; 1 Mo. & Sc. 29.

In an action upon an agreement, of which there is only one part, which the defendant has in his possession, he ought, on the application of the plaintiff, to deliver him a copy, without imposing terms.

But an application to compel him so to do should be made to a Judge at chambers, and not to the Court; otherwise the costs of such application may be made costs in the cause. *Reid v. Coleman*, 3 Law J. (N.S.) Exch. 138, s. c. 2 C. & M. 456; 4 Tyr. 274.

A defendant charged as indorser of a note might obtain a rule to inspect it on affidavit, that he never indorsed or had in his possession such note. *Cesar v. —*, 4 Doug. 11.

The Court will compel a plaintiff to produce written documents, on which an action is founded, for the defendant to inspect and copy, if the defendant states facts which throw a doubt upon their existence or import. *Sembla*—the Court will interfere in all cases where a discovery might be obtained by a bill in equity. *Barry v. Alexander*, 4 Bing. 16.

Where a lease is in the hands of the tenant, and it appears that no counterpart can be found, the Court will permit the landlord to inspect and take a copy of the lease. *Doe d. — v. Slight*, 1 Dowl. P.C. 163.

The Court refused to allow the plaintiff to inspect a document in the hands of the defendant, alleged by him (the defendant's) attorney to be signed by the plaintiff, and to afford a perfect defence to the

action upon an affidavit of the plaintiff, that if such document existed and purported to be signed by him, the signature was a forgery. *Jessel v. Milligen*, 1 Mo. & Sc. 605.

The plaintiff, assignee of A, who had become bankrupt, sued B in respect of certain contracts alleged to have been entered into by A, with the plaintiff, on the joint account of A and B. The Court allowed B to inspect the books of A in the hands of the plaintiff as his assignee, in order that he might discover what the alleged contracts were. *Whitbourne v. Pettifer*, 4 Mo. & Sc. 182.

#### (C) PARISH BOOKS.

In trespass for entering to distrain for poor-rates, the defendant (who had acted on behalf of the parish officers) averred, in justification, that the plaintiff's house was within the parish, which the plaintiff denied:—Held, that the plaintiff could not demand an inspection of the parish book, on the ground that the defendant alleged him to be a pariahoner. *Burrell v. Nicholson*, 3 B. & Ad. 649.

Upon a bill of discovery in aid of an action to try whether the plaintiff's house was within the limits of a certain parish, and therefore liable to the parochial rates, the Court ordered the defendants, the parish officers, to produce for his inspection the rate-books, account-books, minute-books, orders, and other documents, which related to the matter in question, and were admitted, by their answer, to be in their possession. *Burrell v. Nicholson*, 1 M. & K. 680.

#### (D) COURT ROLLS.

If an application to inspect the court rolls of a manor is made when no cause is pending, the rule is *nisi* in the first instance. *Ex parte Best*, 3 Dowl. P.C. 38.

#### (E) CORPORATION BOOKS.

In a bill filed against the corporation, by parties, against whom they had brought an action for tolls, it was alleged, that the corporation had, in their custody, various cases for the opinion of counsel, and charters, deeds, &c., which would shew that they had no right to the tolls, and by which the truth of the matters in the bill would appear. The corporation demurred to the bill, but the demurrer was overruled; and they then put in an answer, admitting the possession of several cases, two of which were prepared long ago, under mistaken notions of their rights, and made without any reference to the present proceedings, and the remainder prepared with a view to the present proceedings, and various charters, &c., shewing their title to the tolls.

Plaintiffs (in equity) moved for the production of all the documents.

Held, that they were entitled only to the inspection of the two old cases, but not of the charters, &c., nor of the cases prepared with a view to the proceedings. *Bolton v. the Corporation of Liverpool*, 1 Law J. (N.S.) Chanc. 166, s. c. 1 M. & K. 88.

A minute-book, containing the proceedings of the council of a corporation, will be directed to be produced at the Stamp Office, in order that an entry in it may be stamped. *Clarke v. the Mayor and Corporation of Coventry*, 4 Law J. (N.S.) Exch. Eq. 58.

## PROFERT.

[See PLEADING—PRACTICE.]

The counterpart of a lease is sufficient proof to satisfy the profert in a declaration in an action for breach of covenant. *Pearse v. Morris*, 1 Law J. (n.s.) K.B. 148, s.c. 3 B. & Ad. 396.

## PROFESSIONAL IGNORANCE.

[See ATTORNEY, Connexion between Attorney and Client.]

## PROHIBITION.

[See INSOLVENT.]

The act, 1 Will. 4, c. 21, "to improve the proceedings in prohibition," does not enable the Court of King's Bench, where a party has declared in prohibition, and succeeded, to grant him his costs incurred in the Ecclesiastical Court. *Tessimond v. Yardley*, 5 B. & Ad. 458.

Where a commission for holding a court martial had been issued, and a party had been found guilty upon certain charges which had been exhibited against him, had been sentenced to be dismissed, and that sentence had been ratified and allowed by the king:—Held, that the Court of King's Bench had no power to grant a writ of prohibition to restrain the carrying into effect the sentence;—that, in short, there was no Court or person to whom such a writ could, under those circumstances, be directed. The court martial and its functions were at an end;—the king, by his prerogative, could dismiss without instituting any inquiry by court martial:—the only remedy to the party complaining of the court martial, is by petition to the king. *Ex parte J. W. Poe*, 3 Law J. (n.s.) K.B. 33, s.c. 5 B. & Ad. 681; 2 N. & M. 636.

The Court of King's Bench will not grant a writ of prohibition restraining the Prerogative Court of Canterbury from compelling an attorney to bring the will of a deceased client into that court, and there leave it to be registered, on the ground that the attorney has a lien upon the will for the amount of his bill, due from the deceased. *Ex parte Law in re Wood*, 4 Law J. (n.s.) K.B. 18, s.c. 4 N. & M. 7.

Where a rule is made absolute for issuing a prohibition, the costs of the rule cannot be granted to the successful party under 1 Will. 4, c. 21, s. 1, that statute only applying to cases where there have been pleadings in prohibition. *Rex v. Kealing*, 1 Dowl. P.C. 440.

A defendant, cited in the Ecclesiastical Court, must appear before he can apply for a prohibition. *Ex parte Law*, 2 Dowl. P.C. 528.

The temporal courts cannot entertain a question, whether, in a particular clause admitted to be of ecclesiastical cognizance, the practice of the Ecclesiastical Court has been regular.

The temporal courts can prohibit a particular proceeding in an ecclesiastical suit, only where such proceeding is contrary to the general law of the land, or manifestly out of the jurisdiction of the Court. *Ex parte Smyth*, 5 N. & M. 145.

## PROMISSORY NOTE.

[See BILL OF EXCHANGE.]

## PROPERTY

Belonging to infants, femes covert, and lunatics; provisions of 1 Will. 4, c. 65, relating to, extended to Ireland. See 5 & 6 Will. 4, c. 17; 13 Law J. Stat. 16.

## PROPOSAL.

[See AGREEMENT.]

## PROSECUTION.

[See INDICTMENT.]

## PROXY.

A proxy, made by a canon to act for him in his absence in all corporate business, is not revoked by the canon making the proxy having appeared and acted for himself. *Eyre v. Lovell*, 3 Doug. 66.

## PUBLIC ACCOUNTS,

Commissioners of, authorized to audit accounts of colonial revenues. 2 Will. 4, c. 26; 10 Law J. Stat. 41;—2 & 3 Will. 4, c. 99; ib. 252.

Regulation of period of rendering. 2 & 3 Will. 4, c. 104; 10 Law J. Stat. 258.

Amendment of Acts relating to transfer of, in Ireland, to Commissioners of Public Accounts in England. 5 & 6 Will. 4, c. 55; 13 Law J. Stat. 118.

## PUBLIC WORKS

Amendment of the acts authorizing advances for carrying on. 3 & 4 Will. 4, c. 32; 11 Law J. Stat. 84.

Public works and fisheries; amendment of acts for authorizing the issue of Exchequer bills for carrying on, and for the employment of the poor. 4 & 5 Will. 4, c. 72; 12 Law J. Stat. 145.

## PUNISHMENT.

Transportation for life is the proper sentence on persons convicted before the passing of 2 & 3 Will. 4, c. 62, of offences punishable within that act, and sentenced after. *Rex v. Lewis*, 1 M. C.C. 372.

## QUAKER.

[See AFFIRMATION—JURYMAN.]

## QUARE IMPEDIT,

[See PRACTICE, When to declare.]

Costs given, in actions of. 4 & 5 Will. 4, c. 39; 12 Law J. Stat. 67.

[*Cooke v. Bishop of Elphin*, 2 D. & C. 247, s. c. 2 Law J. Dig. 243; 5 Bligh, n.s. 103.]

In *quare impedit* against the ordinary, for disturbing the plaintiff in his right to present to a void turn, it is not competent to the defendant to counterplead the plaintiff's title, unless he (the defendant) make title in himself, either as patron, or by collation after lapse. The grant of the advowson does not pass the void turn, because it is a chose in action, or (which appears the better reason) for the public utility, in guarding against simony.

If a benefice be voidable by the received canon law, no sentence declaratory of the deprivation, in the court christian, is necessary, when the patron and the incumbent of the benefice, which is rendered voidable, are one and the same person.

*Semble*—that to shew the first benefice void *de facto*, the plaintiff need not allege in his count, that it is of or above the annual value of 8*l*.; at least, such statement does not appear necessary, when an allegation to such effect is made by the defendant in his plea. *Apperley v. the Bishop of Hereford*, 2 Law J. (n.s.) C.P. 105, s. c. 9 Bing. 681; 3 Mo. & Sc. 102.

#### QUARTER SESSIONS.

[See EVIDENCE, Record—SESSIONS—APPEAL.]

#### QUAYS.

[See PIERS.]

#### QUIA TIMET.

[See INTERPLEADER.]

#### QUO WARRANTO.

[See MAYOR.]

To an information in *quo warranto*, the defendant pleaded, that King Edward I. incorporated the borough of Carnarvon, and granted that the constable should be mayor, and that he should be sworn first to the King, and then to the burgesses: that George III., in 1812, appointed the Marquis of Anglesea constable, to exercise the office by himself or his deputy, and that he took the oaths. It then alleged; that he continued in the office, notwithstanding the several demises of George III. and George IV., until the 10th of January 1831, when William IV., by letters patent, continued and appointed him to the office. The fourth replication alleged, that the Marquis did not take the oath after the granting of the letters patent by William IV., and before the defendant exercised the office of mayor.—Held, on demurrer, that the letters patent of William IV. were a new grant of the office, and not merely a confirmation of the old appointment, and that it was necessary that the Marquis should have been sworn under the new appointment before he could exercise the office. *Rex v. Roberts*, 4 Law J. (n.s.) M.C. 118, s. c. 5 N. & M. 130; 3 Ad. & E. 771.

Held, *per* Lord Tenterden, C.J., Taunton, J. and

Patteson, J. (*Parke, J. dissentiente*), that a *quo warranto* information does not lie for the office of trustee under a public local act, elected, as vacancies occur, by occupiers in the parish, and taking an oath of office, with power to appoint salaried treasurers, collectors, &c. of monies raised under the act, accountable to themselves, to pass bye laws with penalties; to impose rates, in case of certain other functionaries not doing so; to supply omissions in the rates, and to relieve parties aggrieved or incompetent to pay; to appoint salaried watchmen; to purchase, hold, and manage certain property for the purpose of the act; to contract for the supply of the poor, remove nuisances, and apprehend for certain specified nuisances; to maintain the highways, and prevent encroachment thereon; to superintend the lighting, paving, watching, and cleansing of the streets, &c., and to remove dangerous buildings, on complaint upon oath, (which they were to administer,) and to sue in the name of their clerk, or one of themselves. *Rex v. Hanley*, 3 Ad. & E. 463, n.

Where a relator has twice obtained rules  *nisi* for informations in the nature of a *quo warranto*, calling upon a party to shew why he exercised the office of mayor of a borough, which rules have been discharged upon cause shewn, the Court will not allow the relator, on an application against the succeeding mayor, to raise the same questions as to the title of the former mayor to exercise the office. *Rex v. Langhorn*, 2 N. & M. 618.

Held, by Littledale, J. and Patteson, J., Lord Denman, C.J. *dubitante*, that a *quo warranto* information does not lie for the office of governor and director, elected annually by rated inhabitants, under a local act for the government of the poor, and the maintenance of the nightly watch; and having power to make orders to regulate the poor and the watching, to determine how much money shall be raised for the poor and the watch, (for which amount the inhabitants are to make rates, subject to a power in the governors to rectify omissions or mistakes, and to an appeal at Quarter Sessions); to purchase and hold real and personal property, including all the money raised under the act; to erect buildings; to borrow money on the credit of the rates, for the purposes of the act; to appoint and remove treasurers, and salaried clerks, collectors, and other officers, who are to account to them; to appoint watchmen and beadle, who are to be sworn in as constables before a Justice, and to be under their controul; to name sixteen persons, from whom the Justices are to select four overseers; and to sue and be sued in the name of one of themselves, or of their clerk. *Rex v. Ramsden*, 5 Law J. (n.s.) M.C. 72, s. c. 3 Ad. & E. 456; 5 N. & M. 325.

A local act created a corporation, consisting of sworn commissioners, with summary power of seizing goods and imprisonment of the person, and of preventing and removing obstructions and nuisances in the streets; powers for paving, cleansing, and lighting; powers of appointing and paying officers, of determining the number of watchmen, of regulating them, and of dismissing, paying, or pensioning them; of possessing property in materials required under the act; of instituting prosecutions; of imposing rates; of appointing and re-



moving treasurers, to whom penalties, imposed by the act, were to be paid for the purposes of the act; and of hearing appeals in certain cases brought by parties complaining of things done under the act:—Held, that an information in the nature of a *quo warranto* would lie against persons claiming to be commissioners. A part of the commissioners were elected by rated inhabitants, M and T having been candidates; and M having been declared elected, and sworn in, and a rule nisi having been obtained, upon affidavits, that T had the legal majority, for a mandamus to certify T's election, and swear him in, the Court discharged it with costs, and at the same time granted a rule to shew cause why there should not be an information in the nature of a *quo warranto* against M. *Rez v. Beedle*, 3 Ad. & E. 467.

### RABBITS.

Destroying rabbits [in the night time, in a rick-yard in which they were kept, is not a misdemeanour under the stat. 7 & 8 Geo. 4, c. 29, s. 30. *Rez v. Garrett*, 6 C. & P. 369. [Patteson]

### RACE.

[See HORSE-RACE.]

Race-horses, alteration of duties on. 5 & 6 Will. 4, c. 64, s. 14 & 15; 13 Law J. Stat. 146.

### RAILWAY.

[See COMPENSATION—COSTS, In general.]

An act of parliament, by which a rail-road company is established, declares that the money to be paid for the purchase of lands shall be paid into the Bank, until it shall upon petition be applied in the purchase of other lands, and in the meantime, until a purchase is made, shall, upon application, be invested in the funds, and that the expenses of such purchase shall be borne by the company:—Held, that the party applying for such investment must pay the costs of the application. *Ex parte Taylor, in re the London and Birmingham Railroad Company*, 4 Law J. (n.s.) Exch. Eq. 33, s. c. 1 Y. & C. 229.

Effect of clause in railway acts for incorporating the provisions of another act. *Stratford Tram-road Company v. Jones*, 5 N. & M. 88, s. c. 3 Ad. & E. 640.

### RANSOM BILL.

Action on a ransom-bill containing a clause that the bill should be enforced, though the hostage should die, or the vessel be retaken. Plea, that before the captor got into port he was taken, with the hostage and ransom-bill on board, and being required to deliver up all papers, fraudulently did not deliver up the ransom-bill. Demurrer.—Held, by Lord Mansfield, that the plea was bad, but by the other Justices, that the Court had no jurisdiction, this being a matter of prize, cognizable by the Admiralty Court. *Anthorn v. Fisher*, 3 Doug. 166.

Digest, 1831—35.

### RAPE.

[See INDICTMENT—MISDEMEANOR.]

In order to convict on a charge of assault with intent to commit a rape, the jury must be satisfied, not only that the prisoner intended to gratify his passions on the person of the prosecutrix, but that he intended to do so at all events, and notwithstanding any resistance on her part. *Rez v. Lloyd*, 7 C. & P. 318. [Patteson]

A general conviction of a prisoner, charged both as principal in the first degree, and as an aider, abettor of other men in rape, is valid on the count charging him as principal. On such an indictment evidence may be given of several rapes, on the same woman at the same time, by the prisoner and other men, each assisting the other in turn, without putting the prosecutor to elect on which count to proceed. *Rez v. Folkes*, 1 M. C.C. 354.

On an indictment for carnally knowing and abusing a female child under ten years of age, the best evidence of age ought to be produced. And where the offence was committed on Feb. 5, 1832, and her father said, that on his return home from a few days absence on Feb. 9, 1822, he found that the child had been born, and was told by her grandmother (who was still alive), that she had been born the day before, and the register proved the baptism on the 9th, this was held insufficient proof of the age of ten. *Rez v. Wedge*, 5 C. & P. 298. [Taunton and Littledale.]

Where on a charge of rape the jury found that there had been penetration, but no emission, the fifteen Judges held that the prisoner was rightly convicted of rape. *Rez v. Cox*, 5 C. & P. 297, s. c. 1 M. C.C. 337. [Littledale]

In cases of rape, &c., the capital offence is completed if there be penetration, although there has been no emission, and the prisoner has been interrupted in the commission of the offence. *Rez v. Cosins*, 6 C. & P. 351. [Park]

On the trial of an indictment for a rape, the prosecutrix may be asked, whether, previously to the commission of the alleged offence, the prisoner has not had intercourse with her by her own consent. *Rez v. Martin*, 6 C. & P. 562. [Williams]

### RATE.

- (A) IN GENERAL.
- (B) COUNTY RATES.
- (C) CHURCH RATE.
- (D) HIGHWAY RATE.
- (E) PAVING, WATCHING AND LIGHTING RATES.
- (F) SEWERS RATE.
- (G) RATES UNDER INCLOSURE ACT.
- (H) POOR RATE.
  - (a) Inspection.
  - (b) Persons and Property rateable.
  - (c) Principle and Proportion.
  - (d) Appeal.
  - (e) Restitution.
- (I) DISTRESS.

Churches, chapels, and places of worship, exempted from poor and church rate. 3 & 4 Will. 4, c. 30; 11 Law J. Stat. 83.

3 O

## (A) IN GENERAL.

[See MANDAMUS.]

The assessment to the land-tax, if it appears doubtful on the face of the rate, whether it be on the landlord or tenant, is presumed to be on the tenant. *Rex v. St. Lawrence*, 4 Doug. 190.

Where the receipt of the collector of the land-tax expresses the sum paid, to be so much assessed on the landlord, it must be presumed, that the landlord was rated, (if not, that the payment also was by him), and therefore that the tenant gained no settlement. *Rex v. St. James*, 4 Doug. 261.

Where an act of parliament directs a rate to be made on the occupiers of land, &c., and on all persons using and having stocks and personal estates, &c., in equal proportion, according to their several and respective values and estates, and it appears that the rate was not made in equal proportion, it will be quashed. *Rex v. Fakenham*, 4 Doug. 261.

## (B) COUNTY RATES.

[See MANDAMUS—RIOT.]

Regulation of expenditure of. 4 & 5 Will. 4, c. 48; 12 Law J. Stat. 78.

Where borough Justices have separate jurisdiction, and have, before the passing of the 55 Geo. 3, c. 51, been in the habit of levying rates within the borough, in the nature of county rates,—that is a separate jurisdiction within the proviso of the first section of the statute, and the borough is not subject to a county rate. *Rex v. Shepherd*, 4 Law J. (N.S.) M.C. 30, s. c. 2 Ad. & E. 298; 4 N. & M. 185.

*Semble*—That a contributor to the county rate has no right to demand of the Justices an inspection of the rate; but, at all events, a demand made at the Quarter Sessions to inspect a rate is not made at a proper time, and is not sufficient to support an application for a mandamus. *Rex v. the Justices of Nottingham*, 4 Law J. (N.S.) M.C. 113, s. c. 5 N. & M. 100; 3 Ad. & E. 500.

## (C) CHURCH RATE.

Church rate has existed in this country from time immemorial. *Smith v. Keats*, 4 Hag. Ec. 278.

Houses and lands, and all property of that description, are, *prima facie*, liable to church rate, unless there be some legal exemption. *Smith v. Keats*, 4 Hag. Ec. 279.

Parishioners for the repairs of a church, and the lawful and necessary expenses of churchwardens, amounting to 1111, laid before a vestry, and rate to that amount proposed, but a rate of 501. 17s. only granted, whereupon two churchwardens exhibited articles against two other churchwardens and ten parishioners, for refusing to make sufficient rate. A *decree*, rejecting the articles, affirmed with costs. *Memorandum* that the Ecclesiastical Court cannot decide on the quantum of a rate, and therefore, that parishioners, who do not contumaciously refuse to make a rate, but grant one not manifestly collusive, are not liable to be articulated for refusing a sufficient rate. *Greenwood v. Graves*, 4 Hag. Ec. 77.

The presumption of law is, that a church rate made at a vestry duly holden, and the same as in former years, is fairly assessed; and the burden of

proof is on the party objecting to payment on the score of inequality; and the presumption and burden are both increased, when the rate is founded on a valuation long acted upon, both for church and poor-rate. *Lambert v. Weall*, 4 Hag. 91.

By-day objections to church-rates, on the ground of inequality tending to occasion great inconvenience and expense to parishes, are *stricti juris*, and the pleas must be confined to the points originally put in issue. A rate-payer, in his defensive allegation objecting to his assessment, on the sole ground of being over-rated as compared with two others, shall not, in additional articles, introduce, as a fresh objection, that a railway passing through the parish has not been assessed. *Quære*, if the question, where such railway was liable to be rated to church-rate, could have been originally raised as a collateral, incidental point, by party objecting to payment of his own rate on the ground of being over-rated. *Lambert v. Weall*, 4 Hag. Ec. 91.

A poor-rate assessed on the same principle over the whole parish, though affording a fairer criterion than King's taxes, is but adminicular evidence of the quality or inequality of a church-rate. A valuation by competent judges, and founded on the rent that a tenant would pay for the premises, is the proper test: therefore an allegation pleading reasons why the poor-rate did not afford a fair criterion, rejected as immaterial, an explanation of such matter in the answers being sufficient. *Lambert v. Weall*, 4 Hag. Ec. 96.

The Court pronounced for a church-rate and condemned in costs a rate-payer, who, as overseer of the poor, had collected rates, and had long acquiesced in the payment of church-rates made on the same valuation as the church-rate objected to on the ground of inequality, such inequality not being established in evidence. *Lambert v. Weall*, 4 Hag. Ec. 102.

The Court has not jurisdiction, upon original proceeding by an individual rate-payer, to set aside a rate on the ground of inequality in the assessment; the remedy for the party unequally assessed is to enter a caveat against the confirmation, or to refuse payment of the rate. *Wainey v. Lambert*, 4 Hag. Ec. 84.

The Governor of Greenwich Hospital, founded in 1694, and part of an ancient royal demesne, to which an unconsecrated chapel, chaplains, and a burial ground are attached, but the officers of which occasionally bury, christen, marry, have pews at, and resort to, the parish church, and vote at the vestry, is liable to be assessed to church-rate for premises in his beneficial occupation as governor, these premises having never been so rated before, but no valid ground of exemption being shewn to found a prescription. *Smith v. Keats*, 4 Hag. Ec. 275.

A select vestry for a district church, erected in pursuance of the 58 Geo. 3, c. 45, and the 59 Geo. 3, c. 134, have no authority by those acts, of themselves, and without the concurrence of the inhabitants, to make a rate, for defraying the expenses of repairing the church. *Cockburn v. Harvey*, 1 Law J. (N.S.) M.C. 32, s. c. 2 B. & Ad. 797.

When a loan has once been obtained by a parish, in conformity with the 58 Geo. 3, c. 45, ss. 14 & 60, and 59 Geo. 3, c. 134, (Building of Churches,)

it is imperative on the churchwardens to make rates for repaying the sum advanced, although the parishioners, in vestry, may refuse to concur in them. *Re v. the Churchwardens of St. Mary, Lambeth*, 1 Law J. (N.S.) M.C. 93, s. c. 3 B. & Ad. 661.

#### (D) HIGHWAY RATE.

[See MANDAMUS.]

#### (E) PAVING, WATCHING, AND LIGHTING RATES.

[See MANDAMUS.]

By statute 28 Geo. 3, c. 14, for paving the town of Cambridge, it was enacted in s. 23, that commissioners were annually to ascertain the sums to be paid by rate on the inhabitants for that purpose of the act, and levy the same by rate upon tenants and occupiers of all houses, buildings, gardens, tenements, and hereditaments within the town. By sect. 113, the amount as ascertained was to be notified to the Vice Chancellor of the university and the mayor of the town, and two-fifths were to be paid by or on account of the said university; 10% by the corporation, and the residue out of certain tolls granted to the commissioners, and out of the above-mentioned rates. By sect. 114, the Chancellor or Vice Chancellor of the university, and the heads of colleges and halls within the said university, were to meet, upon such notice given, and apportion the respective sums to be paid towards the rate out of the university chest, and by the several colleges and halls. By 34 Geo. 3, c. 104, s. 17, it was provided, that no person or persons should be rated under that or the former act, for any farm, meadow, pasture, or arable land, rented or occupied by any inhabitants of the town, except as to the value of his dwelling-house, yards, gardens, outhouses, and all other buildings rented and occupied by any of the said inhabitants, situated in the said town. Downing College was founded and incorporated with the university, after the passing of these acts. It was built on land within the town, but which had not before paid paving rate:—Held, that the college was liable to be rated as part of the university for a portion of the two-fifths payable by that body, and was not rateable as part of the town, for that s. 25 of the paving act was not applicable to colleges, and ss. 113, 114, extended to all colleges forming part of the university, whether erected before or since the act. *Downing College v. Purchas*, 3 B. & Ad. 162.

A watching and lighting act authorized a rate on all buildings:—Held, that sheds which protected engines for the convenient working of a mine, were within the act. *Brown v. Lord Granville*, 10 Bing. 69, s. c. 3 Mo. & Sc. 453.

A local paving act authorized an assessment on occupiers of all houses, shops, &c. and other buildings and "hereditaments," meadow and pasture ground excepted:—Held, that the exception left all other ground, not meadow or pasture, chargeable under the word "hereditaments," and consequently, that a gas-light company were chargeable as occupiers of the soil in which their pipes were placed. *Re v. the Shrewsbury Gas Company*, 1 Law J. (N.S.) M.C. 18, s. c. 3 B. & Ad. 216.

The 9 Geo. 4, c. 28, explaining and amending 6 Geo. 4, c. 73, (local), authorizes certain commis-

sioners to levy a rate for watching and lighting a certain township, upon all who, for the time being, should *inhabit*, use, or *occupy*, any houses, shops, warehouses, manufactures, mills, lime-kilns, brick-kilns, slip-houses, stables, back-houses, barns, sheds, cellars, vaults, counting-houses, offices, or other buildings or tenements, or any garden, orchard, or wharf in the said township:—Held, upon demurrer to declaration, that a party using certain buildings, for the protection and better enjoyment of certain machines, necessary to the working of a mine, which machines are *in* and *affixed* to the above-mentioned buildings, is liable to the rate, although the coal mines are not liable to such rate under the act of parliament. *Brown v. Lord Granville*, 2 Law J. (N.S.) M.C. 78.

#### (F) SEWERS RATE.

All persons whose property derives any advantage from the works of the Commissioners of Sewers, may be assessed to the sewers rate in respect of that property. And property drained by sewers and drains originally made, and always repaired by persons independent of the Commissioners of Sewers, and deriving no immediate benefits from the works of such commissioners, may be assessed, by reason of the general benefit and advantage resulting from such property becoming thereby accessible, and of its approaching and neighbouring public ways being properly drained and cleansed.—Held, that apartments in Somerset House, appropriated to the office of the Commissioners for Auditing Public Accounts, are rateable by the Commissioners of Sewers for the city and liberty of Westminster, and parts of Middlesex, although Somerset House is declared by act of parliament to be vested in the crown, free from all incumbrances, for the purpose of establishing within the same that amongst other public offices.

By 52 Geo. 3, c. 48, s. 7, all persons are liable to be rated to the sewers rate, as occupiers of premises rateable thereto, who are *de facto* rated in respect of such premises to the poor-rates of the parishes to which that act applies. *Soady v. Wilson*, 4 N. & M. 777, s. c. 3 Ad. & E. 248.

#### (G) RATES UNDER INCLOSURE ACTS.

Provisions for the recovery of, 3 & 4 Will. 4, c. 35; 11 Law J. Stat. 85.

#### (H) POOR RATE.

[See TITHES—STATUTE, Construction of.]

##### (a) Inspection.

The clerk to the guardians of the poor is not an assistant overseer, or "person authorized to take care of the poor," within 17 Geo. 2, c. 3. *Whitchurch v. Chapman*, 1 Law J. (N.S.) M.C. 69, s. c. 3 B. & Ad. 691.

##### (b) Persons and Property rateable.

The trustees of a lunatic asylum receiving money annually and weekly for the care of some of the patients, are rateable for the profits of the building; although the most considerable part of the income is laid out in the expenses incurred in maintaining it. *Trustees of the York Lunatic Asylum v. the Churchwardens and Overseers of St. Giles, York*, 1

Law J. (n.s.) M.C. 50, s. c. 3 B. & Ad. 573, (called *Rex v. St. Giles*).

Tolls were payable to the owners of mills in township A, as a compensation for the loss of water, occasioned by an adjacent navigation. The tolls were receivable at a lock in township B:—Held, that the owners were not rateable at their mills in A, for such tolls. *Rex v. Aire and Calder Navigation Company*, 1 Law J. (n.s.) M.C. 90, s. c. 3 B. & Ad. 139, 533.

A lessee of tolls in the nature of toll thorough, held not rateable for the tolls to the poor, the lessee not being an inhabitant; although a toll-house in the parish was used for the convenience of collection. *Rex v. Snowden*, 2 Law J. (n.s.) M.C. 60, s. c. 4 B. & Ad. 713; 1 N. & M. 459.

*Quære*—If a party practising as surgeon and apothecary have drugs in his possession, which he dispenses only to those patients whom he attends in his professional capacity, and if he make up the prescriptions only of those physicians with whom, in such capacity, he visits a common patient, is such party rateable to the poor under the 43rd of Eliz. c. 2, s. 1, in respect of his drugs as a stock in trade? *Marshall v. Pitman*, 2 Law J. (n.s.) M.C. 33.

No mines but coal mines are rateable to the relief of the poor, by the effect of the 43 Eliz. c. 2, s. 1.

What is a mine, is chiefly a question of fact, to be tried, not by considering the nature of the subject-matter extracted, but by the mode of extracting. Accordingly, a species of clay extracted by mining machinery, was held to warrant the treating the place as a mine; and therefore it was held not rateable. *Rex v. Brettel*, 1 Law J. (n.s.) M.C. 46, s. c. 3 B. & Ad. 424.

If the owner of a mine demise it, or give permission to work it, reserving to himself a part of the produce on its being brought from the earth, he is liable to be rated as occupier of the land; but if he reserve only a money rent, he is not liable. *Rex v. Tremayne*, 2 Law J. (n.s.) M.C. 17, s. c. 4 B. & Ad. 162; 1 N. & M. 194.

It is a principle of law, that the mode of obtaining the material, &c., and not the nature of the material itself, is what constitutes a mine; and it is a question of fact for the Sessions, applying that principle, whether under the circumstances, and considering the mode of obtaining the material, it is a mine or not. *Rex v. Dunford*, 4 Law J. (n.s.) M.C. 59.

In general, where a canal company have authority given them by act of parliament, to make a river navigable, with the usual powers to carry the object into effect, they are not, for the purposes of poor-rate, occupiers of the land which is the bed of the river.

Nor does the circumstance of such a company erecting dams, for the convenience of their navigation, in one of the parishes through which the canal runs, entitle that parish to rate them for the dams, in respect of profits which those dams are the means of making in other parishes, through which the canal runs. *Rex v. the Aire and Calder Navigation Company*, 1 Law J. (n.s.) M.C. 24, 3 B. & Ad. 110, 111.

By the 13 Geo. 1, it was enacted, "that a com-

pany should not be taxed for the navigation or the profits thereof." By the 2 Geo. 4, which was for substituting other cuts and canals, it was among other things provided, "that all powers and authorities in former acts contained, should extend and be applicable to the cuts and canals made under that act, as if the said cuts had been part of the navigation":—Held, that by these words the new cuts were made part of the old navigation; and that as the old navigation was by the former act exempt from rate, they operated likewise to exempt the new cuts made under 2 Geo. 4. *Rex v. Barnby Dam*, 4 Law J. (n.s.) M.C. 78, s. c. 4 N. & M. 436; 2 Ad. & E. 551.

By a statute which incorporated a company, the company was empowered to purchase land and erect buildings thereon, in which the proprietors were to be beneficially interested in proportion to their subscriptions, and such interest was to be personalty; and it was enacted, that two or more rooms should be provided, and used as public rooms for transacting business relating to trade and commerce, and suitably furnished for the purpose.

One of the rooms so provided was supplied with newspapers and other publications, and non-proprietors were admitted upon an annual subscription:—Held, that the company was rateable for the revenue (after deducting the expenses of the room) arising from such subscription, though stock in trade, profits, and personalty, were not rated in the parish, the rate being taken in the parish upon the fair annual value to be let.

By the statute, each proprietor was entitled to attend the room without making any payment: and, by the by-laws of the company, each proprietor was entitled to a payment from the company of an annual sum, upon every share above one held by him, and every proprietor not attending the room was paid by the company an annual sum:—Held, that the company was not rateable for the value of the privilege of such of the proprietors as attended. *Rex v. Proprietors of Liverpool Exchange*, 3 Law J. (n.s.) M.C. 107, s. c. 1 Ad. & E. 465; 3 N. & M. 550.

By a grant of Geo. 1, reciting, that the Chelsea Water-works Company had undertaken works for supplying Westminster, &c. with water, and had petitioned the Crown for liberty to use a certain canal or basin, and old pond in St. James's Park, and to lay mains through the park to and from the same for the purpose aforesaid; and that the surveyor-general had reported, that the said undertaking might be convenient to His Majesty, and to many of his subjects, and ornamental to the park; the King gave, granted, and assigned to the company and their successors the said canal, &c. to be converted into reservoirs, and to be used and enjoyed by them as such, for the purposes aforesaid, during the royal pleasure. Liberty was also granted them to break up the ground at all times through the said park, for laying therein pipes or mains to and from the old pond or canal for the purposes aforesaid, making good the ground so broken as soon as possible. Certain conditions were added, prescribing the direction in which the pipes should be carried, the breadth of ground to be broken, &c. The company were to supply St. James's Palace at reasonable rates; and the ranger was empowered

to supervise all the company's works in the park, and order them to rectify and reform the same, if not done according to the conditions.

The company took the basin and pond in pursuance of the warrant, and made a reservoir, into which they conveyed water, and laid pipes communicating with it for the purposes aforesaid. They subsequently made expensive improvements in and about the reservoir, on the requisition of the Crown; and they were never allowed to alter or repair it but by leave, and under the inspection of the Crown surveyor. They paid no rent, and are paid for supplying the palace, as well as other residences. The ranger is rated to the poor for the herbage growing on the surface of the soil in the park, including that under which the pipes pass:—Held, first, that the company were rateable as occupiers of the reservoir. Secondly, that they were rateable for the occupation of land below the surface of the soil by their pipes, though another person was rated for the herbage. *Rex v. Chelsea Water-works Company*, 2 Law J. (n.s.) M.C. 98, s. c. 5 B. & Ad. 156; 2 N. & M. 765.

Tithes, for which compositions have been entered into by the respective occupiers, may be rated in the hands of the rector in one entire sum.

Upon the refusal of the rector to pay such rate, the Justices are bound, upon the application of the overseers, to issue their warrants for levying it, although such mode of rating be inconvenient to the rector, and contrary to former practice. *Rex v. Justices of Sussex*, 3 Law J. (n.s.) M.C. 56, s. c. 3 N. & M. 263.

An act of parliament enacted, that the tithes of a parish should be held in fee by A, who was owner of part of the lands in the parish, and that all A's lands in the parish should be charged with an annuity payable to the vicar for the time being, who had previously enjoyed the small tithes, and who, by an agreement recited in the act, was to receive such annuity in lieu of all his vicarial dues:—Held, that the vicar was not rateable to the poor in respect of such annuity, for that the tithes were not extinguished. *Rex v. Hambleton*, 1 Ad. & E. 145.

By an inclosure act it was declared, that all the allotments to be set out to the several persons having right of common on a moor, should be deemed to be situate within the same townships and places respectively, wherein the lands lay in respect of which such allotments should be made; and it was provided, that nothing in the act should affect the right of W P to certain coal mines under the said moor:—Held, that the first clause affected only those portions of the soil, which were allotted to the commoners, and not the coal mines under those allotments; and, therefore, that such coal mines were rateable to the relief of the poor in the parish in which they were actually situate, as they were before the act passed, though the allotments became rateable elsewhere. *Rex v. Pitt*, 3 Law J. (n.s.) M.C. 4, s. c. 5 B. & Ad. 565; 2 N. & M. 363.

Whether the owner of a farm composed partly of grass land, who, upon the determination of a lease, takes possession of the farm by a servant, who occupies it for the purposes of protection, but without dealing with the land, is liable to be rated

to the poor as a party beneficially occupying—*quare*. *Rex v. Justices of Buckinghamshire*, 3 N. & M. 68.

By a local act for making a canal, it is enacted, that the rates, tolls, and duties, authorized to be taken by the company of proprietors, shall not at any time or times hereafter be charged with, or be subject or liable to the payment of any parochial rates whatsoever, and the company "shall from time to time be rated to all parochial rates, for and in respect of the lands and grounds to be purchased or taken, and the warehouses and other buildings to be erected or set up by the said company or their successors, in pursuance of this act, in such and the same proportion as, but not at any higher value or improved rent than, other lands, grounds, buildings, lying near or adjacent thereto, are or shall for the time being be rated, and as the lands, grounds, warehouses, and other hereditaments, so to be purchased and taken and erected, would have been rateable, in case the same had continued in their former state, and not been used for the purpose of the said navigation or undertaking:"—Held, first, that the proprietors of the canal were liable to be rated at the fluctuating value of the adjacent lands and buildings, and not at the value which the adjacent lands and buildings possessed at the time, and when the act was passed. Secondly, that the value of the adjacent lands was to be estimated from whatever source it might arise, and the increase of value arising from the formation of the canal was not to be excluded from the calculation. *Rex v. Monmouthshire Canal Navigation Company*, 5 N. & M. 68, s. c. 3 Ad. & E. 619.

A party who, for the settlement of disputes between the incumbent and his parishioners, and for the benefit of all parties, takes a lease of the tithes from the incumbent, rendering a certain rent, the amount of which, and no more, he receives from the tithe-payers of the parish, is liable to be rated to the relief of the poor in respect of those tithes—*semble*. The want of certainty in the specification of some of the property included in a poor-rate, is no ground for refusing a mandamus to Justices to issue warrants of distress for levying the amount of a particular assessment: the defect is ground of appeal only. It is no ground of discharging a rule nisi for a mandamus to Justices to enforce a poor-rate, which the party rated has refused to pay, and for which the Justices have refused to issue a warrant of distress, that, since the granting of the rule, a third party has tendered the amount of the assessment to the overseer. But it is an answer to such an application, that at the meeting of Justices, when the warrant was demanded, the overseer came under a promise to prove that the occupation of the party rated was beneficial, and failed to do so; whereupon the Justices decided against the rate, although it was not necessary, in point of law, that the occupation should have been beneficial. The overseer ought to have gone again, and, after saying that the occupation need not be beneficial, have demanded a warrant. *Rex v. Wilson*, 5 N. & M. 119.

#### (c) Principle, and Proportion.

The principle of assessing lands to the poor-rate should be, to ascertain the net rent which a tenant

at rack-rent would pay, he discharging all rates, charges, and out-goings.

The sewers rate, though paid by the landlord, (or the owner, if he be also occupier,) should, therefore be allowed as a deduction from the rent. *Rex v. Adams*, 2 Law J. (N.S.) M.C. 90, s. c. 4 B. & Ad. 61; 1 N. & M. 662.

The owner of a coal-mine is to be assessed to each parish in which the surface of the mine is, in proportion to the coal got in that part of the mine the surface of which lies within the parish, although there be but one shaft by which the mine is made available, and by which the whole of the coal is brought to the surface; and in that parish in which the shaft is, he is rateable for the profits derived from the steam-engine and other machinery, and from the coal got from that part of the mine the surface of which is in that parish. *Rex v. Foleshill*, 4 Law J. (N.S.) M.C. 63, s. c. 4 N. & M. 360; 2 Ad. & E. 593.

Where, by a local act for the government of a parish, collectors of the rents of houses, &c. within the parish, "the yearly assessment or valuation whereof respectively shall be less than 30*l*," are made liable to be rated, and compellable to pay the rates in respect of such houses, &c.—*Semble*, that the liability of the collector would extend only to cases in which the *real*, and not the *assessed* value of the houses respectively, &c. is under 30*l*. *Rex v. Hall and Dyer*, 4 N. & M. 546, s. c. 2 Ad. & E. 606.

#### (d) Appeal.

[See APPEAL.]

If the inhabitant of a parish, who is *primâ facie* rateable to the poor under the 43rd of Eliz. c. 2, s. 1, be assessed accordingly, and be dissatisfied with such assessment, he must appeal in the first instance to the Quarter Sessions, and cannot maintain trespass or replevin in the superior courts. *Marshall v. Pitman*, 2 Law J. (N.S.) M.C. 33, s. c. 9 Bing. 695; 2 Mo. & Sc. 745.

Where a poor-rate has been made, allowed, and published, and a party has appealed against it, the overseers cannot abandon it, but the appellant is entitled to have the rate quashed at the sessions; and the Sessions cannot refuse to entertain the appeal on the ground of such abandonment of the rate by the overseers. *Rex v. Justices of Cambridge*, 4 Law J. (N.S.) M.C. 8, s. c. 2 Ad. & E. 370; 4 N. & M. 238.

#### (e) Restitution.

The application under 41 Geo. 3, c. 23, s. 8, to refund money obtained by a wrongful distress for poor-rates, can be made only at the same sessions at which the rate is reduced and amended. *Rex v. Justices of St. Peter's Liberty, York*, 1 N. & M. 108.

On the 15th of August 1828, an increased poor-rate was assessed on certain premises, against which an appeal was entered at the October sessions, and respite to the following sessions in January. On the 15th of December 1828, the overseers distrained for the increased rate; but, to prevent a sale, the amount was paid under protest, and the distress relinquished. The rate was subsequently reduced, in consequence of the decision of the Court of King's Bench, on a case sent up by the

Justices on the hearing of the appeal. It did not appear that any notice in writing of the appeal had been given to the overseers, pursuant to the 41 Geo. 3, (U.K.) c. 23, s. 2, before the levy. In an action brought by the party on whom the increased rate was made, against the defendant, one of the overseers at the time of the levy, to recover back the excess above the last effective rate, as money had and received to his use,—Held, that, as no notice of appeal had been given to the overseers pursuant to the second section of the statute, the action could not be maintained. *Priestley v. Watson*, 3 Law J. (N.S.) M.C. 113, s. c. 2 C. & M. 691; 4 Tyr. 916.

#### (I) DISTRESS.

[See JUSTICES, Powers and Duties—MANDAMUS.]

Where Justices are called upon to grant a warrant of distress, for non-payment of a poor-rate, they are bound to satisfy themselves that the property in respect of which the person is rated, is locally situate within the parish whose officers have made the rate; and they are liable to the trial of this question, in an action of trespass against them, at the suit of a person whose goods are distrained upon, by authority of their warrant, and whose property is not so locally situate; although he neither appealed against the rate, nor attended their summons, granted previously to their issuing their warrant of distress. *Weaver v. Price*, 1 Law J. (N.S.) M.C. 90, s. c. 3 B. & Ad. 409.

If a party suffer his goods to be distrained for the poor-rate, and bring an action of replevin, and a judgment of *non pros.* be signed against him, the Court will not order the proceedings upon such judgment to be stayed, except upon the payment of treble damages, as enacted by the 19th section of 43 Eliz. c. 2.

*Semble*, the judgment of nonsuit, mentioned in the 43rd Eliz. and in older statutes, and that of *non pros.*, may be considered as attended with similar consequences for the purposes of those acts. *Skingley v. Barnard*, 3 Law J. (N.S.) M.C. 19.

On a distress for poor-rates for less than 20*l*., a broker is not entitled to charge for a sum paid to a constable for swearing the appraiser. *Smith v. Parrott*, 3 Law J. (N.S.) M.C. 25.

Under the statute 24 Geo. 2, c. 44, s. 6, which protects an officer acting in obedience to a warrant of Justices, and requires that before action brought a demand of the warrant should be made, an officer who exceeds the warrant is not within the protection; therefore, where overseers seized the goods of the plaintiff, as a distress for poor-rates under a warrant, to a greater amount than was reasonably sufficient to satisfy the sum that was due,—Held, that they were liable to an action for an excessive distress, without any demand of the warrant.

The declaration alleged, that the defendant wrongfully distrained for 14*l*. 12*s*. 8*d.*, pretended and alleged to have been duly rated, goods of a much greater value, and thereby, then and there took a great, unreasonable, and excessive distress:—Held, sufficient, after verdict. But, *quære*, whether the declaration might not have been demurred to. *Sturch v. Clarke*, 2 Law J. (N.S.) M.C. 29, s. c. 4 B. & Ad. 113.

The 3rd section of the 50 Geo. 3, (local) c. 45,

authorizes the collector to levy the rates, arrears, &c. and the expenses of the summons before the magistrate, by warrant of distress on the goods and chattels of those who neglect or refuse to pay. The defendant, as such collector, distrained for 1s., the expense of the summons above mentioned; in trespass against him for so doing—held, that the statute warranted his so doing, and, consequently, that the action could not be maintained. *Davies v. Pedley*, 3 Law J. (N.S.) C.P. 120, s.c. (*nomine Clarke v. Pedley*), 4 Mo. & Sc. 321.

If a party is assessed to the poor-rate for premises which he occupies, and other distinct premises which he does not occupy, and his goods are distrained for the several rates jointly, he is not confined to the remedy by appeal, but may bring an action. *Governors of Bristol Poor v. Wait*, 1 Ad. & E. 264, s.c. 3 N. & M. 359.

If a joint distress be made under four several warrants for four several rates, of which one is bad, the distress is not therefore void.

If a party enter and make a joint distress for four several rates, being furnished for that purpose with four warrants, one of which is bad, he may, in an action of replevin for such distress, justify under the good warrants, and abandon the bad one; and if the causes of taking are distinct, and the avowries separate, he will be entitled to a return of all the goods.

Where some of the avowries justified the whole taking under good warrants only, and the plaintiff alleged, in answer to each of the avowries, that the whole distress was taken jointly under four warrants, of which one was bad, and the defendant did not, on the record, contradict this allegation:—Held, nevertheless, that the defendant was entitled to judgment, and a return of all the goods. *Governors of Bristol Poor v. Wait*, 3 Law J. (N.S.) M.C. 71, s.c. 1 Ad. & E. 264; 3 N. & M. 359.

Where a party, having no stock in trade, is rated as an inhabitant of a parish, his remedy is by appeal to the Quarter Sessions. Replevin does not lie for a distress under such a rate. *Marshall v. Pitman*, 2 Law J. (N.S.) M.C. 33, s.c. 9 Bing. 595; 2 Mo. & Sc. 745.

An order of magistrates being made upon a party to pay the amount of his poor-rate, and the costs of a summons, he tenders the former without the latter to the overseer. A subsequent warrant of distress for the poor-rate is illegal. *Cotton v. Kaddell*, 2 N. & M. 399.

#### REAL ACTION.

The demandant commenced his action by a writ of intrusion, and declared against the tenant. He afterwards entered a *nolle prosequi*, and, upon rule to shew cause why the tenant should not be allowed his costs,—Held, that, in a real action, he was not entitled to them. *Williams v. Harris*, 3 Law J. (N.S.) C.P. 217, s.c. 4 Mo. & Sc. 491; 1 Bing. N.C. 13.

#### REAL PROPERTY.

Limitation of actions relating to, and simplifying of remedies. 3 & 4 Will. 4, c. 27; 11 Law J. Stat. 77.

#### RECEIPT.

[See BILL OF EXCHANGE, Actions.]

#### RECEIVER.

[See TRUST AND TRUSTEE.]

The Court will not in general, on minute circumstances, interfere with the Master's appointment of a receiver, but on principle will do so. *Blakeway v. Blakeway*, 2 Law J. (N.S.) Chanc. 75.

The Court has no jurisdiction to order executors of a deceased receiver to bring in and pass the receiver's accounts. *Jenkins v. Briant*, 4 Law J. (N.S.) Chanc. 2.

A receiver held liable for money which he had paid to the plaintiff's solicitor, directing him to pay it into court, which was never done. *Delfosse v. Crawshaw*, 4 Law J. (N.S.) Chanc. 32.

A receiver appointed before answer, upon affidavits of the embarrassed circumstances of an executor, and of expressions shewing an intention of misapplying the assets. *Oldfield v. Cobbett*, 4 Law J. (N.S.) Chanc. 271.

A receiver, who had been discharged, did not pay in his balance on the day fixed by the Master. Ordered that he should pay in the same, and also the amount allowed for his salary, with interest. *Harrison v. Boydell*, 6 Sim. 211.

It is not of course to appoint a receiver against a trustee of real estates, when the trustee is willing to act; but where none but the party applying for a receiver can be affected by the expense of such an appointment, it forms a strong ground for making the appointment.

In such case, and where the trustee had neglected to furnish satisfactory accounts, a receiver was appointed on petition after decree.

A receiver, when appointed, acts for the benefit of all parties interested.

The expenses of carrying into execution the trusts of a will ought to be paid out of the *corpus*, and not out of the annual rents and profits. *Bainbridge v. Blair*, 4 Law J. (N.S.) Chanc. 207.

Testator bequeathed the residue of his real and personal estate to his widow, her heirs, executors, and administrators: "having a perfect confidence she will act up to those views which I have communicated to her in the ultimate disposal of my property after her decease." The testator's widow died intestate. The bill alleged, that the testator had bequeathed the residue of his property to his wife, on the faith of a promise that she would dispose of his property in favour of the plaintiffs, who were natural children of the testator. The Court, on motion supported by affidavits verifying the allegation, granted a receiver of the real estates against the heir and second husband of the widow. *Podmore v. Gunning*, 6 Sim. 485.

A receiver having, without the sanction of the Court, defended actions arising out of a distress for rent made by him on a tenant of the estate, the Court refused to allow him his costs of the actions. *Swaby v. Dickon*, 5 Sim. 629.

Receiver granted, at the suit of a judgment creditor of the office of Master Forester of a Royal forest. *Blanchard v. Cawthorne*, 4 Sim. 666.

A receiver, appointed by the Court of Chancery, has a right to distrain for rent, without any special authority from the Court for that purpose. *Bennett v. Robins*, 5 C. & P. 379. [Tindal]

### RECEIVER OF STOLEN GOODS.

[See LARCENY, *Dunn's case*—STOLEN GOODS.]

### RECOGNIZANCE.

[See FORFEITURE—JUSTICES—SHERIFF.]

What is necessary on moving to discharge a forfeited recognizance. *Rez v. Holden*, 2 Law J. (N.S.) Exch. 240, s. c. 3 Tyr. 580.

The Court of King's Bench cannot interfere to reduce the amount of security, which the magistrates require a defendant to give for the preservation of the peace. *Rez v. Holloway*, 2 Dowl. P.C. 525.

A motion to discharge a defendant from estreated recognizances under the 4 Geo. 3, c. 10, must be preceded by a notice to the solicitor of the Treasury. *Re Tipton*, 3 Dowl. P.C. 177.

Where a defendant entered into a recognizance to appear to, and try an indictment for perjury against her in Trinity term, and she had appeared and pleaded to the indictment, but the indictment had not been tried, the Court would not, in Michaelmas term, discharge the recognizance, but ordered that it should not be put in suit before the last day of the term. *Rez v. Grote*, 3 Dowl. P.C. 255.

The Court, at the Old Bailey, three of the Judges being present, refused to discharge, without the preferring of any bill, the recognizance of prosecutors, being members of a society for promoting religious knowledge among the poor, who had caused a servant to be committed for embezzlement, the application not being made on the ground of any defect in the evidence, but on the ground that they, the prosecutors, thought that the reformation of the offender would be best promoted by such a course. But where parish officers were under recognizance to prosecute a pauper for obtaining money under false pretences, a Judge at the Assizes, on motion, permitted the recognizance to be withdrawn, the party having been in prison for several weeks, and the parish being unwilling to indict. *Rez v. Paul*, 6 C. & P. 323.

### RECORD.

[See ERROR, Proceedings—EVIDENCE.]

### RECTOR.

[See CHURCH.]

### RECOVERY.

[See FINE—SHIFTING USE.]

### RECOVERY IN A FORMER ACTION.

A brought an action for an attorney's bill against B, but only recovered a small sum for money lent, as there had been no bill delivered:—Held, that A

might recover the amount of the attorney's bill in another action brought after the bill was delivered, although this was a part of his demand in the first action; and that it was not necessary that he should have been nonsuited in the first action to entitle him to bring the second. *Heming v. Wilson*, 5 C. & P. 54. [Parke]

### REFERENCE.

[See PRACTICE, *Equity*.]

Where the assignees of a bankrupt brought an action, and the bankruptcy was disputed, but the cause, after being opened before the Judge at Nisi Prius, was referred to arbitration,—Held, that [the Judge before whom the cause was so opened, could not, under 6 Geo. 4, c. 16, s. 90, certify for the costs of proving the bankruptcy. *Barthrop v. Anderton*, 1 Law J. (N.S.) C.P. 80, s. c. 8 Bing. 266; 1 Mo. & Sc. 361.

Where a rule for striking an attorney off the rolls for misconduct is referred to the Prothonotary, he is not to be confined to the affidavits already before the Court, but may receive any evidence tending to the elucidation of the matter. *Dixon v. Warne*, 4 Mo. & Sc. 470.

### REFORM ACT.

England. 2 Will. 4, c. 45; 10 Law J. Stat. 77.

Scotland. 2 & 3 Will. 4, c. 65; 10 Law J. Stat. 167.

Ireland. 2 & 3 Will. 4, c. 88; 10 Law J. Stat. 225.

Amendment of, 2 & 3 Will. 4, c. 65, (relating to Scotland):—5 & 6 Will. 4, c. 78; 13 Law J. Stat. 171.

### REGISTERING

Of British Vessels, Act for. 3 & 4 Will. 4, c. 56; 11 Law J. Stat. 110.

### REGISTRATION OF VOTERS.

Provisions for, in Scotland. 4 & 5 Will. 4, c. 68; 12 Law J. Stat. 173.

### REGENT'S PARK.

Certain streets in Westminster. Jurisdiction of Commissioners, extended. 2 Will. 4, c. 56; 10 Law J. Stat. 113.

### RELEASE.

[See ACTION—WITNESS, Competency.]

The defendant and one M N gave the plaintiff their joint and several promissory notes to secure a separate debt due from each of them. The plaintiff afterwards executed a deed of release to M N:—Held, that although this release discharged both as to the note, it did not enure to the discharge of the separate debt of the defendant, but that the plaintiff might recover that upon an account stated. *Cocks v. Nash*, 2 Law J. (N.S.) C.P. 17, s. c. 4 Mo. & Sc. 162.



Courts of equity will presume a release within the same limits of time, within which juries will be directed to presume it, whether any Statute of Limitations is applicable to the case or not. *Baldwin v. Peach*, 1 Y. & C. 453.

A defendant executed a release to a witness; but before it was given to the witness it was handed to the counsel on the opposite side for his inspection. He objected to the form of it, and it was altered, and the defendant re-executed it:—Held, that it was sufficient, and that it did not require a new stamp. *Allen v. Farren*, 5 C. & P. 513. [Tindal]

A release, which in its terms is general, may be restrained by reference to the particular terms of the recital: therefore, where it was recited that disputes and differences had arisen between the plaintiff and one of the defendants, and that actions at law had been brought by them against each other, which were then depending, and that it was agreed between them, that in order to put an end thereto, the said defendant should pay to the said plaintiff 150*l.*, and that each of them should execute a release to the other:—the release by the plaintiff, which was general, was held not to extend to causes of action existing between the plaintiff and the defendant, jointly with other parties.—Held, also, that evidence was admissible to prove what were the disputes existing at the time, upon which the actions referred to in the recital were brought. *Simons v. Johnson*, 1 Law J. (n.s.) K.B. 98, s.c. 3 B. & Ad. 175.

A and B, on making partition, which was confirmed by act of parliament, had mutually covenanted to use their respective lots in a particular manner. B had afterwards, but with the consent of A, deviated from the terms of the covenant, in the use of his lot; and this deviation continued for many years under B, and those claiming under him.

On the application of a party claiming under B, the Court refused to enforce the covenant against a party claiming under A, to restrain him from using his lot in any way he pleased, on the ground that the conduct of the parties was an implied dispensation with the terms of the covenant. *Hawkins v. Scarborough*, 2 Law J. (n.s.) Chanc. 126.

#### RELIEF.

Relief to a child not living with the father, but unemancipated, disqualifies the voter. *Borough of Bedford (Taylor)*, C. & R. 99.

#### REMAINDER.

[See DEVISE, What Interest vests.]

#### REMITTER.

The doctrine of remitter applies only to those cases, where the estate is thrown upon the party having the right, without any act or concurrence of his own; and if he come into possession under the Statute of Uses, he should waive that possession, and bring his writ of *formedon*. *Doe d. Cooper v. Finch*, 2 Law J. (n.s.) K.B. 41, s.c. 1 N. & M. 130; 4 B. & Ad. 283.

#### REMOVAL OF CAUSES.

[See CERTIORARI—HABEAS CORPUS.]

Where a *pone* has issued for the purpose of removing a plaint out of the county court, and the sheriff has, notwithstanding, proceeded with the plaint, the defendant, in order to obtain an attachment against the sheriff, must shew that the recognizances required by the 19 Geo. 3, c. 70, s. 6, have been entered into by him. *Grimshaw v. Emerson*, 1 Dowl. P.C. 337.

To a writ of *pone* sued out by the defendant, and alleging for cause that he could not obtain justice (in the common form), the sheriff made a return, traversing the cause:—Held a bad return, the Court ordering it to be struck off, and the sheriff to return the writ forthwith. *Park v. Renton*, 1 Law J. (n.s.) K.B. 136, s.c. 3 B. & Ad. 105.

The cause assigned by the defendant in a *pone* for removing a plaint from the sheriff's court to the Court of Common Pleas, is not under any circumstances traversable. *Talbot v. Binns*, 1 Law J. (n.s.) C.P. 34, s.c. 8 Bing. 71; 1 Mo. & Sc. 148.

#### RENEWAL.

[See COVENANT—LEASE.]

#### RENT CHARGE.

A, on his marriage, grants a rent charge to his wife, out of his estates, for her jointure, which he secures by a term limited to trustees. By his will he gives his mansion-house and park to his wife for life, and the rest of his estates to B; and directs that the repairs, painting, &c. of his mansion-house shall be paid for by sale of timber on the premises devised to B; and then he confirms the settlement:—Held that the jointure is wholly raiseable out of those premises. *Grigley v. Powell*, 5 Sim. 290.

An annuity of 200*l.*, in bar of dower, was settled upon the defendant. The settlor afterwards devised to the defendant for her life a portion of the lands out of which the annuity was to arise and an annuity of 20*l.*, payable out of the other lands than those already devised. Upon the death of the settlor the defendant accepted and entered into the lands devised, and afterwards distrained for arrears of both annuities:—Held, in replevin, that the defendant's avowry for distraining for the arrears of the annuity of 200*l.* could not be sustained, inasmuch as the annuity was extinguished by the devise to her of a portion of the lands out of which the annuity was to issue, coupled with her acceptance of the same. *Aliter*, as to the avowry for distraining for the arrears of the annuity of 20*l.*, which was not to issue out of the same lands. *Dennett v. Pass*, 4 Law J. (n.s.) C.P. 70, s.c. 1 Bing. N.C. 388; 1 Sc. 218.

#### REPLEADER.

*Quare*, whether the Court of Exchequer Chamber can grant a repleader. *Paddon v. Bartlett*, 4 Law J. (n.s.) Exch. 333, s.c. 5 N. & M. 383; 3 Ad. & E. 884.

In an action on a bill of exchange, the defendant

pleaded a plea of want of consideration, concluding with a verification; the plaintiff, instead of replying by taking issue on the plea, merely added a *similiter*. After verdict for the plaintiff, the Court held, that the record was imperfect, and that there must be a repleader; but, to save expense, the plaintiff was allowed to amend on payment of costs. *Wordsworth v. Brown*, 3 Dowl. P.C. 699.

### REPLEVIN.

[See BANKRUPT, Petitioning Creditor's Debt—Costs, Security for—DISTRESS—PLEADING, Replication—PRACTICE, Proceedings where stayed, and Verdict—WITNESS, Competency.]

A recovery in replevin is a bar to an action for excessive distress. *Phillips v. Berryman*, 3 Doug. 287.

The sureties in a replevin bond are only liable for the value of the goods seized, and double the costs; and, if that value exceeds the amount of rent due, they will only be liable for the rent. *Hunt v. Round*, 2 Dowl. P.C. 553.

Defendant made cognizance in replevin, under a power of distress for an annuity granted by G T to H, in September 1806; plaintiff pleaded, that in May 1806, G T, for securing another annuity, and in consideration of 3,000*l.*, granted, bargained, sold, and demised the premises in which &c., to F for ninety-nine years:—Held, no bar, without alleging entry by F, or that F elected that the deed should enure by way of bargain and sale. *Miller v. Green*, 1 Law J. (N.S.) Exch. 51, s.c. 8 Bing. 92; 1 Mo. & Sc. 199.

The sheriff is bound to replevy goods distrained for a poor-rate, under a Justice's warrant. *Labourin v. Marshall*, 1 Law J. (N.S.) K.B. 151, s.c. 3 B & Ad. 440.

To an avowry for rent in arrear, the plaintiff pleaded, that he gave a promissory note, which, at the time when, &c. had to run, which the defendant received "for and on account" of the rent in arrear:—Held, bad on demurrer.

*Quare*, whether he could have pleaded it as an agreement on the part of the landlord to suspend his right to distrain. *Davis v. Gyde*, 4 Law J. (N.S.) K.B. 44, s.c. 2 Ad. & E. 623; 4 N. & M. 462.

The sheriff is not bound to take more than one pledge in replevin of cattle damage feasant.

In an action against the sheriff, for taking insufficient pledges, in replevin of cattle damage feasant, the declaration must state the award of a writ, *de returno habendo*.

A count for not restoring the cattle, is bad. *Stucker v. Jordan*, 2 Law J. (N.S.) Exch. 47, s.c. 16 M. & W. 64; 3 Tyr. 107.

Declaration of Easter term, 1831, on a replevin bond by the assignees of the sheriff against W, the plaintiff in replevin and his sureties, after stating the condition, assigned as a breach, "that although the suit was removed into the King's Bench by *re. fa. lo.* returnable in Michaelmas term, 1829, at the instance of W, the plaintiff in replevin, yet he did not prosecute his suit with effect and without delay." Plea, first, that by the *re. fa. lo.* the sheriff was commanded to record the plaint to have the record on the return day in the King's Bench, and to prefix

the same day to the parties, that they might be ready to proceed in the said plaint; that W, the plaintiff in replevin, appeared in court at the return, and was ready to proceed in the suit, and prosecute the same with effect and without delay; but that the now plaintiffs did not appear, and the sheriff returned the *re. fa. lo.* amongst other things, that he had prefixed the same day to the parties, that they might be ready there to proceed in the said plaint. It then averred, that W was always ready to prosecute his plaint with effect, and without delay, and would have done so, if the defendants in replevin (the now plaintiffs,) had appeared. To this plea there was a general demurrer.

The second plea stated, that the sheriff, in pursuance of the *re. fa. lo.* recorded the plaint, returned it, prefixed the day of the return to both parties, and summoned the now plaintiffs to appear in the King's Bench to proceed in the plaint; and that W, the plaintiff in replevin, was ready to proceed, but the now plaintiff did not appear. Replication, that the sheriff did not summon the now plaintiffs to appear. Rejoinder by way of estoppel, that the sheriff, before the assignment, returned to the *re. fa. lo.*, that he had prefixed a day to the parties, that they might be ready to proceed in the plaint. General demurrer.

Held, first, that a plaintiff in replevin, who does not use due diligence in prosecuting the suit, is guilty of a breach of that part of the condition of the bond, which requires him to prosecute without delay, even though it may not appear that the suit is determined.

Secondly, admitting that, upon the replication to the second plea, it was to be assumed, that the now plaintiffs were not summoned; (and, *semble*, that, in the present action, they were not estopped from alleging this,) still, as it appeared by the pleas, that the *re. fa. lo.* contained a direction in effect to summon the now plaintiffs, W, the plaintiff in replevin, was not responsible for the default of the sheriff, or guilty of delay in that suit by reason of the sheriff having neglected to serve a summons. *Harrison v. Wardle*, 5 B. & Ad. 146, s.c. 2 N. & M. 763.

*Quare*—In avowry for a certain sum, rent arrear, can the plaintiff in replevin bring the money into court? *Flechnol v. Pursell*, 2 Law J. (N.S.) C.P. 177.

### REPRESENTATIVES.

[See LEGACY—DEVISE—WILL.]

A sum of money given to a husband, upon trust to pay to his wife the proceeds during her life, and, in default of her appointment, to pay the same to the personal representatives of the wife:—the husband a mere trustee; and has no beneficial interest in the fund. *Robinson v. Smith*, 2 Law J. (N.S.) Chanc. 76, s.c. 6 Sim. 47.

Bequest of a specific sum of stock to pay the dividends to A for life, and after his death to call in the stock, and thereout to pay legacies to the two daughters of A, and to pay the residue to the legal representatives of A:—Held, that the next-of-kin of A were entitled to the residue, after satisfaction of the legacies to his two daughters. *Walter v. Meakin*, 2 Law J. (N.S.) Chanc. 173, s.c. 6 Sim. 148.

The word "representatives," in a will, construed to mean "descendants," the context requiring it. *Styth v. Moura*, 6 Sim. 49.

"Lawful representatives of A" generally means next-of-kin of A; but on the construction given to these words by a codicil,—held, to extend to all the descendants, including children, grandchildren and great-grandchildren. *Sandert v. Richardson*, 2 Law J. (N.S.) Chanc. 211.

*Semble*—that where a testator's will is proved in a Prerogative Court, and his executor's will is proved in a Diocesan Court, the executor of the executor is not the personal representative of the original testator. *Jernegan v. Baxter*, 5 Sim. 568.

### REQUEST.

[See AGREEMENT.]

### REQUESTS, COURT OF.

[See COSTS, Double and Treble.]

Persons seeking their livelihood in Westminster, are not privileged under 23 Geo. 2, c. 27, from being sued elsewhere than in the Westminster Court of Requests, for a debt under 40s. Such privilege is only given to inhabitants and residents. *Scotts v. Seager*, 1 M. & Ro. 244. [Patteson]

An attorney plaintiff suing an attorney defendant for a cause of action not exceeding 5*l.*, arising within the jurisdiction of the London Court of Conscience Act, 39 & 40 Geo. 3, c. 104, is not entitled to his costs. *Burn v. Pasmore*, 1 Dowl. P.C. 17.

Partners keeping a counting-house only, for the purpose of receiving orders, in the city of London, and carrying on business at Liverpool also, are not within the provisions of the London Court of Requests Act, the 39 & 40 Geo. 3, c. 104, s. 12. *Reeves v. Stroud*, 1 Dowl. P.C. 399.

Where a defendant is entitled to enter a suggestion under the Middlesex Court of Requests Act, the plaintiff is bound to find the record, or be answerable for the default of his attorney, who withholds it. *Jones v. Harris*, 1 Dowl. P.C. 433.

To deprive a plaintiff of costs, under a Court of Requests Act, for debts not exceeding 5*l.*, owing by persons residing within a district, it must appear that the defendant resided at the time of the action brought; an affidavit that the defendant "resides" within the district, is insufficient. An act excepted any debt for any sum being the balance of an account or demand originally exceeding 5*l.* *Semble*—that this exception applies to a debt reduced below 5*l.* by payments made from time to time, while the items of debt, forming a demand above 5*l.*, were contracted. *Morreau v. Hicks*, 2 Ad. & E. 782, s.c. 4 N. & M. 563.

Where a plaintiff recovers less than 40*s.* against a defendant resident within the jurisdiction of the Middlesex Court of Requests Act, and his demand has not been reduced by a set-off, the defendant is entitled to double costs. *Jones v. Harris*, 1 Dowl. P.C. 374.

Under the London Court of Requests Act, it is no objection to the defendant's claim for costs, that the plaintiff was unaware that the defendant resided within the jurisdiction. *Crowder v. Bell*, 2 Dowl. P.C. 508.

An action for not using a farm in a tenant-like manner, is not within the meaning of the 46 Geo. 3, c. 66, (the Isle of Wight Court of Requests Act). *Wittam v. Urry*, 2 Dowl. P.C. 543.

An action for the use and occupation of "furnished" lodgings, is within section 13 of the 39 & 40 Geo. 3, c. 104, (the London Court of Requests Act), and therefore it may be brought in the superior courts without the plaintiff's incurring the penalties provided in section 12. *Kidd v. Mason*, 3 Dowl. P.C. 96.

If a defendant resides or inhabits within London, he is liable to be sued in the London Court of Requests, for debts under 5*l.*; and if a plaintiff sues him elsewhere, and recovers less, he will not be entitled to costs, though the defendant has another place, where he usually resides, and the goods are delivered there. *Rice v. Legh*, 2 Dowl. P.C. 105.

Where an act establishing a Court of Requests, gave power to hear cases in assumpsit up to a given amount, but not any such cases in which the freehold should come in question:—Held, that it did not apply to a case in which the plaintiff sued in the superior court in assumpsit, in a form which admitted of the freehold coming into question; and which the defendant on the trial did himself dispute. *The Mayor of Newport v. Saunders*, 1 Law J. (N.S.) K.B. 230.

On an application to enter a suggestion for costs, under a Court of Requests Act, the verdict of the jury will in general be taken as the criterion, to decide whether the case is within the jurisdiction of the Court of Requests.

The Bradford Court of Requests Act, (47 Geo. 3, sess. 2, c. 39,) which gives jurisdiction to the local court, where the debt demanded does not exceed 5*l.* and gives the defendant costs in case of any action in a superior court, for a debt not amounting to that sum, and recoverable in the Court of Requests, applies to rightful demands only, and in general, therefore, to the sum recovered, and not the amount originally claimed. *Dreves v. Coles*, 1 Law J. (N.S.) Exch. 202, s.c. 2 C. & J. 505; 2 Tyr. 503.

The Bath Court of Requests Act applies where the defendant is resident within the jurisdiction, although the plaintiff does not reside, and the cause of action did not accrue therein.

Therefore, on a verdict, under 10*l.*, recovered by the indorsee of a bill of exchange paid to him in London, upon a transaction at that place, accepted by the defendant, a resident within the jurisdiction of the Bath Court of Requests, payable at a London banker's, the defendant is entitled to enter a suggestion on the roll to deprive the plaintiff of his costs. *Graham v. Broune*, 1 Law J. (N.S.) Exch. 117, s.c. 2 C. & J. 327; 2 Tyr. 309; 1 Dowl. P.C. 309.

In determining upon the right to enter a suggestion to deprive a plaintiff of costs under a Court of Requests Act, the Court will, in general, look to the verdict only to decide the amount of the debt recoverable.

The defendant has the first four days to apply to enter a suggestion to deprive the plaintiff of costs under a Court of Requests Act, although the Judge has certified, and, under statute 1 Will. 4, c. 7, execution has issued.

Nor is he precluded from making such applica-

tion, by reason of an agreement to allow immediate execution, if it do not appear that, at the time of such agreement, he was acquainted with his right as to the costs, or by reason of the Judge refusing to rescind his certificate, after referring to the local act. *Baddley v. Oliver*, 2 Law J. (N.S.) Exch. 76, s. c. 1 C. & M. 219; 8 Tyr. 146; and see *Moore v. Jones*, 8 Tyr. 161.

*Quare*—whether an action for use and occupation is within the exception of sect. 11 of the London Court of Requests Act, 39 & 40 Geo. 3, c. 104.

A captain of a trading vessel, in the habit of loading and unloading his cargo, and depositing it in a warehouse, at a wharf in London, belonging to other persons, and of purchasing provisions for the vessel in London, but having no residence, counting-house, or warehouse in the city, is not within the London Court of Requests Act. *Double v. Gibbs*, 2 Law J. (N.S.) Exch. 87, s. c. 1 C. & M. 246; 3 Tyr. 224.

To deprive the plaintiff of costs under the London Court of Requests Act, the defendant must clearly, and in express terms, bring himself within the words of the act.

Therefore, an affidavit in the alternative, that he keeps a "counting-house or warehouse," is defective. *Newton v. Peacock*, 2 Law J. (N.S.) Exch. 167, s. c. 1 Dowl. P.C. 677.

Previous to making an application, with respect to costs under the London Court of Requests Act, it is not necessary to have the record in court. *Kidd v. Mason*, 3 Dowl. P.C. 85.

The power of the commissioners under the first Tower Hamlets Court of Requests Act, (23 Geo. 2, c. 20,) to commit debtors in execution to the House of Correction, was taken away by the General Gaol Act, (4 Geo. 4, c. 64,) and a classification of prisoners in pursuance thereof, and it is not restored by the last Tower Hamlets Court of Requests Act, (2 Will. 4, c. 65). *Rex v. the Governor of the Middlesex House of Correction*, 3 Law J. (N.S.) M.C. 124, s. c. 2 N. & M. 188.

The London Court of Requests Act (39 & 40 Geo. 3, c. 104,) only applies to cases of a liquidated demand; and, therefore, does not extend to a count for not returning goods unsold.

Where a cause is referred to an arbitrator to certify, and the declaration contains some counts on a demand within the statute, and others not, the defendant, if he intends to avail himself of the statute, should take care to have the certificate limited to a verdict upon the former counts. *Poetan v. Massey*, 3 Law J. (N.S.) Exch. 211, s. c. 2 C. & M. 683.

The 10th section of the 39 & 40 Geo. 3, c. 104, the London Court of Requests Act, which renders attorneys, solicitors, and other officers of the courts, &c. liable to the provisions of the statute, does not exempt barristers from such jurisdiction. Where, therefore, a member of such profession is defendant, it is competent to him to enter a suggestion on the roll, for the purpose of depriving the plaintiff of costs under the statute. *Wettenhall v. Wakefield*, 3 Law J. (N.S.) C.P. 75, s. c. 10 Bing. 335; 3 Mo. & Sc. 805.

The defendant is now at liberty to move to have a suggestion entered under the Court of Requests Act, to deprive the plaintiff of costs, notwith-

standing final judgment may have been signed, if the motion is made as early as can be, and particularly if it appears that the costs have not been taxed. *Godson v. Lloyd*, 4 Dowl. P.C. 157.

The defendant's affidavit stated, that, at the time when the action accrued, he had a warehouse and counting-house in the city of London, where he carried on his business; that afterwards, down to the commencement of the action, he had a house and warehouse in the city of London, where he and his partner carried on the same business; that, from the month of January 1833, he had sought, and still seeks, his livelihood by carrying on his business at those houses and warehouses respectively:—Held, that it was sufficient to entitle him to enter a suggestion on the roll, under the London Court of Requests Act.

The defendant had assented to a trial before the Secondary, on a writ of trial:—Held, that he had not thereby lost his right to the suggestion.

The trial was in vacation; judgment had been signed, and execution issued:—Held, that the application, which was made within the first four days of term, was not too late. *Bond v. Bailey*, 4 Law J. (N.S.) Exch. 197, s. c. 3 Dowl. P.C. 808.

The jurisdiction of the Court of Requests in Bath, extends to 10*l*, and the act provides, that if any action for any debt recoverable in the said Court should be commenced in any other court, the plaintiff shall not, by reason of a verdict for him, be entitled to any costs. The Court refused to interfere, by granting a rule for payment of a debt (under 10*l*) without costs, before verdict. *Meradith v. Groom*, 1 Law J. (N.S.) C.P. 49, s. c. 8 Bing. 141; 1 Mo. & Sc. 225; 2 Mo. & Sc. 116.

### RESCUE.

If the sheriff return, that the defendant has been rescued from the custody of his officer, upon *meeme* process, the Court will make the rule for an attachment against the rescuers absolute in the first instance. *Gobby v. Dewes*, 2 Law J. (N.S.) C.P. 226, s. c. 10 Bing. 112; 3 Mo. & Sc. 556.

If a hayward take cattle which are straying in a common or lane, and they are rescued as he is taking them to the pound, this rescue is indictable; but if the hayward take cattle which are damage feasant in the inclosed land of any private occupier, the rescue of them before they get to the pound is not indictable, as, in the latter case, till the cattle get to the pound, the hayward is to be considered as the mere servant of the occupier. *Rex v. Bradshaw*, 7 C. & P. 233. [Coleridge]

### RESERVATION.

[See DEED—GRANT, Construction of.]

### RESIDENT.

[See CONSTABLE.]

### RESTITUTION, WRIT OF.

[See PRACTICE, Motions, Rules, and Orders.]

## RETAINER.

[See ATTORNEY—COUNSEL.]

## REVENUE.

[See ASSESSED TAXES—WOODS AND FORESTS.]

Act 2 Will. 4, c. 1, for uniting the office of Surveyor General of His Majesty's Works and Public Buildings, with the office of Commissioners of Woods and Forests and Land Revenues, and for other purposes relating to the land revenues. 10 Law J. Stat. 3.

Reduction of duties on carriages with less than four wheels. 2 & 3 Will. 4, c. 82; 10 Law J. Stat. 212.

Amendment of laws of Customs. 2 & 3 Will. 4, c. 84; 10 Law J. Stat. 214.

Audit of Customs and Excise revenues in Scotland provided for. 2 & 3 Will. 4, c. 103; 10 Law J. Stat. 258.

Land revenues in Scotland placed under the management of the Commissioners of Land Revenues. 2 & 3 Will. 4, c. 112; 10 Law J. Stat. 278.

Repeal of duties on carriages and horses, and consolidation and amendment of laws relating thereto. 2 & 3 Will. 4, c. 120; 10 Law J. Stat. 287.

Assessed taxes and land tax in Scotland placed under the management of Commissioners of Taxes. 3 Will. 4, c. 13; 11 Law J. Stat. 31.

Repeal of laws relating to the Customs. 3 & 4 Will. 4, c. 50;—Act for management of the same. 3 & 4 Will. 4, c. 51; 11 Law J. Stat. 109.

And see further, as to regulation of Customs, smuggling, duties of Customs, warehousing of goods, 3 & 4 Will. 4, c. 52, 53, 56, 57, 58; 11 Law J. Stat. 110.

Amendment of laws of Excise. 4 & 5 Will. 4, c. 51; 12 Law J. Stat. 84.

Land tax and assessed taxes, amendment of laws relating to, and consideration of boards of stamps and taxes. 4 & 5 Will. 4, c. 60; 12 Law J. Stat. 116.

Repeal of duties on starch, stone bottles, sweets, made wines, mead, and scaleboard. 4 & 5 Will. 4, c. 77; 12 Law J. Stat. 151.

Amendment of laws relating to the Customs. 4 & 5 Will. 4, c. 89; 12 Law J. Stat. 174.

Excise on soap. See 5 & 6 Will. 4, c. 15; 13 Law J. Stat. 11.

Consolidation of certain offices in the collection of the revenues of stamps and taxes, and amendment of laws relating thereto. 5 & 6 Will. 4, c. 20; 13 Law J. Stat. 30.

Amendment of acts relating to hereditary land revenues of the Crown in Scotland. 5 & 6 Will. 4, c. 58; 13 Law J. Stat. 121.

Alteration of certain duties of stamps and assessed taxes. 5 & 6 Will. 4, c. 64; 13 Law J. Stat. 146.

Amendment of 3 & 4 Will. 4, c. 56, relating to the duties of Customs. 5 & 6 Will. 4, c. 66; 13 Law J. Stat. 150.

Glass, amendment of laws relating to duties and drawbacks upon. 5 & 6 Will. 4, c. 77; 13 Law J. Stat. 167.

The Court has no authority to direct that a defendant in an information on the revenue side, shall

have a copy of the information, unless he defends *in forma pauperis*. *Anonymous*, 3 Law J. (n.s.) Exch. 281.

A party cannot shew cause against a rule on the revenue side of the Court of Exchequer, unless the original affidavits on which cause is to be shewn be in court, or he has taken office copies thereof. *Jeffrey in re Dow*, 2 Law J. (n.s.) Exch. 47, s.c. 1 C. & M. 71.

An information under statute 6 Geo. 4, c. 108, s. 45, for harbouring and concealing goods "liable to the payment of duties on the importation thereof," is not supported by evidence of the importing and harbouring of foreign tobacco in packages containing 28 lb. weight each, and foreign brandy and geneva in casks containing four gallons each; for such goods are prohibited by statute 6 Geo. 4, s. 107, ss. 52, 128, and ought, therefore, so to have been described in the information. *The Attorney General v. Key*, 1 Law J. (n.s.) Exch. 40, s.c. 2 C. & J. 2; 2 Tyr. 65.

Where the wife of a paper-maker, who acted in her husband's business during his absence, by giving notices to charge and weigh, and also occasionally by paying paper-duty to the collector, raised money upon paper which had no wrapper or label, and no departure or duty-stamp on it:—Held, that it was for the jury to decide whether the wife acted under the authority of the husband; and consequently, that evidence of her acts, in respect of pledging the paper, was improperly rejected. *Attorney General v. Riddle*, 1 Law J. (n.s.) Exch. 182, s.c. 2 C. & J. 493; 2 Tyr. 523.

The defendant, in an Excise information, will be admitted to defend *in forma pauperis*, upon the common affidavit, that he is not worth 5*l.* over and above his wearing apparel.

The Court will not grant a copy of the information to a pauper defendant, gratis, but they will direct the officer to read over the information to him, and will allow him either to plead *instantly*, or at a future day, when the officer will also be directed to attend in court to receive his plea. *The Attorney General v. Dummie*, 3 Law J. (n.s.) Exch. 86, s.c. 2 C. & M. 393.

By 3 & 4 Will. 4, c. 53, s. 44, persons who shall assist or be concerned in the illegal removal of any goods from any warehouse or place of security in which they shall have been deposited for the security of the duties, shall be subject to a penalty:—Held, that "the King's warehouse" was a warehouse within the meaning of this clause. *Lowe v. the Attorney General*, 4 Law J. (n.s.) Exch. 336, s.c. 2 C. M. & R. 544.

By 3 & 4 Will. 4, c. 52, s. 20, goods taken or delivered out of any warehouse, not having been duly entered, shall be forfeited. The king's warehouse at the Custom House is included in the terms of this prohibition.

By section 17, "The importer of goods shall, within fourteen days after arrival of the ship, make perfect entry inwards of such goods, and land the same, and, in default thereof, the officers of Customs may convey the same to the king's warehouse; and if the duties due upon goods so conveyed shall not be paid within three months, they shall be sold for payment of the duties and charges." By c. 58, s. 28, "If goods which shall have been warehoused, or otherwise secured for home consump-

tion or exportation, shall be clandestinely or illegally removed from or out of any warehouse or place of security, they shall be forfeited."

*Quere*—whether goods conveyed to the king's warehouse by officers of the Customs, for security of the duties, fall within the provisions of this latter enactment. *The Attorney General v. Foudiere*, 4 Law J. (N.S.) Exch. 41, s. c. 1 C. M. & R. 570; 5 Tyr. 206.

The information charged the defendant as assisting and otherwise being concerned in unshipping uncustomed goods, and, in the second count, that certain goods which had been unshipped without payment of the duties, had come into the hands and possession of the defendant, he well knowing that they had been so illegally unshipped. It was proved, that the goods were transferred from a boat in the Downs, a mile or two from the shore, within the limits of the port of Dover, into a hoy, hired by the defendant at that port, for the purpose of receiving them, and were brought into the Thames, and seized in the port of London:—Held, that the information was proved by the evidence, since it established that either the defendant was concerned at Dover in the unshipping of the goods, or that when the master of the hoy brought them into the port of London, he being the defendant's agent, the latter was properly charged as having them in his possession within the United Kingdom.

*Quere*, whether the unshipping on the open sea, being within the limits of the port of Dover, as assigned by the Commissioners appointed by virtue of the 13 & 14 Car. 2, c. 11, s. 14, was illegal.

In revenue informations, the Crown has the general reply on motions for new trials. *The Attorney General v. Tomsett*, 4 Law J. (N.S.) Exch. 171, s. c. 2 C. M. & R. 170; 5 Tyr. 514.

### REVISING BARRISTER

Examined before a committee, by his own consent. *New Sarum case*, P. & K. 247, s. c. C. & R. 311.

### REWARD.

A party is entitled to recover on a handbill promising a reward to the party who shall give such information as may lead to the conviction of an offender, although such information may be given by him not in consequence of the handbill. *Williams v. Cawadine*, 2 Law J. (N.S.) K.B. 101, s. c. 1 N. & M. 507; 4 B. & Ad. 621; 5 C. & P. 800. [Parke]

Rewards under 7 Geo. 4, c. 64, s. 28, for the apprehension of offenders, are not confined to cases where the person apprehending has had a loss of time, or has been at an expense. *Res v. Barnes*, 7 C. & P. 100. [Coleridge]

Where a reward is applied for under the statute 7 Geo. 4, c. 64, s. 28, for the apprehension of an offender, and the facts on which the application is grounded have not appeared in evidence, the learned Judge will require them to be laid before him on affidavit. *Res v. Jones*, 7 C. & P. 167. [Parke]

### RIGHTS, LEGAL AND EQUITABLE.

Decree of court of equity in an administration suit, does not establish the rights of the persons claiming as next-of-kin.

Distribution of assets by a court of equity is not an adjudication of the right to those assets.

After a suit for the administration of the estate of an intestate, in which suit the next-of-kin had been ascertained under the decree of the Court, and the personal estate had been distributed among the supposed next-of-kin, a bill was filed by a person claiming to be the sole next-of-kin of the intestate, against the alleged next-of-kin, to have the decree in the former suit reversed, and the shares of the personal estate which had been distributed, paid to the plaintiff:—Held, that the decree in such suit is not an adjudication of the right; and that the persons having received a share of an intestate's estate, are liable to refund in part or in the whole, as in the case of creditors.

Legal and equitable rights are equally respected in equity, and are equally available.

A legal creditor on an estate, which had been distributed under the direction of the Court of Chancery, would be restrained by injunction from suing the executor or administrator in a court of law;—and *semble*, that a plea of *plene administratus* would, under such circumstances, be a good plea. *David v. Frowd*, 2 Law J. (N.S.) Chanc. 68, s. c. 1 M. & K. 200.

### RIOT.

[See HIGHWAY—JUSTICES—HUNDRED—INSURANCE.]

An action might be maintained, under statute 1 Geo. 1, stat. 2, c. 5, against hundreders, by the trustee in whom the property in a house of correction, belonging to the county, is vested, for the demolition of the house by rioters. *Onslow v. Smith*, 8 Doug. 348.

An indictment on the statute 7 & 8 Geo. 4, c. 30, s. 8, for feloniously beginning to demolish a house, cannot be supported, unless the persons committing the outrage had an intention of destroying the house; and therefore, where considerable damage was done to a house by a mob, who did this with an intention of seizing a person who had taken refuge in the house, this was held to be not within the statute. *Res v. Price*, 5 C. & P. 510. [Tindal]

If an indictment on the Riot Act, 1 Geo. 1, stat. 2, c. 1, s. 1, for remaining assembled one hour after proclamation, in setting out the proclamation omit the words "of the reign of," which were contained in the proclamation read by the magistrate, this is a fatal variance. If the proclamation be read several times, the hour is to be computed from the first reading. If there be such an assembly that there would have been a riot, if the parties had carried their purpose into effect, this is within the statute; and whether there was a cessation or not, is a question for the jury. *Res v. Woolcock*, 5 C. & P. 516. [Patteson]

A meeting called "to adopt preparatory measures for holding a national convention," is an illegal meeting. *Res v. Furzey*, 6 C. & P. 81. [Gaselee and Parke]

Every man has a right to work for the best price he can get; but, if others choose to work for less than the usual prices, the law will not permit that violence should be committed towards them, or towards those by whom they are employed, or those with whom they are connected. *Rez v. Batt*, 6 C. & P. 329. [Gurney]

To entitle a party, who has sustained damages under 30*l.*, by the felonious act of rioters, to require, under 7 & 8 Geo. 4, c. 31, s. 8, the holding of a petty sessions for hearing and determining his claim for compensation, it must appear that, within seven days after the commission of the offence, he went before a Justice of the Peace, and that he has complied with all the other requisites of the third section.

In the absence of an affidavit verifying these facts (in general terms), the Court will not grant a mandamus for the holding of a petty sessions for such purpose. *Rez v. the Justices of Folkestone*, 1 N. & M. 718.

A magistrate may assemble all the king's subjects to quell a riot, and may call in the soldiers, who are subjects, and may act as such; but this should be done with great caution. At the time of a riot, a magistrate may repel force by force, before the reading of the proclamation from the Riot Act.

If, on a riot taking place, a magistrate neither reads the proclamation from the Riot Act, nor restrains nor apprehends the rioters, nor gives any order to fire on them, nor makes any use of a military force under his command, this is *prima facie* evidence of a criminal neglect of duty in him; and it is no answer to the charge for him to say, that he was afraid, unless his fear arose from such danger as would affect a firm man; and if, rather than apprehend the rioters, his sole care was for himself, this is also neglect. *Rez v. Kennett*, 5 C. & P. 282. [Mansfield]

Certain districts, locally situate in the counties of Somerset and Gloucester, were, by a local act, set apart from those counties, and declared to be part of the city of Bristol and county of the same city; but it was provided, that this should not make any alteration in those districts, touching any tax, rate, levy, or assessment, usually raised within Bristol, touching any matter relative to any ecclesiastical, parochial, or manorial jurisdiction.

Held, that a person whose house, within those districts, had been feloniously destroyed, according to the terms of the 7 & 8 Geo. 4, c. 31, was entitled to maintain an action upon that statute, against the inhabitants of Bristol, although no general county rate had ever been there raised. *Humphris v. Bristol*, 2 Law J. (N.S.) M.C. 88, s. c. 2 N. & M. 74.

A riot is not the less a riot, nor is an illegal meeting the less an illegal meeting, because the proclamation from the Riot Act has not been read, the effect of that proclamation being to make the parties guilty of a capital offence if they do not disperse within an hour; but, if the proclamation be not read, the parties are guilty of the common law offence, which is a misdemeanor; and all magistrates, constables, and even private individuals, are justified in dispersing the offenders; and, if they cannot otherwise succeed in doing so, they may use force. Without any proclamation at all, if

a meeting is illegal, a party who attends it, knowing it to be so, is guilty of an offence. *Rez v. Furzey*, 6 C. & P. 81. [Gaselee and Parke]

Where a party of coal-whippers, having a feeling of ill-will to a coal-lumper, who paid less than the usual wages, created a mob, and riotously went to the house where he kept his pay-table, and cried out, that they would murder him, and began to throw stones, brick-bats, &c., and broke windows and partitions, and part of a wall, and continued, after his escape, throwing stones at the house till they were compelled to desist by the threats of the police:—Held, that they might be convicted of beginning to demolish, under the statute 7 & 8 Geo. 4, c. 30, s. 8, though their principal object was to injure the lumper, provided it was also their object to demolish the house, either on account of its being used by him or his men, and though they had not any ill-will against the owner of the house personally. *Rez v. Batt*, 6 C. & P. 329. [Gurney]

## RIVER.

Where two parishes are separated by a river, the *medium flum* is the presumptive boundary between them. *Rez v. Landulph*, 1 M. & Ro. 393. [Patteson]

## ROBBERY.

Obtaining money from a wife, under threat of accusing her husband of an unnatural offence, is not robbery. *Rez v. Edwards*, 1 M. & Ro. 257, s. c. 5 C. & P. 518. [Littledale]

A and B were walking together, B carrying A's bundle, when C and D came up and assaulted A. B threw down the bundle, and ran to the assistance of A, when C took it up, and made off with it. C and D were indicted for robbery, A being the prosecutor:—Held, that they could not be convicted of the robbery, but only of simple larceny, as the thing stolen was not in the personal custody of the prosecutor. *Rez v. Fallows*, 5 C. & P. 508. [Vaughan]

A was attacked by robbers, who, after using very great violence towards him, took from him a piece of paper, on which was written a memorandum respecting some money that a person owed him:—Held, robbery. *Rez v. Bingley*, 5 C. & P. 602. [Gurney]

## ROMAN CATHOLICS,

Charitable donations and bequests of, better secured. 2 & 3 Will. 4, c. 115; 10 Law J. Stat. 283.

## ROYAL FISH.

Royal fish found and taken within the precincts, limits, liberties, or jurisdiction of the Cinque Ports, or their members, belong to the Lord Warden. *Lord Warden of the Cinque Ports v. the King*, 2 Hag. 438.

## SACRILEGE.

A dissenting meeting-house is not within the statute 7 & 8 Geo. 4, c. 29, s. 10, which makes it a capital offence to "break and enter any church or chapel, and steal therein," *See. Rex v. Richardson*, 6 C. & P. 335.

## SALARIES.

Of certain high and judicial officers provided for. 2 & 3 Will. 4, c. 116; 10 Law J. Stat. 284.

## SALVAGE.

[See INSURANCE, BOATMEN—SHIP AND SHIPPING, Pilot.]

Where the master of a whaler, and a boat's crew of five men, had gone, at the imminent peril of their lives, to assist a vessel at sea dismasted, with the water making a breach over her, when they assisted in rigging a jury-mast, and afterwards towed the vessel, during six days, to Plymouth, the Court awarded, out of 7,000*l.*, 1,200*l.*—viz. 700*l.* to the owners for demurrage, repairs, risks, and all expenses; 200*l.* to the master; and 20*l.* to each boatman; and the rest of the crew to share the remainder according to their interest in the voyage. *June (Hudson)*, 1 Hag. 338.

The Court always jealously maintains the right of original salvors, unless further assistance is necessary for the preservation of the property. In case of derelict, and of great merit, the Court gave the original salvors the usual salvage, two fifths of (the whole value) 2,394*l.*, and to a revenue cutter, whose assistance was beneficial, 100*l.* expenses out of the remaining property. *Charlotte (Nesser)*, 2 Hag. 361.

On an appeal from an award of salvage, new matter should not be introduced without special leave from the Court. *General Palmer (Thomas)*, 1 Hag. 323.

The Court, on appeal from an award of salvage, reversed the award, considering the amount excessive, as the service had not been attended by much labour or danger, but allowed the salvors their costs. *Ibid.*

In a case of salvage of treasure by great exertions, from a wreck derelict and sunk under water, one-third of the amount saved awarded to the salvors.

An admiral who had taken upon himself personal exertion and responsibility in recovering treasure, by means of the ships under his command,—held entitled to an eighth of the sum awarded for salvage.

The Admiralty held entitled to repayment for the pay, victualling, and wear and tear of the King's ships, for the time that they were employed upon a service of salvage of private treasure, lost on board of a King's ship, and that repayment deducted from the amount of the money decreed for salvage. *The Thetis*, 2 Kn. 390.

## SANITY.

[See EVIDENCE—LUNATIC—WILL.]

## SATISFACTION.

[See PLEADING, Replication.]

## SAVINGS BANKS.

Amendment of acts, and depositors enabled to purchase government annuities. 3 Will. 4, c. 14; 11 Law J. Stat. 34.

Extension of 9 Geo. 4, c. 92, and 3 & 4 Will. 4, c. 14, to Scotland, and amendment and consolidation of laws relating thereto. 5 & 6 Will. 4, c. 57; 13 Law J. Stat. 120.

An action does not lie against the trustee of a savings bank. In case of disputes, the only mode of proceeding is by arbitration. *Crisp v. Bambery*, 1 Law J. (n.s.) C.P. 112, s. c. 8 Bing. 594; 1 Mo. & Sc. 646.

The Court, under stat. 9 Geo. 4, s. 45, granted a mandamus, calling upon a savings bank to appoint an arbitrator to decide between them and applicants in whose names a deposit had been made, though the deposit had been withdrawn by the person who made it for the applicants; and though the published rules directed that a duplicate book of the deposits shall be delivered by the bank, and be an authority for paying over any sums to the person bringing it to the bank, and though such a duplicate was delivered up to the bank when the deposit was withdrawn. *Rex v. Chesham Savings Bank*, 3 Law J. (n.s.) M.C. 84, s. c. 1 Ad. & E. 323; 3 N. & M. 418.

The directors of a savings bank are not compellable to appoint an arbitrator, under statute 9 Geo. 4, c. 92, s. 45, for the purpose of deciding upon the claim of persons professing to apply on behalf of a body of depositors, if it be matter of dispute among the depositors whether the applicants be entitled to represent the body. *Rex v. Witham Savings Bank*, 3 Law J. (n.s.) M.C. 85, s. c. 1 Ad. & E. 321; 3 N. & M. 416.

## SCHOOL AND SCHOOLMASTER.

The vicar of a parish cannot recover the school house by ejectment, although it may have been built on what is evidently part of the churchyard, if it appear that the house was built on the site of a very old school house, the site of which might have been granted before the disabling statutes; but if part of the house is built on ground taken from the churchyard recently, the vicar may recover that part. *Doe d. Coyle v. Cole*, 6 C. & P. 389. [Fatteson]

The master of an ancient endowed school is entitled to the school house, unless he has been in due manner removed from his office by those having authority to do so. The neglecting of the scholars would be a good ground of removal. *Ibid.*

In ejectment against a schoolmaster who has been removed by sentences of the trustees of the school for misbehaviour, it is not necessary for the lessors of the plaintiff to prove the grounds of the sentence, nor can the defendant disprove them.

The defendant may give in evidence the declarations of a former trustee who signed the sentence, and who is since dead, for the purpose of shewing that his signature was corruptly obtained.



Where the constables of a township are (amongst others) made trustees of a school, in ejectment by the trustees against the schoolmaster, it is sufficient to shew that the constable acted as such, without proving his election and swearing in. *Doe d. Davy v. Haddon*, 3 Doug. 310.

By letters patent, giving licence to A to found a grammar school, in Brentwood, to consist of a master and two guardians, it was granted to the said A and J his wife, and the heirs of the said A, that the said A, during his life, and the said J his wife, during her life (if she should survive), and after their decease, the heirs of the said A, and the heirs of the same heirs, should be the undoubted patrons; and that all and singular the masters of the said school should be named and perfected by the free disposition of the said A, during his life, and of the said J, during her life, and after their decease, by the free disposition of the heirs of the said A, and the heirs of the same heirs—the same of the wardens:—Held, that the right of appointing the schoolmaster and wardens, given by these letters patent, was alienable. *The Attorney General v. Master and Wardens of Brentwood School*, 1 Law J. (N.S.) K.B. 57, s. c. 8 B. & Ad. 59.

#### SCILLY,

Duly appointed persons authorized to act as Justices of the Peace in the islands of. 4 & 5 Will. 4, c. 43; 12 Law J. Stat. 72.

#### SCIRE FACIAS.

[See BAIL, Proceedings against—WARRANT OF ATTORNEY, Judgment.]

Upon a motion to revive a judgment by *scire facias*, the validity of the judgment cannot be impeached for the purpose of opposing that motion, but a separate application must be made to set aside the judgment. *Thomas v. Williams*, 4 Law J. (N.S.) Exch. 184, s. c. 3 Dowl. P.C. 655.

If a plaintiff issues a second *scire facias* on one judgment, and in the declaration on such second *scire facias* he misrecites the proceedings on the prior one, he may abandon that, amend, and proceed on the original judgment. *Kloss v. Dodd*, 4 Dowl. P.C. 67.

It is not necessary for a party in a *scire facias* to return the demurrer book; and therefore judgment signed for not returning it is irregular. *Baylis v. Hayward*, 3 Dowl. P.C. 533.

Plaintiff's attorneys gave defendant's attorneys their own undertaking as security for costs: the defendant obtained a verdict, and died, and judgment was entered up in his name within two terms:—Held, that the attorney for such deceased party, having a claim against his estate in respect of the costs, might enforce the security, to satisfy such claims, without any *scire facias* having been sued out by the personal representatives. *Chauvel v. Chimell*, 4 B. & Ad. 590, s. c. 1 N. & M. 731.

Where a *scire facias* is unnecessarily sued out, but the defendant's attorney, on his behalf, propose

terms of compromise, on which the party for a time acts, the defendant cannot afterwards object to pay the costs of the *scire facias*. *Brewster v. Meaks*, 2 Dowl. P.C. 612.

The plaintiff in his declaration stated, that he brought his certain bill into court against the defendants, in a plea of debt upon recognizance, the tenor of which said writ followed in these words, that is to say, "Middlesex, to wit. Be it remembered, that a writ of his present Majesty, under the seal of his Exchequer, issued in these words"—proceeding according to the usual form of a declaration on an *alias scire facias* against bail. The defendants pleaded no *copias ad satisfaciendum* against the principal:—Held, on demurrer to a subsequent part of the pleadings, that the introductory part of the declaration preceding the words "Be it remembered," might be rejected as surplusage, as the defendants, in pleading over, had treated the *scire facias* as good and valid. *Darling v. Gurney*, 3 Law J. (N.S.) Exch. 3, s. c. 2 C. & M. 226; 4 Tyr. 2.

Where the defendant has been summoned, judgment may be signed after the return of *scire feci*, without an application to the Court. *Anonymous*, 3 Law J. (N.S.) Exch. 54.

The Court will not give leave to sign judgment in *scire facias* on two *nilhils* returned, unless it appears, that attempts have been made to give the party notice. *Sabine v. Field*, 2 Law J. (N.S.) Exch. 172, s. c. 1 C. & M. 466; 3 Tyr. 388.

The rule to produce the record on a plea of *nil tiel record*, to a declaration in *scire facias*, on a judgment recovered, is a four-day rule; and, although the plea is merely for delay, judgment obtained upon a two-day rule will be set aside for irregularity. *Wood v. Frost*, 3 Law J. (N.S.) C.P. 264, s. c. 4 Mo. & Sc. 746.

A patent was granted to the plaintiff for certain machinery in the year 1824. In March, 1832, the Vice Chancellor made an order for the trial of the plaintiff's right in an action in the Court of Common Pleas. A verdict in that action being found for the plaintiff, and a rule *nisi* having been granted for entering a nonsuit, or for a new trial, on the ground of supposed invalidity of the patent by reason of an insufficient specification, and that rule being ready for argument, the defendant obtained a *scire facias* to repeal the patent. The Court refused to postpone the discussion upon the rule, until after the decision of the Court of King's Bench upon the *scire facias*. *Haworth v. Hardcastle*, 3 Law J. (N.S.) C.P. 311, s. c. 10 Bing. 551; 4 Mo. & Sc. 448.

#### SCRIVENER.

A scrivener is one who lends out money for others on commission. *Yeo v. Allen*, 3 Doug. 214.

#### SCOTCH LAW.

[See ARREST—HEIR—FIRE.]

## SCOTCH ROADS IN THE HIGHLANDS,

Amendment of acts for maintaining and repairing.  
3 & 4 Will. 4, c. 33; 11 Law J. Stat. 85.

## SCOTCH PEER.

Defendant having voted at the election of Scotch peers,—held, as a Scotch peer, entitled to be discharged from arrest, although his vote had been protested against, his claim to the title disputed, and never recognized by the House of Lords or at court. *Digby v. Lord Stirling*, 8 Bing. 55, s.c. 1 Mo. & Sc. 116.

## SEAMEN.

[See MERCHANT SERVICE.]

Seamen's wages, (in merchant service)—continuance of 59 Geo. 4, c. 58, for facilitating the recovery of. 3 & 4 Will. 4, c. 88; 11 Law J. Stat. 173.

Seamen's Hospital Society, incorporation of, &c. 3 Will. 4, c. 9; 11 Law J. Stat. 29.

## SEA SHORE.

[See CORPORATION, Rights, Liabilities, and Disabilities—Custom.]

Land down to high-water mark on the sea shore will be presumed to belong to the owner of the adjoining land, until the contrary appear. *Lowe v. Gossett*, 1 Law J. (N.S.) K.B. 224, s.c. 3 B. & Ad. 803.

## SECURITIES

Upon considerations arising out of gambling, usurious, and other illegal transactions; laws relating to, amended. 5 & 6 Will. 4, c. 41; 13 Law J. Stat. 72.

## SEDUCTION.

No action will lie for debauching a daughter, though the mother maintained her and her child during her lying-in, unless on the ground of the loss of service. *Satterthwaite v. Deuherst*, 4 Doug. 818.

## SEISIN.

[See LAND TAX.]

A person's being assessed to the land tax for certain lands, is not evidence of his seisin of those lands.

If a person is seen felling timber in a wood, it is *prima facie* evidence that he is the owner of it; and, therefore, anything he says at that or any other time as to any one else being the owner of it, is evidence. *Doe d. Stansbury v. Arkwright*, 5 C. & B. 270, [Parker]

## SEPARATE ESTATE.

[See HANON AND FEME.]

## SEPARATISTS

Allowed to affirm instead of taking an oath. 3 & 4 Will. 4, c. 82; 11 Law J. Stat. 154.

## SEQUESTRATION.

[See INSOLVENT—OUTLAWRY—ANNUITY—BENEFICE.]

A defendant has no right to have a writ of *levari facias de bonis ecclesiasticis* returned, but may have a return of the amount of profits received by the sequestrator. *Hart v. Vollans*, 1 Dowl. P.C. 434.

Upon an outlawry on mesne process, the sheriff, to a *capias utlagatum*, returned, that the defendant was a beneficed clergyman, having no lay fee, but that he was rector of a rectory. The Court, upon motion, ordered a writ of sequestration to be issued to the bishop. *Rex v. Armstrong*, 3 Dowl. P.C. 760.

A warrant of attorney is void within the statute 13 Eliz. c. 20, when it appears, upon the face of it, to have been given with the intent to charge a benefice.

Thus, where on the defeasance of the warrant of attorney, it was provided, that, in case of any arrear of the annuity, it should be lawful to sue out such executions as the party thought fit, and also to sequester the said rectory:—Held, that such warrant of attorney and judgment thereon, were void within the statute. *Saltmarsh v. Hewett*, *Shrine v. the same*, 3 Law J. (N.S.) K.B. 188, s.c. 1 Ad. & E. 812; 3 N. & M. 656.

Under a writ of sequestration, arrears of tithes cannot be taken by the sequestrator; and, therefore, where a rector commenced actions against his parishioners, for non-payment of his tithes, and some time afterwards his assignees, under an adjudication of the Insolvent Debtors Court, obtained a sequestration against his benefice, it was held, that they could not by virtue of their sequestration claim the arrears so sued for by him; but that he was entitled to those arrears.

A writ of *levari facias*, left with the bishop's registrar, gives no title, even against the rector, until sequestration issues and is published. *Wait v. Bishop*, 4 Law J. (N.S.) Exch. 50, s.c. 1 C. M. & R. 597; 5 Tyr. 90.

## SERJEANT'S SIGNATURE.

[See PRACTICE, Pleas.]

## SERVANT.

[See ACTION—MASTER AND SERVANT—POOR, Settlement.]

Testator gives a year's wages to all his servants:—Held, not to extend to servants employed for a year and paid weekly. *Booth v. Dean*, 2 Law J. (N.S.) Chanc. 162, s.c. 1 M. & K. 560.

## SESSION, IN SCOTLAND,

Provisions for carrying on the business of, upon the death or absence of Judges. 2 Will. 4, c. 5; 10 Law J. Stat. 11.

## SESSIONS.

[See APPEAL—CERTIORARI—HIGHWAY, Surveyors—MANDAMUS—POOR, Removal.]

(A) JURISDICTION.

(B) APPEAL AND PRACTICE UPON.

(C) SPECIAL CASE FROM.

## (A) JURISDICTION.

Prevention of interference of Quarter Sessions with the Assizes. See 4 & 5 Will. 4, c. 47; 12 Law J. Stat. 78.

The Justices of Middlesex, in addition to the four quarter and four general sessions which they have been previously in the habit of holding, appointed other original intermediate sessions:—Held, that they had a right to do so, and that an indictment found at one of such additional sessions was valid in point of law. *Rez v. Mullaney*, 6 C. & P. 96.

By the 14th section of 5 Geo. 4, c. 83, any person aggrieved by any act of Justices, &c. may appeal to the next General or Quarter Sessions, &c., and the Court, at such General or Quarter Sessions, shall hear and determine the matter of such appeal, &c., and in case of affirmance of the conviction shall issue the necessary process for the apprehension and punishment of the offender, according to the conviction:—Held, that the Court at such General Quarter Sessions, had reference to the description of the Court, and not to the component parts thereof; and that, when the Quarter Sessions upon appeal had confirmed the conviction, subject to a case, and the conviction had been sent down to a subsequent sessions with a *procedendo*, the Court at such subsequent sessions had jurisdiction to award process of commitment. *Rez v. the Justices of Warwickshire*, 4 Law J. (N.S.) M.C. 62, s. c. 4 N. & M. 370; 2 Ad. & E. 768.

Where there has been a wrongful distress for poor-rates, the application to the Sessions, under the 41 Geo. 3, c. 23, s. 3, for the refunding of the money obtained by such wrongful distress, must be made at the same sessions at which the rate is amended and reduced. *Rez v. the Justices of St. Peter's Liberty, York*, 2 Law J. (N.S.) M.C. 46, s. c. 4 B. & Ad. 342.

## (B) APPEAL AND PRACTICE UPON.

In case of appeals against orders of removal, the overseer of the parish to which the pauper is to be removed is to have access to him, grounds of appeal are to be stated in the notice, the losing parish is to pay such costs as the Court may direct, and the parishes respectively to pay costs for frivolous or vexatious grounds, included in the order or statement. 4 & 5 Will. 4, c. 76, s. 80, 81, 82, 83; (Poor Law Amendment Act,) 12 Law J. Stat. App. xvii.

The 9 Geo. 1, c. 7, s. 8, only applies to the first sessions after executing the order of removal; and therefore, the Court will not interfere with the discretion of the Magistrates at the second as to adjournment, if it is in furtherance of a reasonable practice. *Rez v. the Justices of Monmouthshire*, 3 Dowl. P.C. 306.

Where an appeal against poor-rate has been en-

tered and abandoned, the respondents are entitled to costs, under the 17 Geo. 3, c. 38, s. 4, up to the time of abandonment. It is a good practice for the clerk of the peace to ascertain the amount of the costs in such cases. *Ex parte Holloway*, 1 Dowl. P.C. 26.

Where an order of Sessions quashes an order of removal for informality, without stating that it is for informality, upon the face of the order:—Held, that it must be intended to mean for some cause not determining the merits, and not necessarily for informality, in the strict legal sense of that term.

The Court of Quarter Sessions have authority under 8 & 9 Will. 3, c. 30, s. 3, to give costs, on quashing an order of removal for informality. *Rez v. Cottingham*, 4 Law J. (N.S.) M.C. 6, s. c. 2 Ad. & E. 250; 4 N. & M. 215.

Upon the trial of an indictment at the Quarter Sessions, that Court is the sole judge of the propriety of the entry of the verdict. Where, therefore, upon a special finding by the jury, amounting to an acquittal, the chairman directs a verdict of guilty to be entered, the Court of King's Bench will not grant a mandamus requiring the minute of the verdict to be altered according to the fact. The only course open to the prisoner is to apply to the Crown for a pardon. *Rez v. the Justices of Suffolk*, 6 Law J. (N.S.) M.C. 37, s. c. 5 N. & M. 139.

An appeal, intended to be against the accounts of overseers, was entered at Sessions as an appeal against the churchwardens and overseers in respect of the accounts of the overseers. Notice of the appeal was given to the overseers only, being the parties against whom it was really directed. The Sessions refused to hear the appeal, because notice had not been given to the churchwardens. But the Court directed a mandamus, commanding them to hear the appeal. *Rez v. the Justices of Norfolk*, 1 Law J. (N.S.) M.C. 12, s. c. 2 B. & Ad. 944.

Where an appeal is respite on payment of costs by the respondents, the order of the Court made at that sessions is sufficient evidence, at the next sessions, that the parties were properly before the Court, so as to dispense with proof of notice of appeal. *Rez v. the Justices of Hertford*, 2 Law J. (N.S.) M.C. 41, s. c. 4 B. & Ad. 561; 1 N. & M. 331.

Removal to the parish of L, which, in fact, consisted of three different hamlets, each having churchwardens and overseers, and separate rates. The order, with the paupers, was delivered to the churchwardens and overseers of one of the hamlets. An appeal was entered at the next sessions, in the name of the parish at large. Notice of the appeal was given, but in the notice, it was described as an appeal against an order, by which the paupers were removed to the hamlet. The Sessions held the notice to be insufficient:—Held, that they were wrong; and mandamus directed, commanding them to hear it. *Rez v. the Justices of Carmarthen*, 2 Law J. (N.S.) M.C. 42, s. c. 4 B. & Ad. 563; 1 N. & M. 368.

An appeal clause in a local parish act, provided that a party aggrieved by any rate, &c. should give notice of appeal, and enter into a recognizance, conditioned to prosecute the appeal.

Under the authority of that act, a rate was made upon the trustees of a local road act, describing

them as trustees. They, by a section in their act, were empowered to take legal proceedings in the name of any one of their body. At a meeting of the body, it was resolved to appeal against the above rate; one of the body, therefore, gave a notice of appeal in his own name, on behalf of the rest, and entered into a recognisance, with sureties, conditioned that he or the trustees should prosecute the appeal:—Held, that the notice and recognisance were sufficient. *Rez v. the Justices of Surrey*, 2 Law J. (N.S.) M.C. 76.

Notice of appeal against an order of Justices, for diverting a footway, under the 55 Geo. 3, c. 68, need not state, in express terms, that the person intending to appeal is a party aggrieved. If he state facts, (e.g. that he and his tenants will be obliged to take a more circuitous road,) from which his being a party aggrieved must necessarily be inferred, it will be sufficient.

Such notice to be served ten days before the sessions, means one day inclusive, and one day exclusive; thus, the 25th of June, for the 5th of July, will suffice.

A rule of that Court of Quarter Sessions, as to the time of service of notice, or the mode of computation, cannot affect the time in cases pointed out by law. *Rez v. the Justices of the West Riding of Yorkshire*, 2 Law J. (N.S.) M.C. 98, s.c. 4 B. & Ad. 685; 1 N. & M. 426.

Where, after regular notice of appeal, the hearing is adjourned to the next sessions, on the application of the appellants, opposed by the respondents, a second notice for the next sessions, in strict compliance with a rule of sessions, requiring notice on all trials of appeal, and the like notice, in the case of respited appeals, is unnecessary. *Rez v. the Justices of Gloucestershire*, 4 Law J. (N.S.) M.C. 103, s.c. 3 Dowl. P.C. 298.

#### (C) SPECIAL CASE FROM.

[See *Rez v. Norton Bavant*, 4 Law J. (N.S.) M.C. 86, s.c. 3 Ad. & E. 161, as to the conclusiveness of the case upon matters of fact.]

Where fraud is not expressly found by the Sessions, the Court of King's Bench cannot infer it from any state of facts. But in a case where the facts stated were such as to render it almost certain that the decision of the Justices at the sessions must have proceeded on the ground of fraud, the Court sent back the case to be re-stated. *Rez v. the Inhabitants of Llanfhaenger Abercromlin*, 4 N. & M. 355.

In general, the Court will not order a mandamus to the Justices at sessions, calling upon them to state a special case; but *semble*, that such a mandamus *habeas*, in an extreme instance, been ordered. *Rez v. the Justices of Pembrokeshire*, 1 Law J. (N.S.) M.C. 92, s.c. 2 B. & Ad. 391.

The Court of King's Bench will not enter into the question of the legality or illegality of items of *overseers'* accounts which have been confirmed by an order of Sessions, unless it appear upon the face of the order what accounts were allowed. A reference in the order to the notices of the grounds of appeal, is not sufficient to enable this Court to go into that inquiry. *Rez v. Oakes*, 3 Law J. (N.S.) M.C. 78.

### SET-OFF.

[See BANKRUPT—EXECUTOR.]

- (A) WHERE ALLOWED, IN GENERAL.
- (B) COSTS AND JUDGMENTS.
- (C) PLEADINGS AND EVIDENCE.

#### (A) WHERE ALLOWED, IN GENERAL.

A rented land of B, who was trustee of certain property, (a part of which was this land,) the rents of which B was to pay in certain shares; one of those shares belonged to the wife of A. B had in his hands a greater amount due to A in the right of his wife than the rent amounted to:—Held, that this could not be set off against the rent without a special agreement to that effect. *Willson v. Desport*, 5 C. & P. 581. [Parks]

The defendant and one Cox purchased a string of pearls with money advanced by the defendant, and agreed that the profit and loss thereon should be equally divided, Cox paying his share of interest till the pearls were sold. Cox became bankrupt, being indebted at that time to the defendant. The pearls were afterwards sold, and the money was received by the defendant. In action by the assignees of Cox for his share of the money received, it was held, that the defendant was entitled to set off the debt due from Cox to himself, this being a case of mutual credit within the statute 5 Geo. 2, c. 38, s. 28. *French v. Penn*, 3 Doug. 257.

A and B are bankers in Scotland, issuing bank notes, and having agents in London respectively; in the course of business the bankers interchanged their notes at stated periods, and he in whose favour the balance was, received a draft at ten days upon the London agent. Upon the 24th of December 1831, an interchange of notes took place between the two houses, when a balance was found in favour of A of 760*l.*, for which he received a bill on London at ten days, and which he indorsed to the defendants, to become due on the 6th of January: on the 30th of December a similar interchange took place, when a balance of 1,000*l.* was in favour of B, for which he received the usual bill on the defendants, to become due on the 12th of January; upon the 2nd of January B stops payment, and is bankrupt; his bill for 760*l.*, of which the defendants were the holders and indorsees, was presented on the 6th, and dishonoured; the defendants, on the next day, the 7th, return the bill to their indorsers under protest, with a receipt, and appropriate to its discharge a certain portion of the cash balances of the indorsers in their hands. The latter, upon the 10th of January, return the bill to the defendants, for the purpose of having it set off by them against the acceptance of 1,000*l.*, to fall due on the 12th of January:—Held, that the defendants had no such right of set-off, inasmuch as they, by returning the bill on the 7th, under protest, with a receipt, and by the appropriation of other funds to its discharge, had ceased to be its legal owners; that they held it merely as trustees for the indorsers; and that the transaction as to the bill between the defendants and the indorsers was closed. *Belcher v. Jones*, 3 Law J. (N.S.) C.P. 39, s.c. 10 Bing. 310; 3 Mo. & Sc. 822.

*Quere*, as to the effect of payment and acceptance of a debt, after making it the subject of a plea or notice of set-off.

Where the plaintiff brought an action for a debt, and to a subsequent action by the defendant gave a notice of set-off for that debt, and the plaintiff's attorney received the whole amount of debt and costs in the first action, under a protest against receiving the sum demanded in the second action:—Held, that the proper question to consider was, whether at the time of the commencement of the second action the plaintiff therein had an available demand. *Jackson v. Godard*, 2 Law J. (n.s.) Exch. 42, s.c. 1 C. & M. 46.

A debt due from a *custui que trust* to the defendant, cannot be set off against the demand by the trustee of such *custui que trust*, suing for his benefit; therefore, in an action for debt on bond by the plaintiff, as executor of G T, who was trustee in the bond for S T against the defendant as executrix of C T, a debt due from S T, the *custui que trust*, to C T, as executrix of W T, is not the subject-matter of set-off within the statute 2 Geo. 2, c. 22, s. 13. *Tucker v. Tucker*, 2 Law J. (n.s.) K.B. 148, s.c. 1 N. & M. 477; 4 B. & Ad. 745.

Plaintiff gave defendant a bill of exchange for 844 4s. and a sum of 131. 16s., to be paid over by him to one T W in discharge of a debt due from the plaintiff to the latter, and they were received by the defendant for that purpose, but were not paid over to T W:—Held, that, in an action for money had and received, the defendant was entitled to set off a sum of money due from the plaintiff to him. The plaintiff should have brought trover for the bill, or a special action for not paying over to T W; as, by bringing money had and received, he confirmed the contract, and let in all the consequences. *Thorpe v. Thorpe*, 1 Law J. (n.s.) K.B. 170, s.c. 3 B. & Ad. 589.

A, as agent for various persons, (but not receiving a *del credere* commission,) effected various insurances for his principals with B, an underwriter, upon which insurances various losses and returns of premium were due. B having become bankrupt, —Held, that in an action by his assignees against A for the amount of premiums, the latter could not set off the amount of the losses, or of the returns of premium. *Wilson v. Creighton*, 3 Doug. 132.

#### (B) COSTS AND JUDGMENTS.

Costs in Chancery cannot be set off against costs on a rule of the Court of King's Bench. *Whitlam v. Fowle*, 2 Dowl. P.C. 444.

A judgment recovered after action brought, and before plea pleaded, is a good set-off. *Reynolds v. Beering*, 4 Doug. 181.

Administrator compelled to allow the set-off of a judgment of the intestate in the Court of Common Pleas against a judgment of the defendant to a larger amount in the Court of King's Bench, although ejectments were pending upon an elegit issued by the administrator, no real satisfaction having been obtained. Judgment upon a verdict obtained in the lifetime of the defendant, entered up more than two terms after the defendant's death, where the Court delayed hearing a rule for reduction of damages, held good at common law. *Bridges v. Smyth*, 1 Law J. (n.s.) C.P. 83, s.c. 8 Bing. 29; 1 Mo. & Sc. 93.

Judgment creditor not allowed to set off his judgment, against the costs of an unsuccessful action against the sheriff for returning *nulla bona* to a *fi. fa.*, issued on that judgment, although the sheriff was indemnified by the trustees, to whom the debtor had conveyed all his property, in trust for his creditors. *Hewitt v. Pigott*, 1 Law J. (n.s.) C.P. 48, s.c. 8 Bing. 61; 1 Mo. & Sc. 122.

The rule Hil. 2 Will. 4, No. 83, which prevents a set-off of costs to defeat the lien of the plaintiff's attorney, does not apply to restrain the Master from deducting the costs of the issues found for the defendant from those found for the plaintiff, and allowing the balance only, according to No. 74. *Eades v. Everett*, 4 Law J. (n.s.) Exch. 221.

The plaintiff brought an action against the three defendants, and obtained a verdict with damages against one, and failed against the other two. He also had commenced an action against the two latter, but suffered himself to be non-pressed. Upon a rule calling upon the Prothonotary to set off the costs of the two defendants in the action in which they obtained a verdict, and also their costs in the other action in which the plaintiff was non-pressed, against the verdict obtained by the plaintiff against the second defendant in the former action:—Held, that the set-off should be allowed in the action in which the same parties were defendants, but not in the second, in which they were different.

*Semble*, the 93rd rule Hil. term, 2 Will. 4, refers to a set-off claimed in different actions. *George v. Bliston*, 4 Law J. (n.s.) C.P. 167, s.c. 1 Bing. N.C. 513; 1 Sc. 518.

In an action for an assault against two defendants, they agreed to consolidate the costs. One let judgment go by default, and the other pleaded. After a verdict for the latter, and 1s. damages against the former, the Court allowed the costs to be set off. *Cawthorne v. Thompson*, 3 Doug. 431.

Where one judgment is set off against another, the lien of an attorney does not extend beyond his costs in the particular matter. *Watson v. Maskell*, 1 Bing. N.C. 366.

Interlocutory costs may be set off against final costs, subject to the attorney's lien. *Doe d. Hope v. Carter*, 1 Dowl. P.C. 269.

Where, in trespass against A and B, the verdict is for A, and against B, the costs of A may be set off against the costs payable by B, without regard to the lien of the plaintiff's attorney, although A and B pleaded separately, and appeared by separate attorney and counsel. *Lees v. Kendall*, 5 N. & M. 340.

The Court refused to allow the costs of a cause in another court, in which the plaintiff had been nonsuited, to be set off against costs imposed by way of penalty upon the attorney for the defendant in this cause, for which costs an attachment had issued. *Dicas v. Waine*, 1 Sc. 384.

L sued K and R in trespass; they severd in their defences, and appeared by different counsel and attorneys; the verdict was for L against K, and for R against L:—Held, that R's costs were to be set off against the damages and costs recovered by L against K, and that the lien of K's attorney upon such damages and costs was so far defeated. *Lees v. Refill*, 3 Ad. & E. 707.

No set-off of judgments will be allowed, even though they arise out of the same award, without

satisfying the attorney's lien. *Domett v. Heyler*, 2 Dowl. P.C. 540.

Interlocutory costs may be set off against final costs, where the payment of them at the time they are adjudged, is not strictly a condition precedent to ulterior proceedings, subject to the attorney's lien, if any. *Doe d. Hope v. Carter*, 1 Law J. (N.S.) C.P. 97, s.c. 8 Bing. 330; 1 Mo. & Sc. 516.

By an order of Nisi Prius, it was ordered, that a verdict should be entered for the plaintiff, with nominal damages, and the plaintiff having by the order agreed to pay the defendant 70*l.*, the Court allowed that sum to be set off against the taxed costs on the plaintiff's judgment. *Newton v. Newton*, 1 Law J. (N.S.) C.P. 79, s.c. 1 Mo. & Sc. 366; 8 Bing. 202.

#### (C) PLEADINGS AND EVIDENCE.

[See PAYMENT, Plea of.]

It is no answer to a plea of set-off on a judgment recovered, that plaintiff has brought a writ of error to reverse the judgment which is still pending.

If the plaintiff, in making up the record, makes the time of plea pleaded appear posterior to the date of the subject-matter pleaded, when it was not so in fact, the Court will direct an amendment at plaintiff's cost if he resists. *Reynolds v. Buring*, 4 Doug. 181.

If the defendant plead the general issue and another plea, he cannot give evidence of a set-off under a notice, but must plead the set-off. *Duncan v. Grant*, 3 Law J. (N.S.) Exch. 341, s.c. 1 C. M. & R. 383; 4 Tyr. 818.

On a plea of set-off, the plaintiff need not, in the first instance, prove the whole of his demand, but after the defendant has proved his set-off, is at liberty to give evidence of the parts of his demand to meet the set-off. *Williams v. Davies*, 2 Law J. (N.S.) Exch. 102, s.c. 1 C. & M. 464; 3 Tyr. 383.

#### SETTLEMENT, MARRIAGE.

[See DOUBLE PROVISION—FOREIGN LAW—PORTION.]

- (A) IN GENERAL.
- (B) VALIDITY OF.
- (C) CONSTRUCTION OF.

##### (A) IN GENERAL.

The settlement of a sum of money on a wife, expressed to be by way of jointure, and in lieu of dower and thirds at common law, will not exclude the wife from her distributive share of the undisposed of personal estate of her husband. *Colleton v. Garth*, 2 Law J. (N.S.) Chanc. 75, s.c. 6 Sim. 19.

A feme sole, without any intention of marriage, or other consideration, transfers money in the funds to trustees, and declares the trusts for herself, and any future husband and her children:—Held, that such settlement cannot afterwards be revoked by the settlor, though she remains unmarried. *Bill v. Cureton*, 4 Law J. (N.S.) Chanc. 98, s.c. 2 M. & K. 503.

By the settlement on the second marriage of A, his intended wife's father settled estates on himself

for life, remainder for the separate use of his daughter for life, remainder for the children of the marriage; and the trustees were directed to apply the rents, after the death of the survivor of the tenants for life, in the maintenance and education of the children during their minorities; and A covenanted to permit his intended wife to enjoy any future property that might accrue to her, for her separate use; and her father covenanted, that all the personal property he should die possessed of, should be settled on his daughter and her children, in the same manner as the property comprised in the settlement, subject to any other dispositions, qualification, or charges, that he might make by his will. The father died, having bequeathed his residuary estate to A, and appointed him his executor. A entered into possession of the settled estates, and received the rents, and mixed them with his own monies. There was issue of the marriage two children. A maintained them at his own expense; and died, having, by his will, given them benefits in real estates, which, it was alleged, he had purchased, in part, with the rents of the settled estates:—Held, that A was a purchaser of the trust for the maintenance and education of the children, and that his executors were entitled to be allowed, in account, the sums which it would have been proper to apply for those purposes: that the covenant, by the father of the wife, was a provision against intestacy only: that the sums due from A to his children, being a debt, were not satisfied by the benefits given them by his will; but an inquiry was directed as to what part of the real estates, devised for their benefit, had been purchased by A out of the rents of the settled estates. *Stocken v. Stocken*, 4 Sim. 152.

By marriage articles, it was agreed, that estates should be settled in strict settlement, and that there should be contained, in the settlement, powers to the husband to charge the estates, by way of mortgage, with a certain sum, and also to charge the estates with another sum for younger children, and to create terms for raising those sums, and likewise all other powers, &c. usually inserted in settlements of the like nature, and which should be proper for effecting any of the purposes aforesaid:—Held, that a power of sale and exchange might be introduced into the settlement. *Hill v. Hill*, 6 Sim. 136.

By a marriage settlement, an annuity for the life of the wife's mother was assigned to trustees for the wife for life, remainder for the husband for life, remainder for the issue of the marriage; provided, that, if the husband should, during the life of the wife, or of her mother, become bankrupt, compound with, or assign his effects, for the benefit of his creditors, or should do any act with a view to charge the annuity, his interest should be for the benefit of the issue. The husband, after his wife's death, sold an annuity to one of the trustees of the settlement, and signed an unstamped agreement to deposit the settlement with him, and authorizing him to retain the annuity so sold out of the settled annuity:—Held, that the husband had forfeited his interest in the settled annuity. *Stephens v. James*, 4 Sim. 499.

Settlement (after marriage) in 1745, to husband and wife for life, remainder to issue in strict settlement, remainder to husband in fee. In 1756, the widow, and the only surviving daughter of the marriage, with her husband, made a settlement which

covered the whole fee, levying a fine "to bar estates tail," and declaring uses. The present vendor claimed the fee thereunder:—Held, that the daughter must be presumed to have known her own title; and, as she could by a recovery have barred the reversion, it must be presumed that she would have done so if not vested in herself; and, consequently, it must be presumed that she was entitled to the reversion as the general heir of her father.

*Quere* (but for that presumption) whether the title would have been marketable—it not being shewn whether the original settlor had a general heir by any previous marriage, nor whether he died intestate; to obtain which information, the vendor had used reasonable endeavours without success. *Lapham v. Pike*, 1 Law J. (N.S.) Chanc. 10.

Settlement by A, of stock, to himself for life; remainder, in case his natural daughter married with his consent, under hand and seal and attested, to her absolutely; but, if not, then to her separate use for life, with remainder to her children. Power of revocation. The daughter went out to India, and was married there very soon after, without any formal consent appearing to have been given. A, however, received and always treated the husband with the greatest cordiality as his son-in-law. A induced the trustees to sell the stock and pay him the money, giving them an acknowledgment, in which he stated, that he had so done at the request of his son-in-law, in order that Bengal interest (12½ per cent.), instead of English, might be made; and that the money was to be put out upon the like trusts, calling it his daughter's stock, and making his assets accountable for the amount. Nothing further appeared to have been done relative to the money. Some years afterwards he settled real property in Calcutta upon his daughter and her family.

Held, 1st, that the transaction relative to the selling out of the stock did not amount to a virtual revocation of the settlement.

2ndly, that it was not to be presumed that A remitted the proceeds of the stock to his daughter and her husband at Bengal.

3rdly, that the subsequent settlement was not to be deemed a satisfaction for the former; but that both were available.

4thly, that a formal consent to the marriage was not necessary, and that a substantial consent was to be presumed from the behaviour of A towards his son-in-law and daughter.

Costs—how ordered. See the end of the judgment. *Blackwell v. Wood*, 1 Law J. (N.S.) Chanc. 35.

#### (B) VALIDITY OF.

In a marriage settlement, where part of the trust fund consists of the wife's fortune, a limitation to the husband until bankruptcy, and, upon that event, for the benefit of the wife and children, is valid to the extent of the wife's proportion of the fund. *Lester v. Garland*, Mont. 471.

*Semble*, that a limitation in a settlement "to the executors and administrators of A, for their own use and benefit," unconnected with any other limitation shewing more specifically who are to take, is void for uncertainty. *Marshall v. Collett*, 1 Y. & C. 232.

#### (C) CONSTRUCTION OF.

A marriage being about to be solemnized between T H and A H, it was provided by the marriage settlement, that certain lands should be settled in tail male upon the person who, at the death of T H, should be the second son then living of T H and A H, and, in case of default of issue answering such description, to the third, fourth, &c., other than and excepting the eldest, in like manner; and for default of such issue as aforesaid, and in case there should be two or more daughters of T H and A H, then to the use of all and every such daughter, and the heirs of their several and respective bodies, &c. to take as tenants in common, not as joint tenants; but, in case there should be only one son of T H and A H, then to the use of that eldest or only son, and the heirs of his body; for default of such issue, to the use of T H, his heirs and assigns for ever. T H, the immediate object of the deed of settlement, died in 1766, leaving four sons: Philip, who died in 1770, an infant, without issue; Christopher, who died in 1829, without issue; Thomas, who died in 1783, without issue; and John, the defendant in this suit:—Held, upon a case sent by the Vice Chancellor for the opinion of the Court, that John, under the circumstances which occurred, took an estate tail under the settlement. *Hawkins v. Hawkins*, 2 Law J. (N.S.) C.P. 154, s.c. 9 Bing. 765; 3 Mo. & Sc. 322.

A deed of settlement executed, may be construed according to the intent of the parties, to be collected from the recitals and provisions of the deed. *Lester v. Garland*, Mont. 471.

By a marriage settlement, money and stock were assigned to trustees, in trust to receive the income during the life of the lady, and pay the same to her for her separate use, or as she should appoint, notwithstanding her coverture, but no payment to be made by anticipation; and it was declared, that the income should not be subject to the debts, &c. of R G, her intended husband; and after her decease, in case he should survive, in trust to permit him to receive the income for his life, &c. The husband died in the lifetime of his wife, and she married again:—Held, that the provision for the separate use of the lady, without anticipation, was confined to the first marriage. *Knight v. Knight*, 6 Sim. 121. And see ANTICIPATION.

By a marriage settlement, stock was assigned to trustees, upon trust to pay the interest and dividends to the husband for life, and in case he should survive the wife, upon trust to transfer the said stock to the husband, "his executors, administrators, or assigns, to and for his or their own use and benefit;" but in case the wife should survive the husband, upon trust during her life to pay the interest and dividends as she should appoint, and after her decease, upon trust to transfer the stock, "unto the executors, or administrators, of the said G M (the husband), to and for their own use and benefit." The wife survived the husband, and took out administration of his effects, and claimed an absolute interest in the whole corpus of the stock:—Held, that she was not entitled. *Marshall v. Collett*, 1 Y. & C. 232.

By a Scotch settlement, a sum of stock was settled on the husband and wife for their lives, and,

after the death of the survivor, on their children, and, failing children, on the nearest heirs of the wife; and she was empowered, at any time in her life, and even on her death-bed, to bequeath or dispose of the stock to any person, and in any manner she might think proper:—Held, that the power was not intended to be available, except in the event of there being a failure of children of the marriage. *Peddie v. Peddie*, 6 Sim. 78.

By a marriage settlement estates were limited to the wife and the husband, for their lives, with remainder to the heirs of the husband on the body of the wife, and their heirs, and, if more children than one, equally to be divided amongst them as tenants in common, and for default of such issue, to the wife and her heirs:—Held, that the husband did not take an estate in tail special, but for life only, and that the children took, by purchase, as tenants in common in fee in remainder. *North v. Martin*, 6 Sim. 266.

By a marriage settlement certain lands were conveyed to trustees, to the use of the husband for life, with power of appointment to male issue, remainder to the trustees to preserve contingent remainders, remainder in default of appointment to the sons successively in tail general, remainder to the right heirs of the husband. After the marriage the husband became bankrupt, and his lands were conveyed by the commissioners to his assignees by deeds of bargain and sale, who afterwards sold them subject to the contingencies in the deed of settlement. The husband afterwards executed a deed of appointment to his son in fee, after the determination of his own life estate:—Held, that the son took no estate under the appointment, but that under the marriage settlement he took an estate tail in remainder, expectant on the determination of the life estate of his father. *Badham v. Mee*, 9 Law J. C.P. 213, s.c. 1 Mo. & Sc. 14.

A father, seized in fee, executed a deed of settlement on the marriage of his son, containing the following clause:—"Whereas it is agreed upon by and between the parties to these presents, that the said A J (the father), giveth and settlith upon his said son Griffith J, all and singular the premises, &c. from Michaelmas next for the term of his natural life: and from and immediately after his decease, to the use of the first son of the body of the said Griffith J, on the body of J J (his intended wife) to be lawfully begotten, and so on successively for all and every other son," &c.; and in default of such issue male, the like limitation to the daughters; and for want of such issue, to the use of the settlor's right heirs:—Held, that this clause was not a mere executory agreement, but operated, in law, as a covenant by the settlor to stand seized to the uses declared by the settlement; namely, to the uses of the first and other sons of Griffith J successively for their respective lives. *Doe d. Jones v. Williams*, 5 B. & Ad. 783, s.c. 2 N. & M. 602.

Construction of a clause in a marriage settlement. (See the case and judgment.) A court of equity will not direct payments made under a mistaken construction of a doubtful clause in a settlement to be refunded, after many years of acquiescence by all parties, and after the death of one of the authors of the settlement, especially where subse-

quent family arrangements have proceeded on the footing of that construction. *Clifton v. Cockburn*, 3 M. & K. 76.

Covenant, in a settlement by A, to bequeath to B (his intended wife) all such goods, chattels, plate, and personal estate, of which A should die possessed; or that, if he died intestate, B should take possession, and enjoy all such goods, chattels, plate, and other personal estate—carried the whole personal estate and effects of A, and he could not make any alteration in the quantum of interest of B therein. *Davies v. Davies*, 1 Law J. (N.S.) Chanc. 31.

By a deed of settlement, an estate in fee was conveyed to trustees to the use of the settlor for life, and, in case the wife should survive him, that she should receive an annuity out of the rents and profits, and, subject thereto, that the trustees, and the survivors and survivor of them, and the heirs and assigns of such survivor, should, from time to time, and at all times thereafter, stand possessed of the residue of the rents and profits to the use of all and every the child or children of the settlor's former wife, W D, G D, S D, J D, and E D, and their issue lawfully begotten and to be begotten, equally to be divided between or amongst them in equal shares and proportions, as tenants in common, and not as joint tenants, and his, her, or their respective issue:—Held, that an estate for life, subject to the widow's annuity, passed by the settlement to the settlor's children, named therein, but that no estate passed to any of his grandchildren, born between the date of the settlement and his death, or the after-born grandchildren. *Whewler v. Duke*, 2 Law J. (N.S.) Exch. 32, s.c. 1 C. & M. 210; 3 Tyr. 51.

Issue, construed to mean issue living at the death, under the circumstances.

In settlements, contradictory or conflicting claims afford presumption in favour of a child; in a will, no presumption that any shall take, but those described as takers. *Tucker v. Harris*, 2 Law J. (N.S.) Chanc. 18, s.c. 5 Sim. 588.

A, on the marriage of his daughter, mortgaged certain estates to trustees, to secure 6,000*l.* for the benefit of his daughter, and her issue; and also covenanted to pay that sum:—Held, that the estates comprised in the mortgage were primarily liable to pay the 6,000*l.* *Graves v. Hicks*, 4 Law J. (N.S.) Chanc. 239, s.c. 6 Sim. 391.

On the marriage of the plaintiff with J D property was settled on the plaintiff for life, with subsequent limitations for the benefit of J D and the children of the marriage; but if the plaintiff survived J D, then to her for life, with remainder to the children of any future marriage, as she and her future husband, or the survivor, might appoint, and in default, to the children of the plaintiff equally. It was afterwards provided, that if there should be no child of the plaintiff by J D, or if the children of plaintiff by J D or any other husband should die under twenty-one, &c., then, after the decease of J D, the property should be subject to the power of appointment of the plaintiff, and, in default, to her absolutely. J D died, and there was no issue of the marriage:—Held, that the plaintiff, who was still J D's widow, was absolutely entitled to the property. *Dalton v. Rich*, 4 Law J. (N.S.) Exch. Eq. 57.



A portion was made payable to children at twenty-one, or marriage, whichever should first happen after the death of the parent; but if in his lifetime, then within *three calendar months after his death*; and it was afterwards provided, that if any child should die before his portion should become payable, his share should go to the surviving children: one of the children married, and died in the lifetime of the parent:—Held, that her portion did not go over, but belonged to her administrator. *Wakefield v. De Burgh*, 4 Law J. (N.S.) Chanc. 215.

Trust in a marriage settlement, to raise a sum of money charged on the settled estate, at the end of twelve months from the decease of the survivor of the husband and wife, and to pay the same to the executors or administrators of the wife:—Held, upon the whole scope and context of the instrument, a trust for the next-of-kin of the wife, although she died in the husband's lifetime. *Bulmer v. Jay*, 3 M. & K. 197, s. c. 4 Sim. 48.

By marriage articles, A B covenanted to settle an estate to the use of himself for life, with remainder to his first and other sons in tail; and provided, that if there should be more than one son, then the trustees should raise such sum as A B should by deed or will appoint, to be divided amongst such younger child or children as A B should direct. By a settlement purporting to be made in pursuance of the articles, the estate was settled on A for life, with remainder to such child or children as A B should by deed or will appoint, and, in default of appointment, to his eldest son in fee; and if there should be more than one son, &c. then in trust to raise 140*l.* for such younger children, to be equally divided. A B by his will devised the same estate to his eldest son, charged with the payment of 500*l.* to a younger son:—Held, that under the circumstances, the will operated as an execution of the power, and that the 500*l.* was well charged on the estate. *Tanner v. Babbage*, 4 Law J. (N.S.) Chanc. 101.

Clause in a marriage settlement, that the future property of the wife should be limited upon the trusts of the settlement:—Held, to apply to such property only as should accrue to her during the continuance of the coverture.

Bequest by the wife of 1,000*l.*, "according to the request of her late husband," at a time when she had no property, except what was in settlement, and over which she had a power of appointment:—Held, not to be a sufficient reference to the power to make the will operate as an appointment under the power. *Howell v. Howell*, 4 Law J. (N.S.) Chanc. 242.

Where by marriage settlement, 6,000*l.* was to be raised if there should be one younger child, 8,000*l.* if two, and 10,000*l.* if three or more, to be vested and payable on their attaining twenty-one respectively: though all the children entitled to portions have not attained vested interests, the whole fund will be directed to be raised at once if a sufficient number of children have attained vested interests to make the whole fund raiseable. *Gillibrand v. Gould*, 3 Law J. (N.S.) Chanc. 100, s. c. 5 Sim. 149.

## SETTLEMENT, OF THE POOR.

[See Poor.]

## SEWERS.

[See ACTION—RATE, Sewers Rate.]

Amendment of Laws relating to. 3 Will. 4, c. 22; 11 Law J. Stat. 58.

Commissioners of, empowered to make new sewer at Bayswater. 4 & 5 Will. 4, c. 96; 12 Law J. Stat. 210.

The arching over an old ditch of smaller dimensions than were mentioned in a consent to the making of a sewer in writing, by certain trustees under an act of parliament, was held to be a breach of an enactment, providing that no ditch, drain, or other watercourse should be narrowed, filled up, altered, covered in, or arched over, without the consent of such trustees, nor in any other manner than should be expressed in such consent.

A surveyor who gives directions in the progress of the work of making a sewer, is liable to an action for a penalty inflicted by an act of parliament, upon any person who alters, covers in, or arches over any drain, &c., contrary to the consent of trustees mentioned therein. *Woodward v. Cotton*, 3 Law J. (N.S.) Exch. 300, s. c. 1 C. M. & R. 44; 6 C. & P. 491.

## SHANNON,

Provisions for the improvement of the navigation of the. 5 & 6 Will. 4, c. 67; 13 Law J. Stat. 161.

## SHERIFF.

[See ARREST—ATTACHMENT—BANKRUPT—EXECUTION—INTERPLEADER—EVIDENCE, Records—PRACTICE—REPLEVIN.]

(A) RIGHTS AND PRIVILEGES.

(B) DUTIES AND LIABILITIES.

(a) Generally.

(b) Arrest.

(c) Bringing in the Body.

(d) Executions and Extents.

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(g) Staying, and setting aside, Proceedings against.

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(D) FEES AND COSTS.

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Writs of inquiry under 8 & 9 Will. 3, c. 11, to be executed before sheriff, and issues to be tried with like powers as of Judges of Nisi Prius. 3 & 4 Will. 4, c. 42, s. 11; 11 Law J. Stat. 98.

Provisions for facilitating appointment of sheriffs, and the audit and passing of their accounts, and the more speedy return and recovery of fines, issues, recognizances, penalties, and deodands. 3 & 4 Will. 4, c. 99; 11 Law J. Stat. 201.

3 R

Provisions respecting the appointment and accounts of sheriffs in Ireland. 5 & 6 Will. 4, c. 55; 13 Law J. Stat. 118.

Sheriff (of city or county of town)—Removal of doubts as to the oath and declarations of. 5 & 6 Will. 4, c. 28; 13 Law J. Stat. 55.

#### (A) RIGHTS AND PRIVILEGES.

[*Humphrey v. Pratt*, 2 D. & Cl. 288; 2 Law J. Dig. 260, s.c. 5 Bligh, n.s. 154.]

#### (B) DUTIES AND LIABILITIES.

##### (a) Generally.

[See ATTACHMENT—BAIL—TRESPASS, Pleading.]

The sheriff is not liable for an escape on mesne process for the whole debt, if the plaintiff's remedy remains against a solvent party, but only for so much as his remedy is affected by the delay and escape, and his costs. *Scott v. Henley*, 1 M. & R. 227. [Littledale]

If an execution creditor abandons his process against certain goods seized under a *fi. fa.* in favour of a claimant, the sheriff has still a right to shew in an action against him, that the goods were the property of the defendant. *Baynton v. Harvey*, 3 Dowl. P.C. 344.

The bill had been dismissed at the hearing, with costs, which the plaintiff refused to pay; he was taken under an attachment. Afterwards, but before the costs were paid, the sheriff let the plaintiff out of custody, upon bail, but retook him before the writ was returnable. The Court refused to order the sheriff to pay the costs. *Collard v. Hare*, 5 Sim. 10.

The Court ordered an attachment against the sheriff to stand as a security, where, had bail been duly put in and perfected, the plaintiff might have set down the cause for the sittings in the term, notwithstanding the accidental circumstance of there being at the time no place for the trial of causes in the Common Pleas in term. *Broadwood v. Ogle*, 1 Sc. 581.

Although there is strong reason to believe, that a *fi. fa.* has been issued in order to defraud the executors of a *bond fide* creditor, and that the sheriff is a party to the fraud; the Court will not interfere summarily to compel the sheriff to pay over the proceeds of the levy to the *bond fide* creditor, but the question of fraud must be tried by a jury. *Barber v. Mitchell*, 2 Dowl. P.C. 574.

In an action against a late sheriff, who appeared to be travelling abroad, and the time of his return doubtful, the Court granted a rule, that service of the process on his under-sheriff should be deemed good service. *Batchelor v. Vyse*, 1 Law J. (n.s.) C.P. 179, s.c. 2 Mo. & Sc. 171.

On an application to set aside an attachment against the sheriff, the affidavit must specifically state that the application is made on behalf of the sheriff, and at his expense. *Res v. Sheriff of Surrey*, 4 Law J. (n.s.) Exch. 15, s.c. 1 C. M. & R. 581; 5 Tyr. 184.

The Court will upon payment of costs set aside an attachment issued against the sheriff, upon the rule of court of Hilary term, 3 Will. 4, bail having been put in and perfected after the contempt, and

before the issuing of the attachment. Where the plaintiff has not declared, he is not entitled to have the attachment against the sheriff for disobedience of a Judge's order to bring the defendant into court, stand as a security. *Res v. Hamilton*, 2 N. & M. 674.

The refusal of a bail-bond in the usual form under the Uniformity of Process Act, renders the sheriff liable to the penalties imposed by statute 23 Hen. 6, c. 9.

In an action on that statute, proof of the offer of a bail-bond, dated the day of the arrest, and conditioned to cause special bail to be put in "within eight days of the date thereof," sufficiently sustains the allegation of an offer of bail, that "within eight days after the execution of the writ," the party arrested should cause special bail to be put in, according to the exigency of the writ. *Evans v. Moseley*, 3 Law J. (n.s.) Exch. 132, s.c. 2 C. & M. 490; 4 Tyr. 169.

The sheriff of Middlesex having obtained a judgment and issued a *feri facias* to the coroner, the sheriff's attorney indorsed on the writ the name of a sheriff's officer, who executed the writ and received the proceeds of the sale of the goods seized from the coroner's broker, but did not pay them over to the sheriff. The goods sold having been afterwards claimed and taken away from the purchaser by a third party, the purchaser brought an action against the sheriff for the purchase-money:—Held, that it was not maintainable, as the officer was the officer of the coroner, and not of the sheriff, and the defendants were not so connected with the transaction as to be liable. *Sarjeant v. Cowan*, 2 Law J. (n.s.) Exch. 235, s.c. 1 C. & M. 491; 3 Tyr. 538; 5 C. & P. 492.

A motion for a writ of *habeas corpus* to bring up the body of a sheriff, is of course, and may be made without affidavit.

But the writ cannot be made returnable on a day out of term. *Res v. the late Sheriff of Middlesex*, 4 Law J. (n.s.) C.P. 24.

The declarations of the under-sheriff are evidence against the sheriff, only when the effect would be to charge himself:—Therefore, where in an action for extortion, an examined copy of the writ had been put in, on which was indorsed the name of B, as the officer to execute it, a declaration of the under-sheriff, that B was the officer of the sheriff, and was the person who executed the warrant on the writ, was held inadmissible. *Snowball v. Goodriche*, 2 Law J. (n.s.) K.B. 53, s.c. 1 Nev. & M. 235; 4 B. & Ad. 541.

A sheriff who levies, and pays over the money to one party where the goods are claimed by another, shall be presumed to be indemnified by the party to whom he pays the money, and the declarations of that party are admissible, in an action against the sheriff by the other party. *Aldridge v. Ireland*, 3 Doug. 397.

##### (b) Arrest.

[See ARREST.]

A sheriff having illegally arrested a defendant in one action, cannot justify his detaining him in another. *Barratt v. Price*, 2 Law J. (n.s.) C.P. 56, s.c. 9 Bing. 566; 2 Mo. & Sc. 661.

Where upon a writ of *f. fa.* against the goods of A B, the sheriff's officer arrests A B, the sheriff is liable to an action for false imprisonment. *Smart v. Hutton*, 3 Law J. (N.S.) K.B. 52, s. c. 2 N. & M. 426.

Beginning to carry, is not a carrying to prison within the meaning of s. 1. of 32 Geo. 2, if the party arrested be not ultimately taken to a gaol or prison, but be merely conveyed to a public-house, and there kept in confinement until he procures bail. *Summers v. Mossley*, 3 Law J. (N.S.) Exch. 128, s. c. 2 C. & M. 477; 4 Tyr. 158.

Irregular process protects the sheriff, but not a party; therefore, in an action of assault and false imprisonment, a writ indorsed for a bailable sum is a sufficient justification of the sheriff and his officer, although there may have been no due affidavit of debt within 12 Geo. 1, c. 20. *Montgomery v. Richardson*, 1 Law J. (N.S.) K.B. 64.

*Semble*—that the sheriff has no right to detain a defendant in custody, although he has been compelled to pay the debt and costs under an attachment. *Rimmer v. Turner*, 3 Dowl. P.C. 601.

In an action against the sheriff for refusing to take bail, it is no answer to the action that the party arrested did not tender a bail-bond. The sheriff is to prepare the bond; but, *semble*, that he is entitled to be paid for so doing by the party arrested. *Millne v. Wood*, 5 C. & P. 587. [Taunton]

(c) *Bringing in the Body.*

[See ATTACHMENT.]

In moving for an attachment against the sheriff for not bringing in the body, it is sufficient to swear that the original rule, and not a copy, was served on the under-sheriff. *Leaf v. Jones*, 3 Dowl. P.C. 315.

Where the sheriff is ruled to bring in the body, he is bound to obey the rule, although the proceedings of the plaintiff may be stayed by an injunction obtained by the defendant. Under 5 Reg. Gen. Hilary term, 2 Will. 4, the plaintiff must declare conditionally if he can, in order to entitle him to have an attachment against the sheriff, to stand as a security. *Rea v. Sheriff of Middlesex*, 1 Dowl. P.C. 454.

If the sheriff is required by a Judge's order to bring in the body in vacation, and he does not obey it in due time, but before an attachment is obtained the defendant is rendered, the contempt is not purged, and he is still liable to an attachment. The Court will, however, set it aside on payment of costs, and not order it to stand as security, where the plaintiff has not lost a trial. *Rea v. Sheriff of Middlesex*, 2 Dowl. P.C. 432.

An attachment for not bringing in the body, granted, where the rule to return the writ expired in vacation, and the sheriff made his return as of the preceding term, and the rule to bring in the body was taken out in the vacation after the return, dated as of the last day of that term. *Heyward v. Jackson*, 1 Law J. (N.S.) Exch. 80, s. c. 2 C. & J. 208.

(d) *Executions and Extents.*

Trespass is not maintainable against a sheriff, for the acts of the bailiff, in executing process on a judgment in the county court. *Tunno v. Morris*, 4 Law J. (N.S.) Exch. 234, s. c. 2 C. M. & R. 298.

*Semble*, an action lies against the sheriff, if he do not sell in a reasonable time after making the seizure, and if he, by such delay, suffer a bankruptcy to intervene, by which the plaintiff loses the fruits of his execution. *Airton v. Davis*, 2 Law J. (N.S.) C.P. 89, s. c. 9 Bing. 740; 3 Mo. & Sc. 188.

An action lies against a sheriff for negligence in not selling goods taken under a *feri facias* before the return of a *venditioni exponas*.

No new warrant is necessary after a writ of *venditioni exponas*, to connect the sheriff with the officer in possession under the *feri facias*; and, therefore, declarations made by the officer after the return of the *feri facias*, and whilst so in possession, are evidence against the sheriff. *Jacobs v. Humphrey*, 3 Law J. (N.S.) Exch. 82, s. c. 2 C. & M. 413; 4 Tyr. 272.

Case lies for a judgment creditor against a sheriff for not selling within a reasonable time, after a seizure under a *feri facias*.

But the plaintiff in such action can recover nominal damages only, unless actual injury be proved. Where, therefore, the sheriff delays selling for an unreasonable time, and before the sale, but after the time when he ought to have sold, receives notice of a fiat in bankruptcy against the execution debtor, and afterwards returns that he has the levy money in his hands, but that he has received such notice, it lies upon the plaintiff to prove the trading, act of bankruptcy, &c., and to shew that, by reason of the sheriff's delay, the right of property in the goods seized, passed, before the sale, into other hands, and that the plaintiff's execution had been thereby frustrated. *Bates v. Wingfield*, 2 N. & M. 831.

A sheriff executing a *feri facias* after a notice of the allowance of a writ of error, is liable in trespass, though there have been no further supersedeas of the execution. Notice to the sheriff of such allowance is notice to his officers, and renders them liable in trespass for proceeding with the execution. *Belshaw v. Marshall*, 4 B. & Ad. 336, s. c. 1 N. & M. 689.

Where the sheriff sells, under an execution, more than sufficient to satisfy the debt and costs, he is liable in trover for the excess. *Batchelor v. Vyse*, 4 Mo. & Sc. 552, s. c. 1 M. & Ro. 381. [Tindal]

The sheriffs not bound to execute bailable process, on which the place of abode and addition of the defendant are not indorsed, although, at the time of receiving the process, he made no objection to the want of indorsement. *Kenrick v. Nanney*, 1 Dowl. P.C. 58.

As to the liability, in trover, of a sheriff, who, under a *feri facias*, had seized and sold the goods of a bankrupt before commission, but after an act of bankruptcy, without notice or knowledge of the act of bankruptcy. See *Garland v. Carlisle*, 3 Tyr. 705, and see s. c. 3 Law J. (N.S.) Exch. 372; 2 C. & M. 31; 4 Tyr. 122; 10 Bing. 452, and s. c. 4 Mo. & Sc. 24. But see the following case.

A public officer, acting honestly, in ignorance, and in obedience to the exigency of a writ, is protected by his official character, and shall not be made liable, in any form of action, as a wrong-doer by relation.

But, if he act under an indemnity, he places

himself in the situation of the parties who indemnify, and will become responsible to the extent of their responsibility.

Therefore, *trover* cannot be maintained by the assignees of a bankrupt, against a sheriff, who, under a writ of *fi. facias*, has seized and sold the bankrupt's goods before the commission, and without notice or knowledge of an act of bankruptcy.

Such action, however, is maintainable against a sheriff's officer who has taken a special indemnity from the judgment creditor against the consequences of the particular seizure. *Balme v. Hutton*, 1 Law J. (n.s.) Exch. 27, s. c. 2 C. & J. 19; 2 Tyr. 17; since reversed in Exch. Ch., 2 Law J. (n.s.) Exch. 116; 1 C. & M. 262; 9 Bing. 471; 2 Tyr. 620; 3 Mo. & Sc. 1.

Where prisoners are in the custody of an officer, having the custody of them independent of the sheriff, it is necessary that there should be a special warrant for the delivery of the prisoners to the sheriff before the latter can do execution upon them; and the service of the signed calendar on the sheriff, is not a sufficient authority for that purpose.

In an information against the sheriff of the county of Chester, for refusing to execute a prisoner—Held, that evidence of reputation was not admissible to prove a custom for the sheriff of the city to execute criminals. *Res v. Antrobus*, 4 Law J. (n.s.) K.B. 91, s. c. 4 N. & M. 565; 6 C. & P. 784; 2 Ad. & E. 788.

On the trial of an information against a sheriff for refusing to execute a criminal, the warrant to a former sheriff, commanding him to gibbet an offender, and a craving by that sheriff of an allowance of his expenses in so doing, which were allowed by the Chancellor of the Exchequer, are receivable in evidence. *Res v. Antrobus*, 6 C. & P. 784.

#### (e) Return of Writs.

The sheriff having entered under a writ of *fi. fa.*, the officers of the Customs, before sale by him, seized the goods in his possession, under a warrant to levy a penalty incurred by the defendant for an offence against the revenue laws. The sheriff thereupon returned *nulla bona* to the writ of *fi. fa.*:—Held, that he was justified in making such return. *Grove v. Aldridge*, 2 Law J. (n.s.) C.P. 44, s. c. 9 Bing. 428; 2 Mo. & Sc. 568.

The Court will not set aside the sheriff's return to a writ of *capias*, on an affidavit denying the truth of the return, and charging collusion with the defendant. *Goubot v. De Crouy*, 2 Law J. (n.s.) Exch. 267, s. c. 1 C. & M. 772; 3 Tyr. 906; 2 Dowl. P.C. 86.

The sheriff's return of *nulla bona* is *prima facie* evidence that the party had no goods at that time. *Airil v. Mordant*, 3 Law J. (n.s.) K.B. 148, s. c. 3 N. & M. 871.

A sheriff, under special circumstances, may be compelled to return a writ of *fi. fa.*, although he has been three years out of office, and has, by leave of the Court, withdrawn from possession of the property seized. *Wilton v. Chambers*, 3 Dowl. P.C. 333.

Where a writ of *fi. fa.* was delivered to the sheriff, and after he was gone out of office a rule to return it was obtained, and served on the new

sheriff, and after the former had been more than six months out of office, he was served with a rule to return it:—Held, that an attachment against him for not making a return could not be supported. *Yerolt v. Hopkins*, 4 Law J. (n.s.) Exch. 196, s. c. 2 C. M. & R. 250; 3 Dowl. P.C. 711.

Where the sheriff has neglected to comply with rule 4 of Michaelmas term, 3 Will. 4, by indorsing on the writ of *capias* the day of execution, the party's remedy is not by attachment, but by a rule calling upon the sheriff to amend his return. *Moore v. Thomas*, 3 Mo. & Sc. 810.

*Semble*, that a bond to a sheriff, the condition of which recites, that the sheriff, by virtue of a *fi. fa.*, had seized and taken in execution of the goods and chattels of R V, divers goods and chattels, and that the sheriff, at the request of the obligor, had quitted possession, and agreed to return *nulla bona*, and then for indemnifying the sheriff for so doing, is illegal. *Wright v. Lord Verney*, 3 Doug. 240.

*Semble*, that where one sheriff has made a special return to a writ of *capias*, the Court will not compel his successor to make another, the circumstances remaining unaltered. *Passmore v. Wilkinson*, 3 Dowl. P.C. 635.

A sheriff's return to a writ of *posse*, "I could not execute this writ, the cause therein alleged for the execution thereof not being true," is bad. *Grimshaw v. Emerson*, 1 Dowl. P.C. 337.

By the sheriff's return of "*languidus*," the illness of the defendant at the return of the writ, should appear. *Perkins v. Meacher*, 1 Dowl. P.C. 21.

The defendant, as well as the plaintiff, may rule the sheriff to return the writ. *Frances v. Clarkson*, 2 Dowl. P.C. 532.

Where the plaintiff's attorney obtained from the sheriff's deputy in London, a warrant which he sent to an officer in the country by the post, but did not pay the postage, and the officer having, in consequence, refused to take in the letter, it was returned to the dead letter office:—Held, that, under these circumstances, the sheriff could not be called on to return the writ. *Hart v. Weatherly*, 4 Dowl. P.C. 171.

#### (f) Extortion.

The examined copy of a writ returned with the name of a sheriff's officer indorsed thereon, and proof that process was executed by an officer of that name, and that the practice of the sheriff's office is to indorse on the writ the name of the officer to whom the sheriff's warrant is delivered, is sufficient to connect the sheriff with the acts of such officer, and to render him liable in an action for extortion.

*Quere*—whether the sheriff is liable to an action on the statute 23 H. 6, c. 9, if extortion be committed by the officer for his own benefit only, and not for the benefit of the sheriff;—and whether the statute be not repealed by 32 Geo. 2, c. 28. *Scott v. Marshall*, 1 Law J. (n.s.) Exch. 97, s. c. 2 C. & J. 238; 2 Tyr. 257.

#### (g) Staying, and setting aside, Proceedings against.

[See PRACTICE, Proceedings, where stayed.]

In an action by the landlord against the sheriff, the Court refused to allow the proceeds of the sale

to be paid into court with the costs of the action, though it was sworn that the sale was regularly conducted. *Groombridge v. Fletcher*, 2 Dowl. P.C. 363.

Where a plaintiff, on account of negotiations between himself and the defendant, delays, for a term, his proceedings against the sheriff, the latter is discharged by the plaintiff's laches. *Res v. the Sheriff of Middlesex*, 1 Dowl. P.C. 58.

The Court will not set aside proceedings against the sheriff, on an affidavit of merits made by an attorney, which only states that he believes that the defendant has a good defence to the action. *Res v. the Sheriff of Middlesex*, 1 Dowl. P.C. 398.

An affidavit to set aside a regular attachment against the sheriff, on payment of costs, must state that the application is made for the indemnity only, and at the expense of the sheriff. *Res v. the Sheriff of Middlesex*, 1 Dowl. P.C. 419. [Taunton]

The sheriff, having returned the writ, may be ruled on the same day to bring in the body, and if he disobeys, may be attached; but the Court will, at the instance of the defendant, set aside the attachment, on payment of costs, in case there are merits. *Godwin v. Montague*, 3 Doug. 235.

In an action against a sheriff for a false return, and for an excessive levy, and for not paying over the residue, the Court refused to allow the sheriff to pay money into court, with costs, though it appeared that the sheriff had, by mistake, retained money to pay hop-duty to the crown, but which was subsequently discovered to have been paid, and had also made charges for possession, and other charges usually made, but in strictness not allowable. *Woodgate v. Baldecock*, 2 Dowl. P.C. 256.

The Court will not stay proceedings in an action by assignees of a bankrupt against a sheriff, for the value of goods of the bankrupt, sold by him under an execution, on his restoring the goods, on paying the sum for which they were sold into court, if the plaintiffs claim any special damage, or there is any dispute about the price, or the amount to be recovered. *Gibson v. Humphrey*, 2 Law J. (n.s.) Exch. 234, s. c. 1 C. & M. 544; 3 Tyr. 588.

Where the sheriff executes a *fi. fa.*, and he receives notice of a year's rent being due, and the goods on the premises are not sufficient to satisfy a year's rent, he must withdraw; and if he sells, the Court will not stay proceedings in an action against him on the 8 Anne, c. 14, s. 1, on paying over the proceeds of the sale. *Foster v. Hilton*, 1 Dowl. P.C. 35.

#### (C) COMPENSATION.

The stat. 55 Geo. 3, c. 50, s. 10, abolishes all fees payable to sheriffs, on *liberates* granted to a debtor upon his discharge from prison, and authorizes the Justices of the Peace for each county, &c. assembled in Quarter Sessions, subject, however, to the approbation of the Justices of the Assize, to make such compensation to the sheriff out of the county rate, as shall to them seem fit. The Justices of Middlesex have jurisdiction to award compensation to the sheriff of Middlesex under this clause, the Judges of the Court of King's Bench and Common Pleas being Judges of Assize for that county. *Res v. the Justices of Middlesex*, 3 B. & Ad. 100.

#### (D) FEES AND COSTS.

[See JUDGES OF ASSIZE.]

The sheriff not entitled to his fees, from a party who has been improperly arrested. *In re Thomas*, 4 Law J. (n.s.) Chanc. 32.

The sheriff is not entitled to his costs on application under the 1 & 2 Will. 4, c. 58, s. 6, and his claim to poundage depends on the legality of the seizure. *Barker v. Dynes*, 1 Dowl. P.C. 169.

Where a sheriff sells goods, which he has taken in execution wrongfully, it is a question for the jury to determine, in their estimate of damages in each particular case, whether or not he shall be allowed the expenses of the sale. *Clarke v. Nicholson*, 4 Law J. (n.s.) Exch. 66, s. c. 1 C. M. & R. 724; 5 Tyr. 233.

Where a writ of extent was indorsed to levy 1,000*l.*, and the sheriff took 824*l.*, and afterwards the Crown compromised for 500*l.*:—Held, that the sheriff was entitled to poundage for this latter sum only. *Res v. Robinson*, 4 Law J. (n.s.) Exch. 319; s. c. 2 C. M. & R. 334.

A sheriff cannot be required to pay into court money levied under an attachment, but he is not entitled to his poundage on the sum levied. *Res v. the Sheriff of Devon*, 3 Dowl. P.C. 10.

The sheriff will be allowed his costs of keeping possession, after applying to the Court, where it is for the benefit of the parties, and not in furtherance of his duty. *Underden v. Burgess*, 4 Dowl. P.C. 104.

Where the plaintiff sent a letter containing a writ, with instructions to execute the same, to the deputy constable, or bodar, of Dover Castle, who was also an attorney, and afterwards had the bill of the latter taxed, the Court refused to review the taxation of the Master, allowing charges for fees beyond those allowed by statute 23 Hen. 6, c. 9, viz. 4*s.* for the warrant, and 6*s.* 8*d.* for instructing the officer to execute it. *Primrose v. Bradley*, 3 Law J. (n.s.) Exch. 209, s. c. 2 C. & M. 687; 4 Tyr. 370.

The fees appointed by the statute 23 Hen. 6, c. 9, to be paid to sheriff's officers, &c., for an arrest and bail, are the fees allowed by law, at the present day: and that statute is not repealed by 32 Geo. 2, c. 28.

The constable of Dover Castle is an officer within the contemplation of the statute 23 Hen. 6, c. 9.

Where a sheriff's officer arrests upon three several writs at one and the same time, and takes three bail-bonds, for which he charges six guineas, he is only liable to one penalty.

The penalty is incurred by the party executing the process, and not by the sheriff. *Philpot v. Sell*, 4 Law J. (n.s.) Exch. 314.

#### (E) WARRANT.

It is not necessary that the sheriff's warrant, issued upon a *capias*, should specify the court out of which the process issued. *Astley v. Goodyer*, 3 Law J. (n.s.) Exch. 210, s. c. 2 Dowl. P.C. 619.

A variance between the sheriff's warrant and a *ca. sa.* lodged in his office, is immaterial. *Rose v. Tomblinson*, 3 Dowl. P.C. 49.

## SHEEP-KILLING.

[See LARCENY.]

On an indictment under 14 Geo. 2, c. 6, for killing sheep with intent to steal the whole carcass, proof of killing with intent to steal part is sufficient to support the charge. *Quare*, whether merely removing a live sheep, for the purpose of killing it, with intent to steal part of the carcass, be an asportation, under 14 Geo. 2, c. 6, of the live sheep. *Rex v. Williams*, 1 R. & M. C.C. 107.

## SHEEP-STEALING.

Upon an indictment for stealing sheep, a prisoner cannot be convicted for stealing lambs, for as 15 Geo. 2, c. 34, specifies lambs as well as sheep, the indictment ought to state which are meant. *Rex v. Loom*, 1 R. & M. C.C. 160.

An indictment under 7 & 8 Geo. 4, c. 29, s. 25, for stealing a sheep, is not supported by proof of stealing an ewe, because the statute specifies ewe and sheep. *Rex v. Puddifoot*, 1 R. & M. C.C. 247.

In an indictment for sheep-stealing, a rig sheep is properly described as "one sheep." *Rex v. Stroud*, 6 C. & P. 535. [Alderson]

## SHIFTING USE.

[See WILL.]

The will of Sir G. Savile, after having devised his estates in a certain way, contained the following clause:—"And it is my will and meaning, that all and every person who, by virtue of this my will, shall become entitled to the possession, or to the rents and profits of the mansion-house and estate in Nottinghamshire, hereinbefore devised, shall and do within the space of two years next after he or they shall severally become entitled to the possession, &c., take upon himself and themselves, and use in all deeds, &c. the surname of Savile, after his or their own surname or surnames, and jointly with any dignity or title that may be vested in him or them; and also shall and do quarter the arms of Savile with his or their own family arms, &c. And in case any person or persons shall refuse or neglect to take such surname and arms, and to take such proper steps and means as may be requisite to enable and authorize him or them so to do within the said space of two years, then it is my express will and meaning, that from and after the expiration of the said space of two years, the gift, devise, and limitation of all and every the manors and hereditaments hereinbefore devised and limited to him or them so neglecting and refusing, &c. shall cease and determine, and become utterly void; and all the same manor, &c. shall in such case immediately thereupon go to the person next in remainder in this my will in the same manner as if such person so neglecting, &c. was or were dead, or, being tenant in tail, was dead without issue male." The will also contained a proviso as follows: "Provided also, and it is my further will and meaning, that if the title of the Earl of Scarborough shall descend or come to any of them, the said Richard Lumley, John Lumley, Frederick Lumley

Savile, H. Lumley, and W. Lumley, [the devisees mentioned in the former part of the will,] or to any of their sons within the period of the lives of such of the younger sons of the said late Earl of Scarborough, as shall be living at my decease, &c. then, and in such case, and as and when the title of the said Earl of Scarborough shall come or fall in possession to him or them, the estate which he or they shall then be entitled unto, in all and every the manors, &c. shall then cease, determine, and become void, and the same manors, &c. shall thereupon go to the person and persons who, under the limitations aforesaid, shall then be next in remainder expectant on the decease and failure of issue male of the person to whom the said title shall so descend or come, in the same manner as such person or persons so in remainder as aforesaid would take the same, by virtue of my will, in case he or they to whom the title of the said Earl of Scarborough shall come and fall in possession as aforesaid, was or were actually dead without issue, such person or persons so in remainder, performing and complying with the condition or proviso for taking the name and arms:—"Held, that the motive and object of the devise was different in the two clauses: and the language in which they were expressed so different, that the first could not be taken as a key to the construction of the second clause.

And held, that the second proviso was to attach to each of the estates created by the will as they should successively vest in possession; and that the effect of it was, that upon the earldom descending on a tenant for life, under the will, there was not merely a cesser of that estate, and an acceleration of the estate of his son, who was tenant in tail under the will, but it operated to shift over the estate to another branch of the family next in remainder.

Held also, that the effect of a recovery suffered by a tenant in tail in remainder, (the tenant for life joining to make a tenant to the præcipe,) would be to bar that proviso, or shifting use, as annexed to his estate tail: but that, as the proviso was to be taken as annexed to each estate created under the will, by the descent of the earldom to the tenant for life, the possibility or interest created by the proviso to the next in remainder, was antecedent to the estate tail, and could not be barred by the recovery; and notwithstanding a recovery so suffered, the estate would go over under the shifting clause. *Doe d. Lumley v. Earl of Scarborough*, 4 Law J. (N.S.) K.B. 172, s.c. 4 N. & M. 724; 3 Ad. & E. 2; reversed in error, 3 Ad. & E. 897.

## SHIP AND SHIPPING.

[See DECEIT—INSURANCE—PRIZE.]

## (A) PROPERTY IN SHIPS.

- (a) Registry.
- (b) Sale.
- (c) Mortgage.

## (B) OWNERS, RIGHTS AND LIABILITIES OF.

## (C) MASTERS AND COMMANDERS.

## (D) SEAMEN.

- (a) Contracts.
- (b) Wages.

- (E) PILOTS.
- (F) PASSENGERS.
- (G) CHARTER-PARTY.
- (H) DEMURRER.
- (I) FREIGHT.
- (K) LOSSES AND INJURIES.
  - (a) To other Vessels.
  - (b) Average.
- (L) SHIP BROKERS.

Shipping and navigation, Act for the encouragement of. 3 & 4 Will. 4, c. 54; 11 Law J. Stat. 110.

Provisions for the admeasurement of the tonnage and burthen of the merchant shipping. 5 & 6 Will. 4, c. 56; 13 Law J. Stat. 119.

#### (A) PROPERTY IN SHIPS.

##### (a) Registry.

See 3 & 4 Will. 4, c. 55; 11 Law J. Stat. 110.

##### (b) Sale.

In trover for a ship, where the bill of sale to the plaintiff does not recite the certificate of registry, whether it is incumbent on the plaintiff to shew that it is not a British built ship, in order to take it out of the provisions of 6 Geo. 4, c. 110, s. 31—*quære*. *Norris v. Williams*, 2 Law J. (N.S.) Exch. 257, s.c. 1 C. & M. 842.

##### (c) Mortgage.

[See *post*, (b) Wages—(L) Ship Brokers.]

*Semble*—that a second bill of sale, by way of mortgage of a ship at sea, reciting, and subject to, a former bill of sale to different persons, is not within the 39th section of the Register Act, 6 Geo. 4, c. 110, and therefore may be entered by the officer of the Customs in the book of registry, before thirty days have elapsed from the day on which the ship arrives in port, so as to render the bill of sale valid and effectual under section 37.

*Quære*—whether a vessel absent at the time of the entry of the particulars of a first mortgage, must actually remain in port thirty days after her return, to entitle a second mortgagee to enter his mortgage in the book of registry; or whether such entry may not be made after thirty days have elapsed from the day of her arrival, although she sail again immediately.

The owner of three ships at sea, by bill of sale, of the 10th of June 1830, conveyed the same, and assigned the freights and policies, by way of mortgage, and caused an entry thereof to be made in the book of registry on the 12th. One of the ships returned to port on the 18th of October, and sailed again on the 16th of November, without any indorsement being made on her certificate of registry, and was subsequently lost at sea. On the 7th of January 1831, he, by bill of sale, reciting the prior mortgage, transferred the same ships, policies of assurance, freights, and monies due for freight, and his right, title, and equity of redemption therein, to other persons, subject to such prior mortgage, and on the 11th of May caused an entry of such transfer to be made in the book of registry; on the

14th of June, he committed an act of bankruptcy, whereon a commission issued, and on the ships' subsequently arriving in port, both mortgages were indorsed on the ships' certificates:—Held, that the second bill of sale was valid, as to the interest in the ships it purported to assign, and as to the policies and monies therein mentioned, as far as choses in action could be assigned. *Ex parte James*, 1 Law J. (N.S.) Exch. 218, s.c. 2 C. & J. 513; 2 Tyr. 671.

A mortgagee who takes possession of a ship before the termination of a voyage, is entitled to the amount of freight earned during the voyage, notwithstanding the provision of stat. 6 Geo. 4, c. 110, that a mortgagee shall not be deemed the owner, except for the purpose of rendering the ship available, by sale or otherwise, for the payment of the debt or debts, for the purpose of which the transfer shall have been made. *Kernvill v. Bishop*, 1 Law J. (N.S.) Exch. 227, s.c. 2 C. & J. 529; 2 Tyr. 602.

A mortgagee of a ship agreed with one of the part-owners, that he would pay all disbursements of a voyage, and in consideration was to have the proceeds of the freight handed over to him in priority of all other charges. He failed to advance any money, and the part-owner was obliged to do so instead.

Both having become bankrupt, and the ship, &c. having been sold,—held, that the assignees of the mortgagee were entitled to their full share of the proceeds, as, though he had not fulfilled his contract, yet the ownership of a vessel is in common, not joint: and this agreement and dealing had not made it joint; and that the part-owner had no claim on the share of the mortgagee for his advances. *Ex parte Leslie re Drury*, 3 Law J. (N.S.) Bankr. 4.

#### (B) OWNERS, RIGHTS AND LIABILITIES OF.

[See *post*, Ship Brokers—INSURANCE, Broker.]

[*Colein v. Newbery*, 6 Law J. K.B. 239; 8 B. & C. 166; 1 Law J. Dig. 479; reversed in the Exchequer Chamber, 8 Bing. 190, and judgment of the Exchequer Chamber affirmed in the House of Lords, 1 C. & F. 283, s.c. 6 Bligh, N.S. 167.]

The vendee of a share of a ship shall be deemed complete part-owner, if an entry of the bill of sale to him, as the form 6 Geo. 4, c. 110, s. 37, requires, is made in the proper book of registry, though it does not express, in terms, that the bill of sale was produced, because it would be against the duty of the officer to make the entry, except on such production; the giving the date, which has nothing to apply to but the production of the bill of sale, will imply it.

Two or more persons may hold shares of a ship jointly.

If the thing attempted would, if successful, have prejudiced any of the part-owners, it shall be intended that such prejudice was meant. The destruction of a vessel by a part-owner, shews an intent to prejudice the other part-owners, though he has insured the whole ship, and promised that the other part-owners shall have the benefit thereof. *Rex v. Philp*, 1 M. C.C. 263.

A steam-vessel was let by charter-party for twelve months, the registered owners engaging to

keep the engine in repair, but the charterer binding himself to do all other repairs, to pay all wages and charges of navigating, &c. incurred in respect of the charter-party and employment of the vessel. The owners were to appoint the engineers. The charterer, who acted as captain, had repairs done to the vessel by persons unacquainted with the above contract:—Held, that no action lay, in respect of those repairs, against the registered owners. *Reeve v. Davis*, 1 A.D. & E. 312, s.c. 3 N. & M. 873.

In an action by the shipper of goods against the owner of a vessel, for not delivering them pursuant to bill of lading, it appeared that A, having sent orders to his correspondents abroad to ship cargoes of wheat, afterwards withdrew his orders; but his correspondents, nevertheless, shipped a cargo of wheat on his account and at his risk, sending with it an indorsed bill of lading to their agents in London; and at the same time sent a letter, with an undorsed bill of lading inclosed, to A, informing him of their having drawn on their agents in town for the amount, and requesting him to furnish funds for their acceptance; which bills were afterwards dishonoured, A giving orders not to accept them: afterwards the cargo was delivered to A:—Held, that no property vested in A to entitle him to receive the goods, he not having accepted the bills drawn upon the agents in town; and that the owner of the ship was liable, to the amount which the goods would have brought at the time they were delivered to A. *Brandt v. Bowlby*, 1 Law J. (N.S.) K.B. 14, s.c. 2 B. & Ad. 932.

If a person ship goods on board a vessel, knowing that she is chartered, the consignee of the goods can maintain no action against the owner of the ship if the goods be injured by bad stowage.

If the shipper of goods was warned as to the way in which goods would be stowed, the consignee cannot maintain any action for damages occasioned by such stowage, even if the stowage were bad. *Major v. White*, 7 C. & P. 41. [Parke]

A part-owner of a ship, which had been let to the East India Company for a voyage to India, after the other part-owners had expended a large sum in repairing it, and fitting it out for the voyage, arrested the ship by process out of the Admiralty Court, and compelled the other part-owner to give security for his share: the ship afterwards sailed to India, and returned home:—Held, that the part-owner who had taken the security, was not entitled to any share of the profits of the voyage, but was bound to pay his proportion of the repairs and outfit. *Davis v. Johnston*, 4 Sim. 539.

Where the owners of a ship instruct the captain to make purchases in a foreign country, and to draw bills upon them in payment, the promise implied by the law is not a promise to accept or pay the bills, but a promise to indemnify the captain against any loss, damage, &c. sustained by him from having drawn the bills.

And on a declaration in assumpsit for not accepting and for not paying a bill, and for not indemnifying the plaintiff, alleging, that the plaintiff was forced and obliged to pay the bill, it is unnecessary for the plaintiff to prove that he had notice of the dishonour of the bill. *Huntley v. Sanderson*, 2 Law

J. (N.S.) Exch. 204, s.c. 1 C. & M. 467; 3 Tyr. 469.

The owner of a ship, and not the charterer, is *prima facie* liable to the consignees for damage done to goods on the voyage, by reason of improper stowage. *Swainston v. Garrick*, 2 Law J. (N.S.) Exch. 255.

One part-owner of a ship cannot maintain a separate action of assumpsit, for his share of the proceeds of the sale of the ship, against a broker who has been employed to sell by the other part-owners, and has paid them their shares, but refuses to pay him his proportion without their concurrence. *Hatall v. Griffith*, 3 Law J. (N.S.) Exch. 191, s.c. 2 C. & M. 679; 4 Tyr. 487.

#### (C) MASTERS AND COMMANDERS.

The master is *prima facie* liable for the safe stowage of the cargo, but he is exonerated by the special appointment of his own stower by the freighter; and if the freighter by a verbal agreement with the owner, undertakes to appoint his own, and he acts as such, the mere silence of a charter-party, subsequently entered into, does not subject the master to his original liability. *Swainston v. Garrick*, 2 Law J. (N.S.) Exch. 255.

The captain of a ship, who gives directions for repairs, is liable to the tradesman in the first instance, if it does not appear that any credit was given to the owners. *Essery v. Cobb*, 5 C. & P. 358. [Tindal]

It is the duty of the captain of a merchant vessel, in case of misconduct of one of the crew, previously to the infliction of punishment to institute inquiry, with the assistance of others, and to have the result entered in the log.

A seaman employed in cutting blubber on board a whaler, in consequence of a quarrel with the captain, followed by a blow from the mate, threw down his knife, and refused to do any more work in the ship:—Held, that such conduct was an offence justifying moderate punishment; and that, although the punishment were excessive, yet, if the seaman, by some concession, might have put an end to it, and refused, he could not recover damages for the continuation of the punishment after such refusal. *Murray v. Moutrie*, 6 C. & P. 471. [Tindal]

#### (D) SEAMEN.

##### (a) Contracts.

A mariner agreed, by articles executed before he sailed on a voyage, not to sue the owners, but to look to the master only:—Held, that such agreement was valid and binding upon him, though the master was one of the owners, and that therefore he could not sue the owners for a balance of wages.

He contracted on a second voyage to receive a certain share of the net proceeds of the voyage, after deducting the usual charges and expenses, with the same stipulation as to suing:—Held, that, as he was joint adventurer, he was bound to allow a deduction for the insurance effected by the managing owners on the cargo, and also for interest on advances made to him in respect of his share at the commencement, and during the continuance, of the voyage.



Having agreed to a settlement of the accounts wherein these charges were contained, and they being the balance claimed in the action:—Held, that a plea of set-off was not required.

The ship-owners, who had received the proceeds of the cargo, had paid the plaintiff his share, minus those charges:—Held, that they had not waived this stipulation in the articles, and were not liable to an action for money had and received.

In a court of equity, the above agreement will not prevent the mariner from pursuing the fund derived from the proceeds in the hands of the owner. *M' Auliffe v. Bicknell*, 4 Law J. (N.S.) Exch. 225, s. c. 2 C. M. & R. 263.

#### (b) Wages.

A clause in the articles, to the effect that mere absence for less than twenty-four hours, shall not be deemed a desertion, relates to occasional absences, and not to a wilful denial of authority. *The Amphitrite* (Morgan), 2 Hag. 405.

A mariner quitted a vessel in defiance of the master, with opprobrious language; and, without any declaration of such intention when he quitted the vessel, entered on board a king's ship within twenty-four hours:—this is desertion, working a forfeiture of wages. *The Amphitrite* (Morgan), 2 Hag. 403.

Ship's articles are conclusive as to the amount of wages and the voyage: on collateral points the Court of Admiralty may consider how far they are reasonable and just. Therefore a clause, providing that if contraband goods were found in the fore-castle, the seamen living therein should forfeit their wages and 10*l.*, is not conclusive to work a forfeiture of wages against those not directly proved to be personally implicated in the offence. The penalty cannot be enforced in the Court of Admiralty. *Prince Frederick* (Hart), 2 Hag. 394.

Loss, arising from the gross negligence of a mariner, may be set off against a claim for wages. *New Phoenix* (Barton), 2 Hag. 420.

Material men have no lien for supplies furnished in England, on the proceeds remaining in the Registry of the Court of Admiralty, of a ship sold under a decree of that Court for the payment of the seamen's wages.

A mortgagee in possession of a ship so sold, is entitled to the remainder of such proceeds, after payment of the seamen's wages and costs. *The Neptune*, 3 Kn. 94.

By articles of agreement for a voyage from the port of London to the South Seas, to procure a cargo of sperm oil, and to return therewith to the port of London, where the voyage was to end, it was stipulated that a seaman should receive a ninety-fifth share of the net proceeds of the cargo in lieu of wages. It was further stipulated that no one of the officers and crew should demand and be entitled to his share of the net proceeds of the said cargo, until the arrival of the ship or vessel at London, and her said cargo should be there sold, and the money actually received by the owner; nor unless he should have well and truly performed the above-mentioned voyage, according to the true intent and meaning of the articles. The ship sailed, and, having procured a cargo, was on her voyage home, when she was disabled, condemned, and sold in a

foreign port. The cargo, with the exception of a small portion sold for repairs, was transhipped to another vessel, on board of which the seaman also shipped himself, for the purpose of attending thereto, but before that vessel reached London the seaman died. The cargo was afterwards delivered in London, and the freight paid to the owner:—Held, that the representative of the seaman could not maintain an action on the articles of agreement for his share of the proceeds of the cargo, but only on a *quantum meruit* for his services on board the second vessel. *Jesse v. Roy*, 3 Law J. (N.S.) Exch. 268, s. c. 1 C. M. & R. 316; 4 Tyr. 626.

#### (E) PILOTS.

A ship arriving at the entrance of the West India Docks, too late to be received into the docks that tide, is not liable under the table of remuneration to cinque port pilots annexed to 6 Geo. 4. c. 125, to an extra charge of pilotage for "docking" on the next tide. *Adam* (Martin), 2 Hag. 326.

Where pilots had not made a fair trial to get off to a vessel in distress during two days, when there might be danger and difficulty, and went off on the third, when there was no danger, and when the weather was moderate, and the wind fair for the harbour, the Court, assisted by Trinity masters, pronounced that the service amounted only to pilotage, and not to salvage; and it sustained the tender, but directed the owners to pay the costs. *City of Edinburgh* (Fraser), 2 Hag. 333.

By a charter of Queen Elizabeth, the corporation of the Trinity House of Hull are authorized to take certain duties "in the port of the town of Kingston-upon-Hull, and in all places within the limits and liberties thereof; that is to say, in all havens, creeks, and other places, where our customer of Hull, by virtue of his office hath any authority to take any custom," &c.; and they are also empowered to exercise jurisdiction over certain disputes arising within the same limits and liberties; and moreover to forbid any mariner of the port of Hull, or the said limits, to take charge as pilot of any ship to cross the seas, except such as shall be first examined by them, whom, if they find sufficient, they shall receive into their guild, and give them a writing, signifying the countries, coasts, and places for which he shall be so found sufficient; and they are authorized to punish any person who shall take charge upon him as pilot to cross the seas without their allowance.

The limits in question extended many miles up the Humber and river Ouse. Goole, a place within those limits, situate on the Ouse, and where the customer of Hull had formerly exercised jurisdiction, was constituted a port in 1828. Till after that time the Trinity House had never licensed pilots to take charge of vessels upon the Ouse, on the Humber above Hull Roads; and the members of the corporation had on one or two occasions refused to interfere with the pilotage of those parts; but they had exercised the other powers given by the charter, both on the Humber and on the Ouse beyond Goole. Before the erection of that port, scarcely any foreign trade was carried on with places above Hull Roads:—Held, that the power given by charter to license, &c. in all places where the customer of Hull had authority to take custom;

extended over all the limits within which the customer might so act at the time when the charter was granted, and was not confined to the jurisdiction of the customer for the time being; consequently, that Goole, though now an independent port as to customs, was still subject to the charter in respect of the licensing of pilots.—Held also, that, under the above circumstances, the forbearance of the corporation in former times to license pilots above Hull Roads, could not affect their right to enforce the charter on this head when it became necessary.—Held, further, that it was not requisite, by the terms of the charter, that every licence should be for crossing of the seas; but that the corporation might grant a more limited licence; as from Goole to Hull Roads.

Section 6 of the general Pilot Act, 6 Geo. 4, c. 125, which enacts, that it shall be lawful for the Trinity House of Hull and Newcastle to appoint sub-commissioners of pilotage to examine and license pilots, is permissive and not imperative. *Brilley v. Raper*, 3 B. & Ad. 284.

#### (F) PASSENGERS.

Where a vessel, bound for the East Indies, is advertised to sail by a certain day, and does not, the ship-owner will be entitled to recover half the passage-money of a person who refused to go, after having engaged a passage, unless either time was of the essence of the contract, or the delay in sailing was unreasonable. *Yates v. Duff*, 5 C. & P. 369. [Tindal]

A covenant to keep up a supply of the necessary and usual quantity of water, for the use of passengers, &c., is not broken by a deficiency for a short time, occasioned by the unusual length of the voyage.

In an agreement under seal for the hire of the cabins and accommodations for passengers in a ship, there was a stipulation, that, if it should be necessary for the convenience, and at the request of the hirer, to put into an intermediate port for stock or otherwise, he (the hirer) would pay all port and necessary charges consequent thereon:—Held, that this, in connexion with covenants to promote the comfort and convenience of the hirer and his passengers, raised an implied covenant, on the part of the captain who let the cabins, &c., to put into any such port, if required.

There was also a covenant on the part of the latter, to permit and suffer the hirer to stow away the baggage of the passengers in a part of the hold:—Held, that this fairly imported, that there should be some demand or request made by the hirer for the clearing of the space agreed on. *Corbyn v. Leader*, 6 C. & P. 32. [Tindal]

#### (G) CHARTER-PARTY.

[See, *post*, Freight.]

It is no defence to an action on a charter-party, for not sailing on the voyage towards a port agreed on, that the port was in a state of blockade, if the defendant knew the fact at the time of entering into the charter-party. *Medeiros v. Hill*, 1 Law J. (N.S.) C.P. 77, s. c. 8 Bing. 231; 1 Mo. & Sc. 311.

By charter-party, the plaintiff, owner, agreed to proceed to the Cape, and having discharged goods, thence to proceed with all convenient speed to Bombay,

In consideration whereof and of everything before mentioned, defendant (the freighter) promised to find a cargo. Plaintiff delayed at the Cape, and then sailed out of his course to the Mauritius, and so arrived at Bombay six weeks later than if he had sailed direct from the Cape; in which time, other vessels which had sailed later from England, had arrived. In assumpsit, for not finding a cargo, it was left to the jury, to find whether the plaintiff's conduct entirely frustrated the defendant's object in chartering the ship:—Held, that the direction was right; and that the proceeding to Bombay was a condition precedent, by breach of which the defendant's object was entirely frustrated, and, consequently, that the plaintiff could not recover. *Freeman v. Taylor*, 1 Law J. (N.S.) C.P. 26, s. c. 8 Bing. 124; 1 Mo. & Sc. 182.

A ship's husband covenanted that his ship should at one port take in a quantity of brandy and convey it to another port, and there receive a cargo of fruit, &c., which the freighters of the ship covenanted to supply. He did not take the brandy, and the freighters did not furnish a full homeward cargo; for which he recovered damages against them. They afterwards brought an action against his widow and representative to recover damages for the breach of his covenant:—Held, that they could not recover in any shape, in that action, either the damages they had paid him, or the costs they had incurred in defending the former action, although they were prevented from obtaining the homeward cargo, by the neglect of the ship's husband in not taking the brandy. *Waltens v. Fothergill*, 7 C. & P. 392. [Tindal]

The defendant entered into a charter-party on the 20th of October with the plaintiffs, by which he bound himself to proceed in ballast to St. Michael's, take in there a cargo of fruit, and return direct to London; the freighters to be allowed so many running days, to commence on the 1st of December: if the vessel did not arrive at St. Michael's on or before the 31st of January, freighters need not load. The defendant made an intermediate voyage to Oporto, and thence back to Portsmouth, whence he sailed for St. Michael's, where he arrived six days after the commencement of the running days mentioned in the charter-party. In an action against him for breach of the charter-party—Held, that the plaintiffs had a right of action against the defendant for a breach of contract, inasmuch as he did not commence the voyage in a reasonable time, so as to secure the freighters the benefit of an early market: but that they were entitled to merely nominal damages, as they did not prove that they suffered any special damage in consequence of the late arrival of the vessel. *M'Andrew v. Adams*, 3 Law J. (N.S.) C.P. 236, s. c. 1 Bing. N.C. 29; 4 Mo. & Sc. 517.

By the terms of a charter-party, the freighter was to proceed to certain ports, and there load a full and complete cargo of merchandise, the fore-cabin or dining-room included, to be filled with light goods. The instrument then specified a certain scale of payment of freight, for sugar, coffee, rice, pepper, and for all other goods in a just and fair proportion. The freighter was also to ship, previous to any other loading, 100 tons of rice or sugar to ballast the vessel, and keep her in proper trim. The freighter duly complied with the last

condition, and then took on board a full cargo of pepper; in consequence of which, the 100 tons of rice were not sufficient to trim the vessel, and the owner was obliged to make up for the deficiency of cargo by ballast.

In an action to recover the amount of freight for merchandise, which should, it was alleged, have been taken on board, so assorted as to render ballast unnecessary:—Held, that by the charter-party the freighter was not obliged to put on board a cargo so assorted; and that, having loaded the vessel with 100 tons of rice, it was optional with him to complete the cargo as he thought proper. *Irving v. Clegg*, 3 Law J. (N.S.) C.P. 265, s. c. 1 Bing. N.C. 55; 4 Mo. & Sc. 572.

By the terms of a charter-party the freighter was to commence paying for the hire of the vessel on the 12th of July, and for six calendar months certain from that day; disputes, however, having arisen as to the day from which payment was to begin, and as to the security for any freight that might chance to be due after the six months, the plaintiffs (owners) refused to let the ship sail until these disputes were adjusted, and the required security was given. The defendant, upon the conditions of the day of payment for the hire of the ship being postponed, from the 12th of July to the 20th of August, and of the ship being permitted to sail upon her voyage, undertook to obtain and deliver within a week, the security of P M for the freight; and, having failed in so doing, upon action brought—Held, that this was not a promise to answer for the debt, default, or miscarriage of another, as P M never engaged to give the guarantee: consequently, the consideration for the promise need not appear.—Held, also, that such intended guarantee of P M was an agreement within the Statute of Frauds; and that, if an action were brought against him, it would have failed, for the want of consideration appearing on the face of it; consequently, though there was a right of action against the defendant for the breach of an original contract, yet the damages should be only nominal, as none could have been recovered on that which he undertook to obtain.

One of the owners alone having executed the charter-party, without the others being made parties to it—Held, that the legal operation of the deed was, that it was the agreement of him alone who executed it; consequently, that the charter-party was correctly set forth as the agreement of that owner alone, though made on behalf of himself and the other joint owners of the vessel.—Held also, that although all the owners could not sue the freighter jointly upon the charter-party, the deed never having been executed by them, yet it did not follow but that they had a joint right of action against the defendant, upon a promise of payment of freight to them all; such contract being perfectly collateral to the contract contained in the charter-party. *Bushell v. Beavan*, 3 Law J. (N.S.) C.P. 279, s. c. 1 Bing. N.C. 103; 4 Mo. & Sc. 622.

A person entering into a charter-party in his own name on behalf of government, is personally liable. *Cunningham v. Collier*, 4 Doug. 233.

#### (H) DEMURRAGE.

By a charter-party entered into between the

plaintiffs, as owners, and defendants, as freighters, of a certain ship, she was to sail with cargo to Oporto; and, if the captain thought it safe, she was to enter the port and discharge there. If the entry were unsafe, the captain was to lie off as near the port as possible, and discharge there into boats. The defendants were allowed twenty-five days from the arrival for unloading, and were liable to 4*l.* a day for demurrage. If the cargo were discharged in port, the freight was to be 300*l.*; if it were discharged outside, the freight was to be 475*l.* The ship arrived; and the captain deeming it unsafe to enter, cast anchor off the port, and remained there more than the twenty-five days. He was then blown off, but brought up again shortly after, and whilst outside he discharged seven-eighths of the cargo. Finally, the impediments being removed, he entered the port, and there discharged the remaining one-eighth. In an action by plaintiffs against the defendants for demurrage, which involved and was decided by the question, whether the plaintiffs were under the circumstances entitled to the greater or less rate of freight,—Held, that they were entitled to the greater rate, and consequently should have the judgment of the Court. *Gibbens v. Buisson*, 4 Law J. (N.S.) C.P. 11, s. c. 1 Bing. N.C. 283; 1 Sc. 133.

#### (I) FREIGHT.

[See Charter-party, *ante*.]

Where goods were shipped according to a bill of lading, on account and risk of W B, the defendant, "to be delivered to certain persons, or their assigns, paying freight," &c.; and the goods were delivered to the consignees, without receiving freight, and they afterwards became bankrupt:—Held, that W B, the consignor, was liable to the ship-owners for the amount of freight. *Domett v. Beckford*, 3 Law J. (N.S.) K.B. 10, s. c. 5 B. & Ad. 521; 2 N. & M. 374.

An assignment of future freight by the owners of a ship is good. Affirmed on appeal. *Douglas v. Russell*, 1 M. & K. 488, s. c. 4 Sim. 524.

The owner of a ship agreed with the defendant for the carriage of goods, &c. on a voyage on which the ship was then actually engaged, for a certain sum freight. The ship-owner, being indebted to others, assigned to them the freight and other earnings of the vessel upon her then voyage, by way of security for debts larger in amount than the freight, &c., and gave the defendant notice of such assignment. He (the owner) afterwards became bankrupt, and, in an action by the assignees against the defendant to recover the freight said to be due to the bankrupt before his bankruptcy,—Held, upon demurrer, that the right to the freight was not in the plaintiffs, but that it passed to the creditors of the bankrupt by the assignment which he (the bankrupt) made before his bankruptcy, and of which assignment the defendant, debtor of the bankrupt, had notice. *Leslie v. Guthrie*, 4 Law J. (N.S.) C.P. 227, s. c. 1 Bing. N.C. 697; 1 Sc. 683.

By a charter-party of affreightment for a voyage from the port of London to Calcutta and back, on the usual terms, it was further agreed, that the freighter, if he thought proper, might hire the vessel for an intermediate voyage, within certain limits, for not less than six months; that, in that event,

the master should refit the vessel for such voyage, and the complement of men should be kept up, and all necessaries provided; in consideration of which, the freighter agreed to pay the owner for such voyage at the rate of 1*l.* a ton per month on the ship's tonnage, and to pay four months of such hire in advance; and at the end of six months, two further months' pay, and so in every succeeding two months; and the balance due at the termination of such hiring, in cash or approved bills.

It was further stipulated, that if the vessel should be lost, or captured, the freight, by time, should be payable up to the period when she should be so lost, or captured, or heard of:—Held, that, under the former clause of this agreement, the freighter could not claim a return of any part of the four months' advance on the vessel being lost within that period; but the advance, being in respect to freight, was absolute, and that the stipulation on this head was not qualified by the subsequent clause. *Saunders v. Drew*, 3 B. & Ad. 445.

#### (K) LOSSES AND INJURIES.

##### (a) To other Vessels.

In a case for running down a ship, neither party can recover when both are in the wrong; but the plaintiff may recover, although he might have prevented the collision, provided that he was in no degree in fault in not endeavouring to prevent it. *Fennell v. Garner*, 1 C. & M. 21, s.c. 3 Tyr. 85.

In collision, the owners are only entitled to indemnification, if the damage is occasioned by the fault or misconduct of the vessel charged as the wrong-doer; therefore, the collision having arisen from the neglect of the vessel damaged, the owners of the other vessel dismissed with costs. *Ligo*, 2 Hag. 356.

In a case of collision, happening in the Humber, twenty miles from the main sea, but within the flux and reflux of the tide, at about three fourths flood, the protest of the defendants sustained upon proof, that the site was *infra corpus comitatus*. *Public Opinion* (Ackland), 2 Hag. 398.

By the 53 Geo. 3, c. 159, the responsibility of ship-owners for damage done by their ships to other vessels, is limited to the value of the ship doing the damage:—Held, that such value must be ascertained as at the time of the accident. *Dobree v. Schroder*, 6 Sim. 291.

##### (b) Average.

A consignee of goods is not liable to the ship-owner for general average, unless it be expressed in the bill of lading, that he is to pay, or that the goods are liable to the charge. *Scally v. Tobin*, 1 Law J. (N.S.) K.B. 183, s.c. 3 B. & Ad. 523.

#### (L) SHIP BROKERS.

If a person, who is mortgagee as well as broker of a ship, gives directions for repairs to be done, the question for the jury will be, in an action by the tradesman against him, whether he gave the directions only in his character of broker, or a person having an interest in the vessel. *Castle v. Duke*, 5 C. & P. 369. [Tindal]

#### SHOOTING, RIGHT OF.

[See GAME.]

#### SHOOTING, WITH INTENT TO MURDER, &c.

[See INDICTMENT.]

If an indictment for shooting another, with intent to murder, &c., in all the counts aver that the pistol was loaded with powder and a leaden bullet, it must appear that the pistol was loaded with a bullet, or the prisoner will be entitled to an acquittal. *Rex v. Hughes*, 5 C. & P. 126. [Bolland]

A had the barrels of a double-barrelled percussion gun detached from the stock and lock. By striking the percussion cap, which was on the nipple of one of the barrels, he fired it and shot B:—Held to be within the statute 9 Geo. 4, c. 34, s. 11 & 12. *Rex v. Coates*, 6 C. & P. 394. [Patteson]

#### SIDE CLERK.

[See ACTION, Where maintainable.]

The office of side clerk is not abolished by 1 Will. 4, c. 70, and 2 & 3 Will. 4, c. 110; but the side clerks have still the right to sue and arrest, by *capias* of privilege, attorneys of the other courts. *Stokes v. White*, 3 Law J. (N.S.) Exch. 321, s.c. 1 C. M. & R. 223; 4 Tyr. 786.

#### SIGNATURE.

[See SPECIAL CASE.]

#### SIMILITER.

[See JUDGMENT, As in case of a Nonsuit—New TRIAL—PLEADING.]

#### SIMONY.

Simony, on the part of a presentee to a living, being in law a very odious offence, and the consequences of conviction thereof highly penal, the law, even if a simoniacal agreement is established, requires the strictest proof of the presentee's privity thereto before induction, or of his confirmation thereof after; so, in proof that a clerk is *simoniace promotus*, a corrupt agreement must be no less conclusively shewn. In a criminal suit against a clerk for simony, and for being simoniacally promoted, the Court holding, 1st, that neither his privity to, nor confirmation of, any simoniacal contract was proved; 2ndly, that no criminal contract was established,—dismissed him from the suit, and condemned the promoters in costs.

*Semble*, that, when a clerk is *simoniace promotus* without his privity, or subsequent confirmation, the Ecclesiastical Court cannot proceed to a sentence of deprivation in a criminal suit. *Whish v. Hesse*, 3 Hag. Ec. 659.

*Quære*, whether acts subsequent to induction in confirmation of a simoniacal agreement made without his knowledge, amount to a simony on the part of the presentee. 1b. 696.

SKILL, WANT OF.  
[See SURGEON.]

## SLANDER.

[See INFANT—LIBEL—VARIANCE.]

(A) ACTION FOR, WHERE MAINTAINABLE.

(B) PLEADINGS AND EVIDENCE.

(A) ACTION FOR, WHERE MAINTAINABLE.

Words imputing a crime are actionable, although they describe it in vulgar language, and not in technical terms. *Colman v. Godwin*, 3 Doug. 90.

Saying of an attorney "that he has robbed" another, is actionable. The meaning to be attached to the word "rob" is *prima facie*, that which the law attaches to it; and it is for the person who uses it to shew, by reference to the subject-matter of conversation, that he did not use it in that sense. *Tomlinson v. Brittlebank*, 2 Law J. (n.s.) K.B. 105, s.c. 1 N. & M. 455; 4 B. & Ad. 630.

The words "he is a thief, and has robbed me of my bricks," held, upon special demurrer, slanderous. The stat. 7 & 8 Geo. 4, c. 29, s. 6, having given a legal definition to (and thereby having removed all ambiguity of meaning from) the word *rob*; and bricks being, in the ordinary sense, considered as chattels, and severed from the freehold. *Stoman v. Dutton*, 3 Law J. (n.s.) C.P. 109, s.c. 10 Bing. 401; 4 Mo. & Sc. 174.

To say of another, "You have committed an act for which I can transport you:"—Held, to be actionable, and that no colloquium was necessary. *Curtis v. Curtis*, 3 Law J. (n.s.) C.P. 158, s.c. 10 Bing. 477; 4 Mo. & Sc. 337.

A person chosen and sworn in at a court-leet held by a corporation, as chamberlain of commonable lands of the corporation, whose duties in that office are to collect monies from commoners and others using the lands, to apply the monies so received to keeping the lands in order, to account at the end of the year to two of the aldermen of the borough, and to pay over any balance to his successor, is not a servant, or person employed in the capacity of a servant, within 7 & 8 Geo. 4, c. 29, s. 47.

*Semble*, therefore, that a verbal imputation of fraudulent embezzlement in the office, is not actionable. *Williams v. Stott*, 2 Law J. (n.s.) Exch. 303, s.c. 1 C. & M. 675; 3 Tyr. 688; 3 Law J. (n.s.) Exch. 110.

The question in an action for words is not what the party using them considered their meaning, by any secret reservation in his own mind, but what he meant to have understood as their meaning by the party to whom he uttered them. *Read v. Ambridge*, 6 C. & P. 308. [Denman]

If a person has a communication to make to an inquest for their information, not on oath, he is bound to do it in such a way as to satisfy a jury, if he is afterwards charged with slander, that he was only stating the fact for the information of the inquest, and that he did it in a proper manner. *Wilson v. Collins*, 5 C. & P. 373. [Bosanquet]

Where a person originates false reports prejudicial to a tradesman, and being called on by the employers of the tradesman to examine the matters

complained of, repeats to them the false statements, such statements are not privileged communications. *Smith v. Matthews*, 1 M. & Ro. 151. [Lyndhurst]

The plaintiff, a dissenting minister, accompanied by a friend, went to the defendant, who, in answer to questions put by the plaintiff and his friend, stated, that his (the defendant's) wife had been cautioned against the plaintiff as a drunkard, &c.:—Held, that this was a privileged communication, and that slanderous expressions used in it were not actionable, if the defendant spoke *bond fide*, and was not actuated by malice:—Held, also, that it was incumbent on the plaintiff to prove that the defendant was actuated by malicious motives. *Warr v. Jolly*, 6 C. & P. 497. [Alderson]

Words are spoken by a master in giving a character to a servant. In an action of slander brought by the servant, if, from the circumstances under which, and the manner in which, they were spoken, there is a possibility of the master having been actuated in what he said by any other motive than that of giving what he conscientiously believed to be a true character of the servant, it is a proper question for the jury whether the words were spoken maliciously.

Secondly, the words "she secreted 1s. 6d. under the till," at the same time stating "these are not times to be robbed," are not actionable *per se*; therefore, when the plaintiff obtained a verdict, with 1s. damages—Held, that she was entitled to increased costs.

No action will lie for words spoken, with special damage alleged, unless the words themselves bear an injurious meaning; therefore—held, thirdly, on motion in arrest of judgment, that these words were not actionable with special damage, as they rather imported praise than blame to the party of whom they were spoken. *Kelly v. Partington*, 3 Law J. (n.s.) K.B. 104, s.c. 2 N. & M. 460; 3 N. & M. 116; 5 B. & Ad. 645.

If the defendant, in an action for verbal slander, at the time of speaking the slander, gave up the name of the person from whom he heard it, this is no justification; but, if he did this, and at the trial prove that he did, in fact, hear the slander from that person, it will go in mitigation of damages. *Bennett v. Bennett*, 6 C. & P. 588. [Alderson]

A statement of the misconduct of a workman, made to his master or employer by the person upon whose premises and for whom he has been at work, if made immediately, *bond fide*, and without any malicious intention, is a privileged communication.

So also is an honest and *bond fide* complaint made to the workman himself, though in the presence of a third person.

But a repetition of such complaint to the third person, if he has no interest in the matter, when the party accused is not present, is not so privileged. *Toogood v. Spyring*, 3 Law J. (n.s.) Exch. 347, s.c. 1 C. M. & R. 181; 4 Tyr. 582.

If, in consequence of slanderous words spoken of a servant, a master dismisses the servant, an action alleging special damage is maintainable whether the master believes the imputations conveyed, and acts upon that belief, or whether he acts from any other motive.—*Semble*, a communication made *bond fide* by a landlord to his tenant, as to the conduct of lodgers in his house, is privileged.

*Knight v. Gibbs*, 3 Law J. (N.S.) K.B. 135, a.c. 1 Ad. & E. 43; 3 N. & M. 467.

(B) PLEADINGS AND EVIDENCE.

[See NEW TRIAL.]

A declaration for slander stated, by way of inducement, that plaintiff was a pork-butcher; and then charged the defendant with publishing to plaintiff, in presence of other persons, these words of and concerning plaintiff:—"You are a bloody thief. Who stole P's pigs? You did, you bloody thief, and I can prove it. You poisoned them with mustard and brimstone;" *innuendo*, that plaintiff was guilty of pig-stealing. The jury found, that the words were not intended to impute felony, but were spoken of plaintiff in relation to the trade:—Held, that plaintiff was not entitled to recover, as the words used did not shew that they were necessarily spoken of him in relation to his trade, and no colloquium concerning his trade was laid in his declaration. *Sibley v. Tomlins*, 4 Tyr. 90.

A declaration for slander without any special introductory averment, except that the plaintiff had been in the service of the defendant, and was likely to be retained and employed as a servant by another person; and that the defendant intended to cause it to be suspected and believed that the plaintiff had conducted himself dishonestly and unfaithfully, and had robbed the defendant whilst in his service, alleged that the defendant spoke the words, "You have robbed me of 1*l.* tan money,"—*innuendo* that the plaintiff had fraudulently and wrongfully taken and applied to his own use the sum of 1*l.* being part of the sum of 6*s.* 6*d.*, which he had received into his custody as the servant of and for and on the behalf of the defendant; and which said monies were so paid to the said plaintiff, for and on account of him the said defendant, as and for the produce of the sale of a certain quantity of a certain article called tan, theretofore sold by the said plaintiff, for and on behalf of him the said defendant; and for which said sum of 6*s.* 6*d.*, he, the said plaintiff, as such servant as aforesaid, was accountable to the said defendant:—Held, that the counts of the declaration founded upon these words were bad, inasmuch as the words as alleged were not actionable of themselves, and the *innuendo* introduced new facts; and also shewed, that the defendant did not mean to impute robbery, but embezzlement.

Where a declaration in slander contains some good counts, and others bad, concluding with a general allegation of special damage, judgment entered on a verdict with damages generally, is error; and the court of error will award a *venire de novo*. *Day v. Robinson*, 3 Law J. (N.S.) Exch. 381, a.c. 1 Ad. & E. 564; 4 N. & M. 884.

The defendant wrote a letter concerning the plaintiff, who was a gardener, and had been in his employment, to one C A P who had hired him subsequently, which letter was set out in a declaration for libel, with innuendoes in this manner:—"Sir, as I believe you were perfectly aware that the gardener whom you are employing was discharged from the service of Mrs. Nicholls and myself, for dishonesty, [meaning that the plaintiff had been guilty of dishonesty and unlawful practices in his business and employment of a gardener,] and I have reason to suppose that many of the flowers of which I have

been robbed, are growing upon your premises, [thereby meaning that the plaintiff had been guilty of larceny, and had stolen from the defendant certain plants, roots, and flowers of the defendant, and had disposed of them unlawfully to the said C A P, and unlawfully placed them in the garden of the said last-mentioned person,] may I beg to know when it will be convenient for you to see me?"—Held, after argument, on motion in arrest of judgment, that the libel warranted the last innuendo; or, at least, it might be rejected, and enough libellous matter would remain to sustain the action.

The defendant brought a writ of error, and assigned this objection as a ground of error:—Held, by the Court, that they could not say it was frivolous, they having granted a rule to shew cause, and heard it argued. *Gardiner v. Williams*, 4 Law J. (N.S.) Exch. 164, a.c. 1 C. M. & R. 78.

A declaration for slander stated a colloquium "of and concerning certain meat which J G had purchased of the plaintiff, who had purchased the same of other persons, and had paid for the same," and alleged the publication of defamatory words, imputing that the plaintiff had stolen the money with which he had paid for the meat:—Held, that the averment that the plaintiff had purchased and paid for the meat was immaterial, and therefore, that the failure by the plaintiff to prove those facts, did not constitute a variance. *Cox v. Thomson*, 1 Law J. (N.S.) Exch. 128, a.c. 2 C. & J. 361; 2 Tyr. 411.

In an action for slanderous words, the declaration stated the words to have been spoken "of and concerning the plaintiff in his character of a physician," without any averment of special damage:—Held insufficient, and, that the declaration, to be maintained without special damage, must state, not only that the scandalous conduct imputed to the plaintiff was imputed to him in his character of a physician, but must state further in what manner the words were spoken of him in his profession; it must allege words imputing improper conduct to him as connected with his profession. *Ayres v. Craven*, 4 Law J. (N.S.) K.B. 35, a.c. 2 Ad. & E. 2; 4 N. & M. 220.

Where, in a declaration for slander, a good innuendo ascribing a particular meaning to words, is not supported by the evidence, the plaintiff cannot reject it and prove the words to have another meaning. *Williams v. Stott*, 2 Law J. (N.S.) Exch. 303, a.c. 3 ibid. 110; 1 C. & M. 675; 3 Tyr. 688.

Declaration stated, that a house in the plaintiff's occupation at Charlton had been burnt; and that the defendant, intending to cause it to be believed that the plaintiff had been guilty of setting it on fire, spoke, &c.—After verdict, held to be insufficient; the mere setting on fire by a man, of his own house, without any apparent intention to injure another, being no punishable offence. *Sweetapple v. Jesse*, 2 Law J. (N.S.) K.B. 181, a.c. 2 N. & M. 36; 5 B. & Ad. 27.

In an action for slander *per quod*, it is not sufficient to prove equivalent words of slander, though explained in the same sense by the defendant himself. *Armitage v. Dunster*, 4 Doug. 291.

In an action for slander, the plaintiff may give evidence of anything, that the defendant afterwards said, which goes to shew malice in the defendant, provided that it cannot be the subject of another

action; therefore the plaintiff may give evidence that the defendant repeated the same words at a subsequent time, or spoke on the subject of this action, but cannot go into evidence of other words subsequently spoken, if those words may be the subject of another action. *Defries v. Davis*, 7 C. & P. 112. [Tindal]

In an action for slander, a writ of inquiry executed in a former action between the same parties for similar words, and in which the defendant apologized, and admitted his error, is admissible as evidence of the conduct of the defendant. *Jackson v. Adams*, 4 Law J. (N.S.) C.P. 194.

A document was produced in evidence, purporting to be a diploma from the university of St. Andrews, and a witness was called, who stated that he went to a place which he was told was St. Andrews, taking with him the diploma, where he had seen three persons, whom, he was informed, were three of the professors, one of whom was the librarian, who acknowledged their signatures to that diploma. He was also shewn, by the librarian, the Book of Acts, in which was an entry, (of which he produced an examined copy,) conferring the degree of M.D. on the plaintiff, as also the seal of the university, corresponding with that on the diploma:—Held, that that was sufficient evidence of the conferring of the degree by the university of St. Andrews. Such degree, however, granted by a Scotch university, does not confer on the person to whom it is granted, a right to practise as a physician in England without licence from the College of Physicians:—Held therefore, that a plaintiff could not maintain an action, in which he alleged he was a physician, against a person who denied that he was such, for slander of him as such physician, upon the above evidence. *Collins v. Carnegie*, 3 Law J. (N.S.) K.B. 190, s. c. 1 Ad. & E. 695; 3 N. & M. 703.

#### SLAVES AND SLAVERY.

Abolition of slavery in the British colonies. 3 & 4 Will. 4, c. 73; 11 Law J. Stat. 123.

Provisions for further execution of 3 & 4 Will. 4, c. 73, for compensating owners of slaves. 5 & 6 Will. 4, c. 45; 13 Law J. Stat. 75.

Slaves, recently but not legally transferred from a son to his mother, removed from Watling's Island to New Providence, both places being under the same government, a licence from the governor for their removal, as plantation slaves under 5 Geo. 4, c. 113, s. 14, having been refused, and without certificate of registration, and afterwards claimed by the mother as domestic slaves attending upon the son as part of her family, condemned. *Three Slaves*, 2 Hag. 412.

The exception in favour of the removal of domestic slaves, was not intended to legalize the permanent removal of domestic slaves, without an actual *bond fide* attendance on their master. *Ib.* 416.

Parties are bound to observe the general prohibitions of the statutes respecting the removal of slaves, if accidental circumstances prevent them from availing themselves of the exceptions applicable to their case. *Ib.* 419.

Slaves in Antigua cannot be equitably mortgaged by a deposit of a registered title-deed containing a schedule of slaves, if the memorandum accompany-

ing the deposit, which is registered, do not contain a list of the slaves. *Ex parte Rucker*, 3 Law J. (N.S.) Bankr. 104, s. c. 1 M. & A. 481;—reversed, *Ex parte Borradaile*, 2 M. & A. 398.

On appeal from the restitution of a slave, the alleged property of A, to whom he had only been just transferred, and shipped for removal from Naassau to Ragged Island within the same government, on board a vessel cleared for Cuba, but (the Governor's licence, which had been applied for, not having been received,) relanded, and subsequently seized, the Court affirmed the sentence, but without costs, holding that the transfer, though suspicious, was apparently valid and legal; that the shipment was *bond fide* for Ragged Island, and contingent on the obtaining a licence; and that the bare shipment did not work a forfeiture, the intention of removal without a licence being negated by the relanding. *The Slave Duncan*, 2 Hag. 427.

#### SLAVE TRADE.

Provisions for carrying into effect two conventions with the King of the French for the suppression of. 3 & 4 Will. 4, c. 72; 11 Law J. Stat. 123:—and for carrying into effect a similar treaty with the King of the French and the King of Sardinia. 5 & 6 Will. 4, c. 60; 13 Law J. Stat. 126:—and with the King of the French and the King of Denmark. 5 & 6 Will. 4, c. 61; 13 Law J. Stat. 133.

The 5 Geo. 4, c. 113, s. 71, gives the Court of Admiralty power to decide on claims to share in the proceeds or bounties in slave captures, although the condemnation has passed in the mixed commission court. *Donna Barbara* (Luís), 2 Hag. 370.

The instructions annexed to the convention with Portugal, embodied in 5 Geo. 4, c. 113, imply that the seizures of the Portuguese slave ships are to be made under the personal direction of a commander of a ship of war:—Held, therefore, that a seizure by an open boat, (the crew of which was borne on the books of a King's ship,) commanded by an officer of the rank required to make the search, but actually putting off from an unauthorized tender, and at a distance of 1,500 miles from the King's ship, did not entitle the ship to the moiety of the proceeds, or to the bounties under 5 Geo. 4, c. 113, s. 67 & 68, the slave ship having been condemned by the competent Court as prize to a tender to a King's ship. *Ib.* 366.

#### SMUGGLING.

[See CONTRACT, Valid or Illegal—REVENUE.]

So much of 3 & 4 Will. 4, c. 53, as authorizes the sending of offenders to serve in His Majesty's Naval service, repealed; and certain provisions of the same act altered and amended. 4 Will. 4, c. 13; 12 Law J. Stat. 22.

*Semble*, that bats, which are long poles used by smugglers to carry tubs of spirits, are not offensive weapons within the meaning of the 6 Geo. 3, c. 108, s. 56. A prisoner ought not to be convicted upon the evidence of any number of accomplices, unconfirmed by other testimony. *Res v. Noakes*, 5 C. & P. 326. [O.B.]

A vessel coming within a league of the coast of the United Kingdom, having had prohibited goods

on board in the same voyage, is liable to forfeiture, under the 3 & 4 Will. 4, c. 53, s. 2, though she had unshipped those goods before she came within that limit. *Attorney General v. Schiers*, 4 Law J. (N.S.) Exch. 324, s. c. 2 C. M. & R. 286.

#### SOAP,

Alteration of duties, allowances, and drawbacks upon. 3 Will. 4, c. 16; 11 Law J. Stat. 40.

#### SOCIETY, ILLEGAL.

[See OATH.]

#### SODOMY.

On an indictment for sodomy, the crime is complete, if the jury be satisfied that penetration took place. *Rex v. Roekpear*, 1 M. C.C. 342.

#### SOLICITOR.

[See ATTORNEY AND SOLICITOR.]

#### SOVEREIGN PRINCE.

[See PRACTICE, *Eq.*, Answer.]

A foreign sovereign prince, being declared entitled to sue in the Court of Chancery here in his political capacity, claims the privilege of putting in an answer, by his agent, without oath, or signature, to a cross-bill, filed against him by the defendants to his original bill:—Held, that he stands upon the same footing with ordinary suitors as to the rules and practice of the Court, and is bound, like them, to answer a cross-bill personally, and upon oath. *The King of Spain v. Hullett*, 1 C. & F. 333.

#### SPEAKER OF THE HOUSE OF COMMONS

Disabled from holding office of place or profit, during pleasure, under the Crown; and provision for support of. 2 & 3 Will. 4, c. 105; 10 Law J. Stat. 258.

Reduction of salary of. 4 & 5 Will. 4, c. 70; 12 Law J. Stat. 143.

#### SPECIAL CASE.

[See SESSIONS, Special Case.]

May be stated without proceeding to trial. 3 & 4 Will. 4, c. 42, s. 25; 11 Law J. Stat. 98.

A special case directed by a court of equity, must be signed by counsel, before it can be set down for argument; the settlement and signature thereof by a Master in Chancery are insufficient.

An application to compel the attorney of one of the parties to lay such a case before counsel for signature, must be made to the Court by which the case is ordered, and not to the Court where it is to be argued. *Forbes v. Champneys*, 4 Law J. (N.S.) C.P. 47; s. p. (*nomine Mostyn v. Champneys*) 1 Sc. 57; and *Roy v. Champneys*, 3 Dowl. P.C. 105.

#### SPECIAL JURY.

[See JURY.]

#### SPECIAL VERDICT.

[See TENDER, *Finch v. Brook*.]

No special verdict in a writ of right. *Davies v. Lowndes*, 4 Law J. (N.S.) C.P. 214, s. c. 1 Bing. N.C. 619; 2 Sc. 104.

Where a special case, on which judgment had been given for the plaintiff in the Court of Common Pleas, was, at the instance of the defendant, turned into a special verdict, that he might have the opportunity of obtaining the judgment of a court of error thereon, the Court of Common Pleas, after the lapse of two years, and after the costs of the trial and special case had been taxed and paid, refused to allow the plaintiff the costs thereby occasioned. *Collins v. Guynne*, 2 Sc. 332.

#### SPECIALTY CREDITOR.

[See DEBTOR AND CREDITOR, Priority of Payment.]

#### SPECIFIC PERFORMANCE.

[See BANKRUPT, Right of Assignees, and Jurisdiction of the Court of Review—INJUNCTION—INSOLVENT, Right of Assignees—PLEADING, In Equity—VENDOR AND PURCHASER.]

- (A) BILL FOR, WHERE SUSTAINABLE.
- (B) PRACTICE.

- (A) BILL FOR, WHERE SUSTAINABLE.

[*Harris v. Kemble*, 2 D. & Cl. 463, s. c. 2 Law J. Dig. 270; 5 Bligh, N.S. 730.]

Specific performance of an agreement that appeared to be only a preliminary foundation for a future agreement, refused. *Robertson v. Marquis of Londonderry*, 2 Law J. (N.S.) Chanc. 137.

Filing a bill, held to be sufficient evidence of plaintiff's assent to an agreement of which the bill seeks to enforce specific performance. *Agar v. Bide*, 2 Law J. (N.S.) Chanc. 3.

In determining whether time be of the essence of a contract, the intention of the parties will be taken into consideration. Delay in furnishing abstracts of title, and other circumstances, shewing that time was not absolutely considered of the essence of the contract, will amount to a waiver, although there was an express stipulation in the first instance for the payment of the purchase-money on a particular day. Where parties, however, arbitrarily, mutually agree that a particular act shall be done by a stated time, a court of equity, equally as a court of law, will enforce the contract. *Hipwell v. Knight*, 4 Law J. (N.S.) Exch. Eq. 52, s. c. 1 Y. & C. 401.

Equity will not compel a purchaser to take an equitable lease instead of a legal one; but where a person contracts for a lease, for a term certain, of copyhold premises, knowing the property to be of copyhold tenure, he is bound to inquire whether the custom of the manor warrants a lease for the



term agreed to be granted; and exercising acts of ownership without such inquiry, will prevent his waiving the contract, because the lease for the whole term cannot be granted. *Hanbury v. Lichfield*, 3 Law J. (n.s.) Chanc. 49, s.c. 2 M. & K. 629.

Where an undated written contract for a lease omits to state the period of commencement, and contains nothing from which it may be inferred, a specific performance of it cannot be enforced as a written contract.

Where a party to a written contract enters afterwards into a parol one, inconsistent with it, he thereby so far abandons the written contract, that he cannot enforce a specific performance of it in equity. *Gilbert v. Hall*, 1 Law J. (n.s.) Chanc. 15.

Circumstances under which the specific performance of an agreement not under corporate seal was decreed. See *Maxwell v. Dulwich College*, 4 Law J. (n.s.) Chanc. 138.

Where, by the same articles of agreement, in writing, A agrees to sell, and B agrees to purchase A's estate, and B agrees to sell, and A agrees to purchase B's estate, these are separate and independent contracts; and when B is unable to make a good title to his estate, A may compel B to take his estate; and no evidence will be admitted to shew an intention in the parties that the agreement was in the nature of an exchange, and not of two separate contracts. *Croome v. Lediard*, 3 Law J. (n.s.) Chanc. 98, s.c. 2 M. & K. 251, 293.

Where there is an agreement for a lease, of such a nature that, in the usual course, a certain covenant would be introduced in it, and the intended lessee has done that which would be a breach of such covenant, he cannot compel the specific performance of the agreement. *Tunno v. Lewis*, 1 Law J. (n.s.) Chanc. 177.

A agrees to sell B a house, and writes to his attorney, saying, that he has sold the house for 1,000 guineas, and directing the attorney to get the deeds as soon as he can, that the money may be paid; this letter he signs, and gives to B to read and send by the post:—Held, on a bill being filed by B for specific performance, that this was a sufficient memorandum within the Statute of Frauds.

The Court will not act on an arrangement between parties to a bill for specific performance, that no advantage shall be taken of the want of a stamp, either by decreeing specific performance, or dismissing the bill. *Owen v. Thomas*, 3 Law J. (n.s.) Chanc. 205, s.c. 3 M. & K. 353.

Where a landlord agrees to grant a lease to A, his executors, administrators, and assigns, upon certain conditions, and A assigns his interest in the contract to B, and then becomes bankrupt, B, on performing the conditions, has a right to enforce the agreement specifically, notwithstanding his assignor's bankruptcy; and this right is not affected by a proviso, that in case of the bankruptcy of A, the landlord shall have power to re-enter and sell the benefit of the contract and the premises, and hold the proceeds, subject to his own claims, for the use of A's estate. *Morgan v. Rhodes*, 1 M. & K. 435.

A leased premises to B for ten years, and B covenanted not to assign the premises without A's consent. A agreed to grant to C a lease for ten

years from the end of B's term, subject to the same covenants as were contained in B's lease. C died before the lease was executed to him. A filed a bill against C's executors (who admitted assets) for a specific performance of the agreement, and offered so to qualify the covenants of the lease, as that the executors should be no further liable thereon than they would have been on the covenants which ought to have been entered into by the testator, in case a proper lease had been made to him. Specific performance of the agreement decreed, with a reference to the Master to settle the lease. *Phillips v. Everard*, 5 Sim. 102.

A, in consideration of the intended marriage of his niece, entered into a bond, with a penalty conditioned to give, by will or otherwise, unto or in trust for her or the issue of the intended marriage, so much in money, or in valuable effects, as he should by his will give or bequeath to any one of his next-of-kin, or to any other person whomsoever:—Held, that this condition was not to be satisfied by the penalty, but must be specifically performed. All voluntary assignments and transfers of personal property, and all conveyances of real estate purchased subsequently to the date of the bond, in which real estate or personal property the obligor retained a life interest, were declared to be in the nature of testamentary dispositions, to be considered in equity, for the purpose of giving effect to the true intent of the agreement in the bond, as if the said estates had been given or devised by the obligor's will. The persons entitled to the benefit of the bond were declared to be specialty creditors upon the obligor's estate, for satisfaction of their claims under the bond. *Logan v. Wienholt*, 1 C. & F. 610, s.c. 7 Bligh, n.s., 1.

A granted an annuity to B, and covenanted to charge it upon all such property as, in the event of C dying before him, he might become possessed of at C's death, either by will or otherwise. A afterwards became bankrupt, and obtained his certificate, and then C died, having bequeathed an annuity in trust for A:—Held, that B was entitled to a decree specifically charging his annuity upon the annuity bequeathed in trust for A.

An agreement, of which the subject is an expectancy contingent upon the will of a living person, is not illegal, but will be enforced in equity. *Lyde v. Mynn*, 1 M. & K. 683.

Bill to compel the transfer of certain stock, the reversionary interest in which had been formerly purchased by the plaintiff, and had now become vested in possession. The transfer was resisted by the vendor, and the trustees of the settlement under which he claimed, on two grounds—first, fraud, or undue advantage; and secondly, inadequacy of the consideration. The first ground wholly failed in evidence. On the second point, the effect of the evidence was, that the price given was sufficient, according to the opinion of auctioneers, and persons of that description, but was about two-thirds of the value, calculated by actuaries from the tables:—Held, that the inadequacy of the consideration was not sufficiently proved. *Potts v. Curtis*, 1 Yo. 543.

Bill for specific performance of an agreement to renew a lease, dismissed; the agreement being too vague and uncertain to be executed by the Court. The insolvency of the intended lessee is a good

ground of objection to a bill brought by him for the specific performance of a contract to renew a lease. Certified copies of the schedule, &c. may be given in evidence under the Insolvent Act, by parties other than the insolvent or his creditors. *Price v. Asheton*, 4 Law J. (n.s.) Exch. Eq. 3, s.c. 1 Y. & C. 441.

In an agreement for the purchase of an estate, one of the stipulations was, that the vendor should be tenant from year to year to the purchaser:—Held, that the inability of the vendor to perform this stipulation, by reason of embarrassments, of which the purchaser must have had some notice, was no bar to the specific performance of the contract.

A stipulation to give such a title as shall be satisfactory to the purchaser, does not authorize the purchaser to make any other than the usual objections to the title.

Deterioration of the estate, arising from delay in completing the purchase, is not a ground for rescinding the contract, but may be the subject of an allowance to the purchaser. *Lord v. Stephens*, 1 Y. & C. 222.

The plaintiff and his wife, who was one of the children of A, agreed with the other children to divide equally A's property at his death. The plaintiff's wife died before A, and the plaintiff was her administrator. He made an assignment, by which his share passed, and afterwards filed a bill for a specific performance:—Held, that the agreement was valid, and that the plaintiff being a trustee of his share for the assignees, the suit was properly instituted by him. *Hyde v. White*, 5 Sim. 524.

#### (B) PRACTICE.

Upon a bill filed by the vendor, for the specific performance of a contract, it appeared that the defendant, in the course of correspondence between the solicitors, and upon a case stated on his part for the opinion of counsel, expressed himself willing to accept the title, if a particular objection then referred to were removed. That objection not being removed, the bill was filed, and the Court ruled that the reference to the Master as to the title must be in general terms, and not confined to the particular objection. *Lesturgeon v. Martin*, 3 M. & K. 256.

Where a parol agreement, varying the terms of the written agreement, is set up by the defendants in a suit for specific performance, and supported by evidence affording a presumption or suspicion of its existence, an inquiry will be directed. *Van v. Corpe*, 3 M. & K. 268.

Where one general exception, consisting of several distinct objections, which are specified as the grounds of the exception, is taken to a report in favour of a title, and the Court overrules the exception as to some of the objections, and allows it as to others, the deposit will be divided. *Whilton v. Peacock*, 3 M. & K. 325.

#### SPIRITS

Made from malt only—duty reduced on (in Scotland and Ireland). 2 Will. 4, c. 29; 10 Law J. Stat. 47.

Alteration of duties on, in Ireland; and on

licences to retailers of, in the United Kingdom. 4 & 5 Will. 4, c. 75; 12 Law J. Stat. 149.

Certain retailers of, exempted from duties on licences. 5 & 6 Will. 4, c. 39; 13 Law J. Stat. 70.

#### STABBING.

[See CUTTING AND MAIMING.]

#### STAFFORD.

[See BRIBERY.]

#### STAGE COACHES.

Amendment of 2 & 3 Will. 4, c. 120, relating to, 3 & 4 Will. 4, c. 48; 11 Law J. Stat. 107.

A coach proprietor is bound to convey his passengers in road-worthy vehicles; and if an accident happen from a defect in construction, the proprietor is liable, although the defect be out of sight and not discoverable upon ordinary examination. *Sharp v. Grey*, 2 Law J. (n.s.) C.P. 45, s. c. 9 Bing. 457; 2 Mo. & Sc. 620.

#### STALLAGE.

[See ASSUMPSIT.]

#### STAMP.

[See ADMINISTRATOR—ARBITRATION, Award—COGNOVIT—PRODUCTION OF DOCUMENTS—RELEASE—REVENUE.]

- (A) IN GENERAL.
- (B) ADMINISTRATION.
- (C) AGREEMENTS.
- (D) ANNUITY.
- (E) APPRENTICESHIP, INDENTURES OF.
- (F) AWARDS.
- (G) BILL OF EXCHANGE AND PROMISSORY NOTES.
- (H) DEEDS IN GENERAL.
- (I) LEASES.
- (K) MORTGAGE.
- (L) NOTARIAL ACT.
- (M) SCHEDULE, CATALOGUE, OR INVENTORY.
- (N) FELONIOUSLY CUTTING OFF STAMPS.
- (O) GOLDSMITHS' STAMP.
- (P) PRACTICE ON TRIAL, WITH RESPECT TO.

Artificial mineral waters, manufactured in England, exempted from. 3 & 4 Will. 4, c. 97; 11 Law J. Stat. 198.

Provisions for preventing the sale and uttering of forged stamps. 3 & 4 Will. 4, c. 98; 11 Law J. Stat. 198.

Reduction of duties on advertisements and certain sea insurances; repeal of duties on pamphlets, receipts under 5*l.*, and insurances on farming stock. 3 Will. 4, c. 23; 11 Law J. Stat. 72.

Affidavits on registering votes in Ireland, exempt from stamp duty. 4 & 5 Will. 4, c. 56; 12 Law J. Stat. 113.

Stamp duty on almanacs, directories, &c.—repeal of; and relief provided for in certain other cases. 4 & 5 Will. 4, c. 57; 12 Law J. Stat. 113.

Stamps and Taxes,—consolidation of Boards of. 4 & 5 Will. 4, c. 60; 12 Law J. Stat. 116.

## (A) IN GENERAL.

Where an instrument is not required by law to be stamped within a particular time after its execution, the Court, upon its being offered in evidence, will not inquire when the stamp was affixed, nor, if a penalty was incurred, whether the proper penalty was paid on the stamping. An indenture of apprenticeship, without premium, was executed April 27, 1825, but not stamped till July 1832, when a 1*l.* stamp was put on it, and a 5*l.* penalty paid. The indenture was offered in evidence, to prove the settlement of a pauper by service under it:—Held, that, as it was not within stat. 8 Anne, c. 9, which limits the time for stamping indentures, the Court was not called upon to notice the circumstances under which the stamps were affixed. *Rez v. Preston*, 3 Law J. (n.s.) M.C. 68, s. c. 5 B. & Ad. 1028; 3 N. & M. 31.

Where an indictment is founded on a written instrument, and where the instrument itself is the crime, it is receivable in evidence, although not stamped; but where the indictment is for an offence distinct from the instrument, and the instrument be only introduced collaterally, it cannot be received unless it be properly stamped. *Rez v. Smyth*, 5 C. & P. 201. [Tenterden]

## (B) ADMINISTRATION.

The stamp, upon letters of administration, must be of sufficient amount to cover the sum for which the action is brought. Therefore, where the defendant had covenanted to indemnify the plaintiff's intestate against the arrears of an annuity granted by him in his lifetime to A S, and A S had obtained judgment against the plaintiff as administratrix for the amount of arrears—of assets *quando acciderint*:—in an action by her, on a breach of that covenant, to recover 500*l.*, with costs incurred in defending the action, letters of administration, taken out on an affidavit that the intestate's effects were under the value of 20*l.*, are not sufficient to entitle her to maintain the action.

The intestate was not a mere trustee for the party entitled to the annuity, within the meaning of the exception in the Stamp Act. *Carr v. Roberts*, 1 Law J. (n.s.) K.B. 83, s. c. 2 B. & Ad. 905.

## (C) AGREEMENTS.

[See PARTNERS, *Jackson v. Shepherd*.]

Where several lots are knocked down to a bidder at an auction, and his name marked against them in the catalogue, a distinct contract arises for each lot; and a memorandum signed afterwards by the bidder, stating that he agrees to become the purchaser of the several lots in his name, does not require a stamp, though the aggregate exceed 20*l.* in value, no single lot being of that price. *Roots v. Lord Dorman*, 4 B. & Ad. 77, s. c. 1 N. & M. 667.

Where an agreement and a writing described therein as annexed to it, contain together more than 1080 words, a 3*5s.* stamp is required, although in fact the writing was annexed to the agreement after it was executed. *Veal v. Nicholls*, 1 M. & Ro. 248. [Tindal]

In an agreement "to pay rateably and proportionably, according to the sums of money severally subscribed by us, and set opposite to our respective names,"

all the sums and signatures must be reckoned in the number of words; and therefore, where such an agreement was executed by the defendant, and nearly two hundred other persons, and the number of words, inclusive of the sums and signatures, down to and including the defendant's, did not amount to 1080, but, including all the sums and signatures, exceeded that number: it was held, that a 1*l.* stamp was insufficient. *Linley v. Clarkson*, 2 Law J. (n.s.) Exch. 114, s. c. 1 C. & M. 436; 3 Tyr. 352.

Where an agreement, duly stamped as such, was put in evidence, and referring to another as the consideration for its execution, the latter was also produced:—Held, that the latter might be read, though not stamped, and though the former was not stamped with a stamp of 1*l.* 15*s.*, the number of words in the two together not amounting to 1080. *Peate v. Dickinson*, 4 Law J. (n.s.) Exch. 28, s. c. 1 C. M. & R. 422; 5 Tyr. 116.

An instrument by which the defendant undertakes to hold harmless and indemnify the plaintiff from all costs and charges, damages, and other expenses or liability, which may be incurred by him, or arise from his having become special bail "for my son," requires a stamp: the sum for which the son was arrested being more than 20*l.* *Wrigley v. Smith*, 3 Law J. (n.s.) K.B. 116, s. c. 5 B. & Ad. 1117; 3 N. & M. 181.

A paper as follows:—"Memorandum, I, J R, consent to take 10*s.* per month from W H H, in discharge of a sum of 32*l.* the said W H H intends giving him, and upon the said sum being paid, he engages giving a receipt in full of all demands," signed by J R, and dated, requires a stamp under stat. 55 Geo. 3, c. 184, sch. 1, part 1. "Agreement," as an agreement whereof the matter is of the value of 20*l.* *Remon v. Hayward*, 4 Law J. (n.s.) K.B. 64, s. c. 2 Ad. & E. 666.

"Memorandum of an agreement betwixt W S and W B, which is—the horse to be 34*l.*, W B to have half at 17*l.*, and to pay half the horse's expenses, being with J M from his arriving at M. At the same time agreed for the horse to go to N to be entered for the handicap and silver cup:—Held, to be an agreement relating to the sale of goods, wares, and merchandise, and not to require a stamp. *Marson v. Short*, 4 Law J. (n.s.) C.P. 270, s. c. 2 Bing. N.C. 118; 2 Sc. 243.

In an action on an agreement for a lease, where two parts have been executed, and the plaintiff has lost the part delivered to him, the Court, or a Judge, on summons, will order the defendant or his attorney to produce the part in his possession at the Stamp Office to be stamped. *Neale v. Sweeney*, 1 Law J. (n.s.) Exch. 118, s. c. 2 C. & J. 278; 1 Dowl. P.C. 314.

## (D) ANNUITY.

A copy of court roll admitting a surrenderee in trust for the grantee of an annuity there stated to be secured by the bond of the purchaser, and subject thereto to the use of the purchaser, his executors, administrators, and assigns, requires an *ad valorem* stamp in respect of the purchase-money expressed to be so paid by the purchaser to the surrenderer, but without reference to the annuity—whether the statement is taken to refer to an annuity

already granted, or to an annuity to be created in future. *Doe d. Chapman v. Reynolds*, 2 N. & M. 383.

(E) APPRENTICESHIP, INDENTURES OF.

[See *POOR, Settlement.*]

(F) AWARDS.

Whether a statement and the opinion of counsel thereon, pursuant to an agreement, to have a question in dispute settled by such statement and opinion, if both contain more than one thousand eight hundred words, requires a stamp according to the progressive duty; and how far one partner may bind his co-partners by signing such an agreement. *Boyd v. Emerson*, 4 Law J. (N.S.) K.B. 43, s. c. 2 Ad. & E. 184; 4 N. & M. 99.

(G) BILLS OF EXCHANGE AND PROMISSORY NOTES.

[See *BILL OF EXCHANGE.*]

(H) DEEDS IN GENERAL.

[See *BOND, Stamp—ASSESSED TAXES.*]

Where the parties interested have met to execute a deed, it is not so perfect, by the execution of the granting party alone, as to render a new stamp necessary upon an alteration being made in it at the instance of the grantee, before his execution and before the re-execution by the grantor. *Jones v. Jones*, 2 Law J. (N.S.) Exch. 249, s. c. 1 C. & M. 721; 3 Tyr. 890.

A release of a witness having been executed by a defendant was given to the defendant's attorney. During the trial it was altered by inserting the name of another witness, and changing the terms so as to make a release of both witnesses, and was re-executed by the defendant before delivery to either witness:—Held, that the instrument was *in fieri* at the time of the second execution, and therefore that no new stamp was necessary.

*Quære*—whether a release to two witnesses requires two stamps. *Spicer v. Burgess*, 3 Law J. (N.S.) Exch. 285, s. c. 1 C. M. & R. 129; 4 Tyr. 598.

A deed of feoffment conveying property in consideration of natural love and affection and of 10s., requires only one stamp of 1l. 15s. *Doe d. Wheeler v. Wheeler*, 4 Law J. (N.S.) K.B. 58, s. c. 2 Ad. & E. 28; 4 N. & M. 10.

The counterpart of an assignment of a lease requires a thirty-five shilling stamp.

The plaintiffs declared in covenant for rent, as executors, stating that their testator assigned the messuage, &c. to the defendant for the residue of a term, and, upon issue taken upon the fact of assignment, they produced at the trial the counterpart of an indenture, whereby the testator demised the premises to the defendant, for a period extending some months beyond the termination of his own interest, which indenture was signed by the defendant only, and was impressed with a stamp for 30s. —Held, that this could not be treated as an assignment, or as the counterpart of a lease, but as the counterpart of an assignment only; and, therefore, that it came within the words of the schedule of 55 Geo. 3, c. 184, as a deed "not otherwise charged for," and, as it had not a 36s. stamp, was inadmissible in evidence. *Baker v. Gosling*, 4 Law J. (N.S.) C.P. 31, s. c. 1 Bing. N.C. 246; 1 Sc. 58.

(I) LEASES.

A lease was executed in 1805, when the amount of the stamp would have been 1l. 10s., but was stamped in 1834 under the provision of the 37 Geo. 3, c. 136, s. 2, with a stamp of 1l., being the amount of the stamp then in force:—Held, that the proper duty had been paid. *Buckworth v. Simpson*, 4 Law J. (N.S.) Exch. 104, s. c. 1 C. M. & R. 834; 5 Tyr. 344.

Upon a demise of two different farms, which contained two distinct habendums, for which there was a reservation of two distinct rents, and in which the tenant was bound by distinct covenants:—Held, that a single *ad valorem* stamp was sufficient, as the contracting parties intended it should be one transaction, and the tenant entered upon the entire property at the same time. *Blount v. Pearman*, 4 Law J. (N.S.) C.P. 149, s. c. 1 Bing. N.C. 408; 1 Sc. 55.

(K) MORTGAGE.

[See *ante, Annuity.*]

In a mortgage deed, securing the sum lent with interest, and all sums which the mortgagee should expend in respect of the deed and interest thereon, with a power of sale, and direction for the mortgagee to stand possessed of the proceeds of sale in trust, after deducting the mortgage money and interest and all expenses and interest, for the mortgagor; with a covenant from the mortgagor, to pay the mortgage-money and interest, and all costs attending the execution of the trust with interest, the stamp affixed on the deed was calculated upon the principal sum alone: and held, sufficient. *Doe d. Scruton v. Scruton*, 1 Law J. (N.S.) C.P. 59, s. c. 8 Bing. 146; 1 Mo. & Sc. 230.

A mortgage deed was given for the security of 1,137l., after payment of the costs of the trustees, and also a reasonable sum by way of satisfaction for their trouble:—Held, that a 5l. stamp, required by the 48 Geo. 3, c. 149, on a deed for the security of a sum not exceeding 2,000l., was sufficient, unless it were proved that such reasonable sum, by way of compensation, when added to the principal, exceeded that amount. *Paddon v. Bartlett*, 4 Law J. (N.S.) K.B. 65, s. c. 2 Ad. & E. 9; 4 N. & M. 1.

By 3 Geo. 4, c. 117, s. 2, where, upon a transfer on mortgage, a further sum is advanced, an *ad valorem* stamp is payable on the additional sum advanced with the progressive duty of 1l., and no transfer stamp is required in addition.

The transfer stamp is only required when no additional sum is advanced, and then also a progressive duty of 1l. 5s.

*Quære*—whether a common deed stamp is necessary in addition. *Doe d. Bartley v. Gray*, 4 Law J. (N.S.) K.B. 197, s. c. 4 N. & M. 719; 3 Ad. & E. 89.

An assignment of leasehold, determinable on lives, by way of mortgage, with a covenant to pay a certain sum with interest, and also the yearly premium and other costs and charges of an assurance of one of the lives for the term of seven years, requires a stamp of 25l. as being a deed to secure a sum without limit.

The term "without limit," in the 55 Geo. 3, c. 184, Schedule, 'Mortgage,' means, without limit on the face of the deed. *Halse v. Peters*, 1 Law J. (N.S.) K.B. 2, s. c. 2 B. & Ad. 807.

(L) NOTARIAL ACT.

[See PRACTICE, Ecclesiastical Courts.]

(M) SCHEDULE, CATALOGUE OR INVENTORY.

By an agreement of demise, the land was to be farmed according to covenants contained in an expired lease. The expired lease being produced in an action brought for not farming the land according to those covenants,—Held, that it was not a schedule, catalogue, or inventory, containing the conditions or regulations for the management of a farm, within 55 Geo. 3, c. 184, sched. part. 1, and therefore did not require a stamp of 25s. *Strutt v. Robinson*, 3 B. & Ad. 395.

(N) FELONIOUSLY CUTTING OFF STAMPS.

One who innocently cuts off the stamp and part of the parchment, &c. from an instrument, will be guilty of a capital offence under 55 Geo. 3, c. 184, s. 7, if he afterwards gets off such stamp from such parts of the parchment with intent to use it again. And it will be equally an offence, whether the impression was made before or after 55 Geo. 3, c. 184. *Rez v. Smith*, 1 M. C.C. 314.

(O) GOLDSMITHS' STAMP.

A person may be found guilty under stat. 13 Geo. 3, c. 52, s. 14, and 38 Geo. 3, c. 69, s. 7, if he be proved to have transposed the mark of the Goldsmiths' Company from one gold ring to another, although both rings be genuine, and although the jury may be of opinion that he did so without any fraudulent intention. *Rez v. Ogden*, 6 C. & P. 631. [Bolland and Park]

(P) PRACTICE ON TRIAL WITH RESPECT TO.

If an instrument offered in evidence is objected to as being improperly stamped, the party offering it may either go into the rest of his evidence, and send the instrument to the Stamp Office to be stamped anew, taking the chance of its coming back sufficiently early, or his counsel may argue the objection, taking the stamp as it is; but, if the instrument be sent away to the Stamp Office, the Judge will not allow any argument as to the original stamp being proper. *Beckwith v. Besser*, 6 C. & P. 681. [Gurney]

STANNARIES COURT,

Facilitation of taking of affidavits and affirmations in. 4 & 5 Will. 4, c. 42; 12 Law J. Stat. 72.

STARCH.

Repeal of part of 26 Geo. 3, c. 51, relating to duties on starch, and frauds thereon; and substitution of other provisions. 3 Will. 4, c. 17; 11 Law J. Stat. 42.

STATUTES.

(A) CONSTRUCTION OF, AND OPERATION.

(B) PLEADING.

(C) PROOF OF PRIVATE ACT.

(A) CONSTRUCTION OF, AND OPERATION.

[See APPEAL—RATE, Watching and Lighting—TOLL.]

A statute restricting courts of justice from hearing and determining suits upon certain contracts not entered into without the consent of government, and not registered in a particular manner, does not render those contracts illegal, and, therefore, when that statute has been repealed, such contracts may be enforced in courts of justice, although entered into while the statute was in force. *Gopes Mohun Takoor v. Raja Radhanat*, 2 Kn. 228.

An act of parliament reciting a will, by which estates were devised to A for life, remainder to his first and other sons in tail, remainder to B in tail, and that B had suffered a recovery to the use of A in fee, directed the estates to be sold, and other estates to be purchased and conveyed to such of the uses of the will as, at the time of the sale, should be existing, undetermined, and capable of taking effect. The estates were sold, and the proceeds invested in other estates, which were conveyed to such of the uses of the will as were then existing, &c.—Held, that B did not take an estate tail in the purchased estates. *Wortham v. Mackinnon*, 4 Sim. 485.

Clauses in an act of parliament requiring notice of action, and giving treble costs to the defendant, where an action is commenced "for any act or thing done in execution of or under the authority of the act," extend only to acts done under colour, and not in direct violation of the act of parliament, and, therefore, do not apply to an action against a commissioner, to recover a penalty for acting in a matter wherein he was personally interested. *Charlesworth v. Rudgard*, 4 Law J. (N.S.) Exch. 89, s.c. 1 C. M. & R. 896; 5 Tyr. 476.

By a clause in a local act, it was enacted, "that no action or suit should be brought against any person for anything done in pursuance of that act, until twenty-one days' notice in writing should have been given":—Held, that this did not apply to an action against the vestry clerk, for the breach of a contract alleged to have been made by the vestry.

It was also enacted by the same act, "that the vestrymen should sue and be sued in the name of their clerk, and that any inhabitant of the parish should be deemed a competent witness, notwithstanding his paying the rates":—Held, that a director and guardian of the poor was a competent witness, on behalf of the parish, to disprove a contract alleged to have been made with him and the other director and guardians, his name not appearing on the record, and he not having any more interest in the subject-matter of the action than any other inhabitant. *Fletcher v. Greenwell*, 4 Law J. (N.S.) Exch. 126, s.c. 1 C. M. & R. 754; 5 Tyr. 316.

Where a local act of parliament provided, that no "ditch, drain, or watercourse should be narrowed, filled up, altered, covered in, or arched over," without the consent of the trustees, "nor in any other manner than was expressed in such consent; and that any person who should so narrow, &c. should be liable to a penalty":—Held, that the surveyor of the owner of certain property let for the purpose of building, who had applied for, and

had obtained leave of the trustees to make a sewer of certain dimensions, and who, after a sewer of less capacity had been commenced by the tenant's workmen, gave directions that it should be continued, was liable to the penalty. *Woodward v. Cotton*, 3 Law J. (N.S.) Exch. 300, s. c. 1 C. M. & R. 44; 4 Tyr. 689.

By a local act, the rector, vestrymen, &c. were empowered to make rates; and it was provided that if any person should find himself aggrieved, he should first apply to two Justices, &c., and if not relieved, should be obliged to pay, and afterwards appeal to the Sessions:—Held, that this gave the two Justices, by implication, the power to relieve.

And where, upon application by a party aggrieved, Justices had made an order, relieving him, by reducing the estimate of the annual value from 2,943*l.* to 1,650*l.*, the Court refused to quash the order, although it appeared by affidavit that the Justices came to the conclusion, that the estimate was too high, by considering that the principle of rating, which had been pursued by the parish, was erroneous, and by acting upon a distinct principle. *Rex v. St. James's, Westminster*, 4 Law J. (N.S.) M.C. 15, s. c. 2 Ad. & E. 241.

Where a statute for regulating the trade of the Isle of Man prohibited all goods prohibited in the United Kingdom, was held to vary from time to time with the prohibitions in the United Kingdom, and the repeal of the prohibition of any particular goods as to the United Kingdom is a repeal of the prohibition as to the Isle of Man, although not named in the repealing act. *Burrow v. Quick*, 2 Kn. 79.

The Quebec Act having provided that every owner of lands, goods, or credits in his or her lifetime, may devise or bequeath the same at his or her death, by his or her last will and testament, such will being executed either according to the laws of Canada or according to the forms prescribed by the laws of England:—Held, that a will invalid according to French law, and not executed according to the provisions of the Statute of Frauds, so as to pass freehold lands in England, will not pass lands in Canada, although it would pass copyhold or leasehold lands in England. *Meiklejohn v. Attorney General*, 2 Kn. 328.

What amounts to acting as a commissioner within a clause in a local act of parliament, prohibiting any person from so acting in a matter in which he is personally interested. *Charlesworth v. Rudgard*, 4 Law J. (N.S.) Exch. 89, s. c. 1 C. M. & R. 498; 4 Tyr. 824.

Where two acts of parliament come into operation on the same day, and are directly repugnant,—that which last received the royal assent virtually repeals the other, and is to prevail; although the former, by reason of the classing of the different acts, may be numbered as of a chapter later down in order than the latter. *Rex v. Justices of Middlesex*, 1 Law J. (N.S.) M.C. 5, s. c. 2 B. & Ad. 818.

Although in an act of parliament it is expressly enacted, that it shall commence and take effect from a day named, yet, if the royal assent be not obtained until a day subsequent, the provisions of a particular section, in its terms prospective, do not take effect until such subsequent day. *Burn v. Carvalho*, 1 Ad. & E. 895, s. c. 4 N. & M. 893.

## (B) PLEADING.

[See INDICTMENT.]

## (C) PROOF OF PRIVATE ACT.

A local act containing a clause declaring it to be a public act, and that it shall be taken notice of as such without being specially pleaded, is receivable in evidence, without being proved to have been examined with the parliament roll, or to have been printed by the king's printer.

Limitation of the decision in *Brett v. Beake*. *Woodward v. Cotton*, 3 Law J. (N.S.) Exch. 300, s. c. 1 C. M. & R. 44; 4 Tyr. 689.

A private act of parliament, containing a clause which enacts, "That the act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such, by all Judges, Justices and others, without being specially pleaded," may be given in evidence, without proof of its correctness, by examination with the parliament roll. Such proof will be as unnecessary in this case, as where a statute is public, without the aid of such special clause. *Beaumont v. Mountain*, 3 Law J. (N.S.) C.P. 118, s. c. 10 Bing. 404; 4 Mo. & Sq. 177.

## STEAM CARRIAGES.

The act of 1 & 2 Will. 4, c. 22, relating to hackney-carriages, waggons, drays, &c., in the metropolis, does not extend to steam carriages, or carriages impelled otherwise than by animal power. 3 & 4 Will. 4, c. 48, s. 7; 11 Law J. Stat. 107.

## STET PROCESSUS.

[See PRACTICE, Proceedings, when stayed.]

## STOCK.

[See BANK STOCK—EXECUTOR AND ADMINISTRATOR—LEGACY, Residue—MONEY HAD AND RECEIVED.]

A husband had before making his will transferred two sums of 4*l.* per cent. and 5*l.* per cent. stock, then forming the whole of his funded property, into the joint names of himself and his wife. By his will he gave the rents of his leasehold houses, and the interest of all his funded property or estate of whatever kind, upon trust for his wife for life, and, after her decease, upon trust to pay divers legacies of 4*l.* per cent. stock, the aggregate amount of which fell short by 50*l.* only, of the amount of stock of that description so formerly transferred by him. He afterwards made some further purchases of 5*l.* per cent. stock, taking the transfers in the joint names of himself and his wife, and died in her lifetime, leaving no funded property except the 4*l.* per cents. and 5*l.* per cents. before mentioned, exclusive of which, his assets were wholly insufficient to pay his legacies:—Held, first, that all the sums of stock then standing in the joint names of the husband and wife, and whether transferred before or after the date of his will, became, by survivorship, the absolute property of the wife; secondly, that the will did not purport to dispose of the stock in terms sufficiently distinct and explicit, to put the

wife to her election. *Dummer v. Pitcher*, 2 M. & K. 262.

B M covenanted, that his executors should, within six months after his decease, settle 4,000*l.* stock in the navy 5*l.* per cent. annuities, on his wife and children. The navy 5*l.* per cent. stocks having been reduced to 4*l.* per cent. stock, and that stock having been converted into a 3*l.* 10*s.* per cent. stock:—Held, on the construction of the acts of parliament, that this covenant would be satisfied by a purchase of 4,200*l.* in the 3*l.* 10*s.* per cent. annuities. *Milward v. Milward*, 3 Law J. (n.s.) Chanc. 141, s. c. 3 M. & K. 311.

Unclaimed stock standing in the joint names of A and B, was transferred to the Commissioners for the Reduction of the National Debt; B survived A, and a petition was presented by the personal representative of B for the retransfer. The application was refused, on the ground that no account was given of the beneficial interest. *Ex parte Bateman*, 4 Law J. (n.s.) Chanc. 112.

It is sufficient for the petitioners to make out the legality of their claim to entitle them to a re-transfer of stock, under the 56 Geo. 3, c. 60. The Court will not inquire whether they are the parties beneficially interested. *In re Bigg*, 4 Law J. (n.s.) Exch. Eq. 41, s. c. 1 Y. & C. 245.

#### STOLEN GOODS.

It makes no difference whether a receiver receives for the purpose of profit or advantage, or whether he does it to assist the thief. *Rex v. Davis*, 6 C. & P. 177. [Gurney]

If a receiver of stolen goods receive the property for the mere purpose of concealment, without deriving any profit at all, he is just as much a receiver as if he had purchased it. *Rex v. Richardson*, 6 C. & P. 335.

In an indictment for the substantive felony of receiving stolen goods, an allegation that the goods were stolen "by a certain evil-disposed person," is good, without stating the name of the principal felon, or averring that he is unknown. *Rex v. Jervis*, 6 C. & P. 156. [Tindal]

A and B were indicted for larceny as principals. A had been sent by his master to deliver goods to C: he only delivered part, and the rest was stolen and found in the possession of B:—Held, that it was a question for the jury whether B was present at the time when A separated the portion stolen from the bulk, for that, if he was, both were rightly charged as principals. *Rex v. Butteris*, 6 C. & P. 147. [Gurney]

If prisoners be charged, by several indictments, with receiving stolen goods:—*Seemle*, that, in strict law, any receiving that was before the one in the indictment which is being tried may be given in evidence, although itself the subject of another indictment; but, if given in evidence, the other indictment ought, as matter of candour, to be given up. *Rex v. Davis*, 6 C. & P. 177. [Gurney]

Stolen property being found concealed in an old engine-house, and, it being watched, the prisoners were seen taking it away:—Held, that, to warrant the conviction of the prisoners, on an indictment charging them as receivers, the jury must be satisfied that the property had been stolen by some

other person with the knowledge of the prisoners, and that there should be some evidence to shew that such was the case:—Held, also, that the evidence given in this case would warrant a conviction for the stealing. *Rex v. Densley*, 6 C. & P. 399. [Patteson]

If two are charged jointly with receiving stolen goods, a joint act of receiving must be proved; proof that one received in the absence of the other, and afterwards delivered to him, will not suffice. Successive receivers are all separate receivers, and all punishable.

Whether, upon a charge of receiving from T S, the receiving from T S must be proved, the statute making it criminal to receive, without regard to the person from whom received—*quære*. *Rex v. Messingham*, 1 R. & M. C.C. 257.

Under the 3 Geo. 4, c. 24, s. 3, a receiver may be indicted for felony, though the principal is not convicted, whatever the goods are. *Rex v. Solomons*, 1 M. C.C. 292.

In an indictment for receiving stolen goods, knowing them to have been stolen by a person named, the stealing by that person must be proved, or the receiver must be acquitted. *Rex v. Woolford and Lewis*, 1 M. & Ro. 384. [Patteson]

The owner of goods stolen, having prosecuted the felon to conviction, is entitled to recover the value of them in trover, from the purchaser of them by private contract, although the latter had, before the conviction took place, sold them in market overt. *Peer v. Humphrey*, 4 Law J. (n.s.) K.B. 100, s. c. 4 N. & M. 430; 2 Ad. & E. 495.

#### STOPPAGE IN TRANSITU.

Where goods, before their arrival at the place of delivery agreed upon between the vendor and vendee, are deposited in the warehouse of the carrier, either to be sold and delivered from thence, to the customers of the vendee, or to be conveyed to the place of ultimate destination, according to the direction of the vendee, the transit is at an end; and the vendor cannot stop them in transitu—notwithstanding the carrier has refused to deliver them, on the ground of a lien for carriage. *Allen v. Gripper*, 1 Law J. (n.s.) Exch. 71, s. c. 2 C. & J. 218; 2 Tyr. 217.

A trader of Guernsey, who was in the habit of purchasing goods in London, and sending them to the defendant, his general agent at Southampton, there to be shipped for Guernsey, purchased certain goods of the plaintiffs in London, which he directed to the defendant at Southampton, to be conveyed to Guernsey by the next packet. The goods arrived at Southampton by the waggon, and were shipped by the defendant in his own name; he also paid the waggoner. Before the vessel sailed, the purchaser became insolvent, and wrote to the defendant to stop the goods until further orders. This was done by the defendant's clerk; and, at the same time, another person, from whom the insolvent had purchased goods, arrived at Southampton, and desired his own goods to be stopped, and, though unauthorized, gave similar directions respecting those of the plaintiffs. The goods were unshipped, and the defendant being applied to to return them to the persons from whom the pur-

chaser, now a bankrupt, obtained them, he refused, and claimed a lien for his general balance against the bankrupt. In trover for the value of the goods, the jury found that the defendant stopped the goods for the benefit of the owners:—Held, under the circumstances, that the transitus was not terminated, and that the defendant was not entitled to maintain his lien. *Nicholls v. Le Feuvre*, 4 Law J. (N.S.) C.P. 281, s.c. 2 Bing. N.C. 81; 2 Sc. 146; s.c. (*Slater v. Le Feuvre*), 7 C. & P. 91.

S W consigned goods to L & Co. merchants in Liverpool, with directions to their agents to deliver the bill of lading to L & Co. upon their accepting a bill of exchange drawn by the consignor. The bill of exchange was accepted, and the bill of lading delivered accordingly. L & Co., for valuable consideration, indorsed the bill of lading to H & Co., who were in the habit of making advances to L & Co. upon goods placed in their hands for sale. Before the arrival of the goods at Liverpool, but after the indorsement of the bill of lading by L & Co., L & Co. became bankrupts, and the agents of the consignor gave notice to the captain of the ship, on its arrival, not to deliver the goods to L & Co., and also demanded the delivery of them to themselves, tendering the freight:—Held, that the property in the goods, at the time of the bankruptcy, had vested in H & Co., as the indorsees of the bill of lading, for a valuable consideration, and that the demand of the consignor by his agents gave him no legal right to the property in the goods; but by the attempted stoppage in transitu, the consignor acquired a right to the goods in equity, as against the assignees of L & Co., subject to the lien which H & Co. had upon the goods. Held also, that the consignor being as a surety, by means of his goods, to H & Co., for the debt of L & Co., had an equity to oblige H & Co. to apply the proceeds of such goods as they might have of L & Co. in their possession, first, to the payment of their debt, before they had recourse to the goods of the consignee. *In re Westcynthius*, 3 Law J. (N.S.) K.B. 56, s.c. 5 B. & Ad. 817; 2 N. & M. 644.

A sold to B a butt of wine, which was not delivered. B compounded with his creditors, and the amount of the wine was, by A's consent, included in the composition. The composition money was secured by bills, and A had a claim against B beyond the price of the wine. Before the whole of the composition was paid, B demanded the wine of A, who refused to deliver it:—Held, that he was bound to deliver it, as he had undertaken to do so; and that the doctrine, with respect to stoppage in transitu, did not apply under the circumstances. *Nichols v. Hart*, 5 C. & P. 179. [Tindal]

### STRANDING.

[See INSURANCE.]

### SUBPENA.

[See INJUNCTION—PRACTICE—WITNESS.]

Difficulty in serving a subpoena will not dispense with the necessity of personal service, unless it is sworn that the person keeps out of the way to avoid personal service. *Barnes v. Williams*, 1 Dowl. P.C. 110.

The solicitor of an executrix residing abroad, was receiving the assets under a power of attorney from her. An application in a creditor's suit, to make service of subpoena on the solicitor, good service upon the executrix, was refused. He ought to have been made a party. *Ravenhill v. Arundell*, 4 Law J. (N.S.) Chanc. 194.

Where a defendant's clerk in court dies, and the defendant keeps out of the way to avoid service, the Court will order that service on the solicitor of the subpoena to name a clerk in court, may be good service. *Jones v. Phillips*, 4 Law J. (N.S.) Chanc. 215.

### SUGAR

To be refined for exportation, may be admitted without duty. See 3 & 4 Will. 4, c. 61; 11 Law J. Stat. 110.

### SUICIDE.

[See PRINCIPAL AND ACCESSARY.]

### SUIT, DETERMINATION OF.

[See PRACTICE—MALICIOUS ARREST, Action for.]

### SUNDAY.

[See PRACTICE, Process—SCIRE FACIAS.]

### SUPERSTITIOUS USE.

[See LEGACY.]

### SURETY.

[See PRINCIPAL AND SURETY.]

### SURGEON AND APOTHECARY.

Practising as an apothecary is the mixing up and preparing medicines, prescribed either by a physician or any other person, or by the apothecary himself. *Woodward v. Ball*, 6 C. & P. 577. [Williams]

A person who advises patients, and compounds and sells the medicines recommended by himself, but does not and cannot make up physicians' prescriptions, is liable to the penalties of 55 Geo. 3, c. 194, s. 20, for practising as an apothecary without a certificate. *Apothecaries' Company v. Allen*, 4 B. & Ad. 625, s.c. 1 N. & M. 413.

The acting as a surgeon or accoucheur is not practising as an apothecary; nor would the party supplying medicines to a friend be so. But if the party sought his living by practising as an apothecary, that is sufficient, as it is not essential that he should have gained his whole livelihood by his practice. *Woodward v. Ball*, 6 C. & P. 577. [Williams]

Form of pleadings. *Ibid.*

A diploma granted by a Scotch university, authorizing a person to practise as a physician, does not exempt him from the penalties imposed by the 55 Geo. 3, c. 194, if he practise as an apothecary without complying with the regulations of that statute.



And *semble*, that a similar diploma granted by an English university, would not exempt the person from such penalties. *The Apothecaries Company v. Collins*, 2 Law J. (N.S.) K.B. 149, s.c. 1 N. & M. 401; 4 B. & Ad. 604; 5 C. & P. 519; and see *Collins v. Carnegie*, 3 Law J. (N.S.) K.B. 190, s.c. 1 Ad. & E. 695; 3 N. & M. 708.

When a surgeon attended patients in cases requiring surgical aid, and also dispensed medicines to them, not being certificated as an apothecary under 55 Geo. 3, c. 194,—Held, that he might recover for his surgical advice.

*Semble*, that a surgeon may dispense medicines to his patient in a case which he attends requiring surgical aid. *Simpson v. Ralfe*, 4 Tyr. 325.

A surgeon is responsible for an injury from the ignorance of his apprentice; but the want of skill must be distinctly proved. And, if a person goes into a surgeon's shop, and asks to be bled, saying he has found relief from it before, without consulting the person there as to the propriety of the operation, and there are no external indications of its being improper, the surgeon will not be answerable for its beneficial result. *Hancke v. Hooper*, 7 C. & P. 81. [Tindal]

#### SURRENDER.

[See LEASE.]

Where a trust term was created by devise for payment of annuities and other purposes, and the remainder-man within eighteen years leased the premises to the plaintiff, who received the rents thereof:—Held, that the jury, in an action by the plaintiff for an injury to his reversionary interest, could not presume a surrender of the trust term. *Day v. Williams*, 1 Law J. (N.S.) Exch. 168, s.c. 2 C. & J. 460.

#### SURVEYOR.

[See HIGHWAY.]

#### SURVEYOR GENERAL.

Union of office of, with that of Commissioners of Woods and Forests. 2 Will. 4, c. 1; 10 Law J. Stat. 3.

#### SUSPICION.

[See FALSE IMPRISONMENT.]

#### TAXES.

[See ASSESSED TAXES—BOND.]

Taxes and Stamps—consolidation of Boards of 4 & 5 Will. 4, c. 60, s. 3; 12 Law J. Stat. 116.

The sale of a tax collector's lands and goods is a condition precedent to the putting in suit of the bond, given by his surety for the due performance of his duty. *Dissentientibus* Lord Abinger, C.B. and Parke, B.

DIGEST, 1831—35.

But it is only so when the commissioners have notice of the collector's lands and goods. *Diss. Williams, J. and Lord Denman, C.J.*

In an action on such a bond, the defendant pleaded that the collector had lands and goods of which the commissioners *had notice*, but did not sell; the plaintiffs replied, that he had no saleable lands and goods of which the commissioners *had notice*. The rejoinder asserted, that he had saleable lands and goods, omitting all mention of notice. The jury found that there were saleable lands and goods; that the commissioners had no notice of the lands, but had reasonable grounds for believing that he had goods:—Held, that the plaintiffs were entitled to judgment on this issue. *Diss. Littledale J. and Parke, B.*

The bond was conditioned for payment by the collector to the receiver general of the taxes, and also to the commissioners if required. The payments were to be made on the days appointed by the acts, and no days were appointed:—Held, that the bond was not invalid on either of these grounds.

The collector paid over a part of the proceeds of the year, for which the obligor was surety, in discharge of arrears due on the account of a former year:—Held, that the bond was not discharged by such payment. *Gwynne v. Burnell*, 4 Law J. (N.S.) Exch. 340, s.c. 2 Bing. N.C. 7.

Provided a party, from whom assessed taxes are due, has an intimation that they have been called for by the collector, that is a sufficient demand, if he subsequently refuse to pay them to a party authorized to receive the money; and it is not necessary that the specific sum due should have been demanded personally of the householder, or that the refusal should be to the collector himself. *Rees v. Ford*, 4 Law J. (N.S.) M.C. 58, s.c. 4 N. & M. 451; 2 Ad. & E. 588.

#### TEA.

Provisions for the collection and management of the duties on. 3 & 4 Will. 4, c. 101; 11 Law J. Stat. 208.

Repeal of acts requiring deposits upon teas sold at sales of East India Company. 4 & 5 Will. 4, c. 33; 12 Law J. Stat. 56.

Duties upon. 5 & 6 Will. 4, c. 62; 13 Law J. Stat. 63.

#### TENANCY, PROOF OF.

[See WRIT OF RIGHT.]

#### TENANTS IN COMMON.

[See ADVERSE POSSESSION.]

Tenants in common cannot maintain a joint action to recover double value under 4 Geo. 2, c. 23, if a joint demise, which is a fact for the jury, be not proved. *Wilkinson v. Hall*, 4 Law J. (N.S.) C.P. 204, s.c. 1 Bing. N.C. 713; 1 Sc. 675.

## TENANT FOR LIFE.

[See LEASE, Renewal.]

A tenant for life, subject to impeachment for waste, is entitled to the interest of money produced by the sale of timber, cut by order of the Court. *Tooker v. Annesley*, 5 Sim. 235.

## TENANT FOR YEARS.

[See LANDLORD AND TENANT—LEASE.]

A lessee for years may make a grant for lives, which will be good during the term. *Saffery v. Edgood*, 3 Law J. (N.S.) K.B. 151, s. c. 1 Ad. & E. 191; 3 N. & M. 346.

## TENANT IN TAIL.

[*Mullins v. Townsend*, 2 D. & Cl. 430, s. c. 2 Law J. Dig. 275; 5 Bligh, N.S. 567.]

By marriage settlement, certain lands, &c., were settled to the use of A, (the settlor for life,) with remainder to trustees to preserve contingent remainders, with remainder to the use of the wife of the settlor for life, with remainder to trustees for five hundred years, to raise portions for younger children, with remainder to the first and othersons of the settlor successively in tail male:—Held, that, notwithstanding the outstanding term, the first son, upon his father's death, became tenant in tail in possession of the estate tail; and that, consequently, a fine levied by him worked a discontinuance of the estate tail, and divested the remainders.

After the levying of the fine by the first tenant in tail, he made his will, and devised to trustees, in trust, amongst others, for the second remainderman in tail, for life, remainder to trustees, remainder to his son for life, &c. The second remainderman, after coming into possession of the estate, suffered a common recovery; after his death, his son came into possession:—Held, that if he adopted the recovery suffered by his father, and came in under that, he would not be remitted to the old estate tail; and if he was in possession under the will of his uncle, neither then would he be remitted; because the estate would be thrown upon him by the Statute of Uses. *Doe d. Cooper v. Finch*, 2 Law J. (N.S.) K.B. 41, s. c. 1 N. & M. 130; 4 B. & Ad. 283.

Order made by the Lord Chancellor, as protector, under the 3 & 4 Will. 4, c. 74, to enable a quasi tenant in tail in remainder of a sum of stock, of which the tenant for life was a lunatic, to dispose of the fund. *Grant v. Yea*, 3 M. & K. 245.

Order made for payment out of court of a sum of stock, of which the petitioner was quasi tenant in tail in possession under a settlement, on his producing the deed enrolled, or an affidavit of the enrolment of the deed, whereby, in pursuance of the provisions of the 3 & 4 Will. 4, c. 74, s. 71, he had barred the estate tail, and remainders over in the stock in question. *In re Smythe*, 3 M. & K. 240.

## TENDER.

[See INNKEEPER—JUDGMENT FOR WANT OF A PLEA—PAYMENT OF MONEY INTO COURT—TRESPASS.]

A tender in country bank notes, though made through an agent, is good, if not objected to at the time on account of the form, but refused by reason of the amount. *Poiglass v. Oliver*, 1 Law J. (N.S.) Exch. 5, s. c. 2 C. & J. 15; 2 Tyr. 89.

Proof of a tender of 20l. 9s. 6d., held to support a plea of tender of 20l. *Dean v. James*, 2 Law J. (N.S.) K.B. 94, s. c. 1 N. & M. 392; 4 B. & Ad. 546.

Where the defendant is allowed to withdraw a plea of tender and to plead *de novo*, he will be relieved from the effect of payment of money into court in respect thereof, except as to the costs incurred by reason of such plea having been pleaded. *Grange v. Medley*, 2 Law J. (N.S.) Exch. 26.

A tender to the clerk of an attorney in whose hands the plaintiff had put his case, is not a sufficient tender, without proof that the clerk had authority to receive money. *Bingham v. Alport*, 2 Law J. (N.S.) K.B. 86, s. c. 1 N. & M. 398.

To make a tender good and valid in law, there must be either an actual production of the money, or dispensation with such production on the part of the creditor.

A dispensation cannot be inferred by the Court, from facts stated in a special verdict. *Finch v. Brook*, 4 Law J. (N.S.) C.P. 1, s. c. 1 Bing. N.C. 252; 1 Sc. 70.

Tender cannot be pleaded to account for unliquidated damages, in respect of breach of agreement to keep premises in repair. *Dearle v. Barratt*, 3 Ad. & E. 82, s. c. (called *Barrett v. Dearle*), 3 Dowl. P.C. 13, and (called *Searle v. Barratt*), 4 N. & M. 200.

A tender, to be good, must be unconditional; so that if the plaintiff take the money, and there be more due, he may still bring an action for the residue: therefore, where a plaintiff offered to take a sum tendered in part of his demand, and the defendant would only allow him to take it "as a settlement,"—held, not, a good tender. *Mitchell v. King*, 6 C. & P. 237. [Vaughan]

## TERMINATION OF SUIT.

[See PRACTICE.]

## TERM.

[See WARRANT OF ATTORNEY, Judgment.]

By the operation of 1 Will. 4, c. 3, s. 1, on the 11 Geo. 4, c. 70, s. 6, the first day of Trinity term is the 22nd of May, even though that day of the month falls on a Sunday. Consequently, the *essoign day*, by s. 2 of the former act, is the 19th of May. *Doe v. Roe*, 1 Dowl. P.C. 63.

## TEST ACTS.

Relief in respect of, in Ireland. 2 Will. 4, c. 7; 10 Law J. Stat. 12.

## THAMES.

[See METROPOLITAN POLICE.]

Depredations upon. 3 Will. 4, c. 19; 11 Law J. Stat. 44.

## THEATRE.

The 2nd section of the stat. 10 Geo. 2, c. 28, inflicting a penalty of 50*l.* on persons performing or causing to be performed, plays, &c., without letters patent, &c., is not repealed by the stat. 5 Geo. 4, c. 83.

Proof that a party was the acting manager of a theatre, and that he paid the salary of, and dismissed one of the performers, is sufficient proof that he caused the performances; and, if he caused the performances, it is not material whether he did so as the agent of others or not. *Parsons v. Chapman*, 5 C. & P. 33. [Tenterden]

## THELLUSSON ACT.

[See ADMINISTRATION OF ESTATE.]

## THREATENING LETTER.

On an indictment for sending a threatening letter, the prisoner's declarations of the meaning of the letter are admissible evidence.

An indictment, on 4 Geo. 4, c. 57, for sending a letter threatening to accuse of an infamous crime, need not specify such crime, for the specific crime the prisoner threatening to charge might intentionally be left in doubt. *Rex v. Tucker*, 1 R. & M. C.C. 134.

If a party be indicted for sending a threatening letter, the Court will, on motion of the prisoner's counsel, as soon as the bill is found, order that the letter be deposited with the officer of the court, that the prisoner's witnesses may inspect it. *Rex v. Harrie*, 6 C. & P. 105. [Bolland]

## THRESHING MACHINES.

[See HUNDRED.]

## TILES.

Repeal of duties and drawbacks. 3 Will. 4, c. 11; 11 Law J. Stat. 30.

## "TILL."

[See TIME.]

## TIMBER.

[See TENANT FOR LIFE.]

## TIME.

[See CERTIORARI—GUARANTEE, Rights and Liabilities—SPECIFIC PERFORMANCE.]

"Three months' time to plead," means three lunar months. *Soper v. Curtis*, 3 Law J. (N.S.) Exch. 61, s.c. 2 Dowl. P.C. 237.

In the computation of the six days notice required to be given by 13 Geo. 3, c. 18, s. 5, to Justices, one day is to be reckoned exclusive and one inclusive. *Rex v. the Justices of Cumberland*, 4 Law J. (N.S.) M.C. 721, s.c. 4 N. & M. 378.

Appointment of executor, provided he proved the will within three calendar months next after the death of the deceased; in computing the time, the day of the death excluded. *In the goods of Wilmot*, 1 Cur. 1.

*Semble*—That the word "till" is inclusive of the day to which it is prefixed. *Dakins v. Wagner*, 3 Dowl. P.C. 535.

## TITHES.

[See RATE, What Property and Persons rateable to the Relief of the Poor.]

- (A) WHAT TITHEABLE, TITLE TO, AND PROPORTION.
- (B) SETTING OUT.
- (C) CARRYING AWAY.
- (D) MODUS AND EXEMPTION.
- (E) COMPOSITION.
- (F) CUSTOM.
- (G) ACTIONS AND SUITS.
- (H) PLEADINGS AND EVIDENCE.

Provisions for the more easy recovery of. 5 & 6 Will. 4, c. 74; 13 Law J. Stat. 166.

Facilitation of recovery of, in Ireland, and relief of the clergy. 2 Will. 4, c. 41; 10 Law J. Stat. 71.

Provisions for the relief of owners of, in Ireland, and amendment of act of preceding session. 3 & 4 Will. 4, c. 100; 11 Law J. Stat. 208.

- (A) WHAT TITHEABLE, TITLE TO, AND PROPORTION.

The words "white tithes" have no general meaning, but are applicable to distinct things in distinct parishes. The meaning, therefore, of those words, as applicable to a particular parish, is to be ascertained only from the usage in that parish. *Becher v. Clays*, 1 Yo. & C. 448.

There is nothing illegal in the supposition that, in ancient times, a chapel and chapelry existed, to the curate or chaplain of which, the rector of the parish, with the consent of all proper parties, may have assigned a portion of the tithes by way of endowment, reserving to the rector the right of the patronage of the curacy; and therefore, where it appeared, from ancient documents, that a chapel had immemorially existed as a parochial chapel, with rites of baptism, marriage, and sepulture; and that, in early times, there were chaplains having an assignment of the tithes, as of old time, and there were appointments to the curacy from a very early period; and there was evidence of usage, on the part of the curate, to receive all small tithes of modern introduction:—Held, that the curate was

entitled to all small tithes, except wool and lamb, which appeared, from the documents, to be clearly payable to the rector. *Dent v. Rob*, 1 Y. & C. 1.

Evidence of continued perception of tithe of corn by a lay impropriator, is alone sufficient *prima facie* evidence of his right to the tithe of hay; so as to call upon the occupier to shew that the right is in some other person. *Drever v. Downes*, 1 Law J. (n.s.) K.B. 208.

A miller who grinds his own corn at his mill, and sells the flour, is not liable to the payment of tithe in respect of such corn. *Austin v. Elphinstone*, 2 Law J. (n.s.) Exch. Eq. 17, s.c. 1 Y. 596.

Tares and other artificial grasses, cut green, and given to husbandry horses used in the cultivation of the farm, are not liable to the payment of tithes, where there is no sufficient sustenance of any other description for the horses on the farm. And whether there was or was not sufficient sustenance, is a question of fact, and the subject of inquiry before the Master.

The tithe of tares, clover, and other artificial grasses, cut green, and consumed by husbandry horses, is in the nature of an agistment tithe, and is not agistment tithe, following all the circumstances of agistment tithe.

Where a farm was situate in two parishes, and tares and other artificial grasses were cut green in one parish, and carried to the farm buildings, which were situate in the other parish, and there given to husbandry horses used in the cultivation of the whole farm, it was referred to the Master to inquire whether the proportion of the produce of the lands consumed by the horses was in proportion to the labour of the horses employed in each parish. *Austin v. Allen*, 1 Y. 585.

A portioner entitled to tithe of hay, is not necessarily entitled to tithe of clover, tares, vetches, and grass, cut and carried away green. *Lewis v. Bridgman*, 2 C. & F. 738.

The tithe calf is the tenth in order of birth. *Cartington v. Cornock*, 4 Sim. 217.

#### (B) SETTING OUT.

Tithes of turnips to be taken in the same manner where they are severed from the ground to be consumed by sheep or cattle, as where they are not severed. 5 & 6 Will. 4, c. 75; 13 Law J. Stat. 166.

Where turnips are drawn in small quantities at a time, the tithe may be set out by placing aside every tenth turnip, and it is not necessary to place the tithe in heaps, unless the farmer gathers the turnips into heaps for himself. *Blamey v. Whitaker*, 3 Doug. 183.

Sentence of the Court of Arches, pronouncing "that to set out the tithe of potatoes, by the tenth basket, as raised, and immediately remove the nine parts, is not sufficient," affirmed by the Delegates. *Thompson v. Bearblock*, 3 Hag. 795.

#### (C) CARRYING AWAY.

A tithe-owner cannot claim a fixed right of way for carrying off his tithe, unless by prescription or grant.

The owner or occupier of the soil, if he acts *bona fide*, is entitled to shut up a way by which tithe has been carried, although the effect is to produce great inconvenience to the tithe-owner, by

compelling him to use a much more circuitous road for the conveyance of the tithe.

*Quere*—whether the tithe-owner may use all the roads used by the farmer for the ordinary cultivation of his farm, or is confined to the use of the road by which the farmer carries away his crop from the land where the tithe grew. *James v. Dods*, 3 Law J. (n.s.) Exch. 47, s.c. 2 C. & M. 266; 4 Tyr. 101.

#### (D) MODUS AND EXEMPTION.

[See, *post*, Evidence.]

Act for shortening the time in claims of modus or exemption from tithes. 2 & 3 Will. 4, c. 100; 10 Law J. Stat. 253.

Amendment of act for shortening the times for claims of modus and exemption from. 4 & 5 Will. 4, c. 83; 12 Law J. Stat. 164.

Where a modus is set up as a defence to a bill by a rector, for an account and satisfaction of tithes, an issue will be directed, unless the evidence is full and satisfactory.

The exemption from tithes, extended by the 31 Hen. 8, to all abbey lands, whether great or small, which were surrendered to the Crown subsequent to the 4th of February, in the 27 Hen. 8, will be extended to one of the smaller monasteries, not surrendered until the 30 Hen. 8.

The existence of a religious house, and the possession of lands by it, will not be inferred from modern usage alone; nor will the foundation of a religious house, prior to legal memory, be presumed without some evidence.

The mere payment of a sum in lieu of tithes, will not raise a presumption in favour of the existence of a composition real.

The incompetency of a witness whose evidence goes to prove the payment of a modus by him, and whose name appears on a map or plan as owner of several closes, is not removed by the 3 & 4 Will. 4, though the evidence will be received *de bene esse*. *Barnes v. Stuart*, 4 Law J. (n.s.) Exch. Eq. 25, s.c. 1 Y. & C. 119.

Where a modus for tithes covers such as arose from a right of common, the allotment which is given by an inclosure act in lieu of such right, is covered likewise; and it matters not, that the common, which was before pasture, has been, since inclosure, converted into arable land. *Askew v. Wilkinson*, 1 Law J. (n.s.) K.B. 141, s.c. 3 B. & Ad. 152.

A double issue may be directed to try the validity of a farm modus; the inquiry being, 1st, as to the existence of the ancient farm; 2ndly, as to the payment of the modus. *Bryan v. Parker*, 1 Y. & C. 170.

A modus of three half-pence, payable by every occupier of land in the parish, for every cow kept by him within the parish, in lieu of the tithes of the milk and calves of such cow, is good. *Tomlinson v. Lymer*, 4 Sim. 467.

The defendants set up a modus of 1*l.* 17*s.* 9*d.* as covering the tithes of four townships in a parish, which were claimed by the plaintiff. The latter proved, by documents older than those produced by the defendants, that separate moduses, amounting to 1*l.* 17*s.* 9*d.* had been paid for separate portions of the four townships:—Held, that the modus pleaded was bad. *Harcourt v. Peirson*, 5 Sim. 368.

A modus payable by every householder, in lieu of all tithes of hay, without regard to the fact, whether such householder has or has not hay, is valid: but otherwise, if it be alleged to be payable only when the householder has hay.

Sixpence in lieu of a tithe pig is rank; a modus for fruit and garden stuff is good, though it be not alleged to be growing in a garden. *Gronow v. Edwards*, 2 Russ. & M. 102.

#### (E) COMPOSITION.

Amendment of acts relating to compositions for tithes, in Ireland. 2 & 3 Will. 4, c. 119; 10 Law J. Stat. 286.

Tithes, compositions for—power given to the Lords of the Treasury to suspend proceedings for the recovery of instalments of, in Ireland. 5 & 6 Will. 4, c. 79; 13 Law J. Stat. 172.

Though it is not necessary to produce the actual deed creating a composition real, still reasonable evidence must be given to make it probable that such a deed once existed; and the mere circumstance of the possession of a piece of land, mentioned in various ancient documents as having been assigned to the curate, is not a sufficient ground for any such presumption. *Dent v. Rob*, 1 Y. & C. 1.

#### (F) CUSTOM.

A custom to pay one-twentieth instead of the full amount of tithes, though proved to be very ancient, cannot be supported by such proof alone, but must be shewn to have had a legal origin. In a case where this proof of legal origin was wanting, the House of Lords, affirming a decree of the Equity Exchequer, held the tenants of the lands liable to account for the full tithes. *Wilson v. Lord Kensington*, 1 C. & F. 1, s. c. 5 Bligh, n.s. 475.

In that part of the parish of St. Andrew, Holborn, which lies out of the city of London, the occupiers of certain houses, either ancient, or built upon ancient sites, have for the last hundred years, uniformly paid certain specified and invariable sums in respect of each house. The payments are too large for a modus, and are not made by the occupiers of houses built on new sites. They differ in amount on different houses; are not taken in any distinct rate or proportion to the values of the houses *inter se*, and are not general through this part of the parish:—Held, first, that the Court were warranted in inferring that they had been made from time immemorial; secondly, that they might have had a legal origin, and could be legally enforced by the rector of the parish. *Beresford v. Newton*, 4 Law J. (n.s.) Exch. 113, s. c. 1 C. M. & R. 901; 5 Tyr. 432.

#### (G) ACTIONS AND SUITS.

In an action by those seized of the rectorial tithes of a certain parish, under 2 & 3 Ed. 6, against the defendant for not setting out the tithe of potatoes grown in open fields, and cultivated by the plough, the defendant relied upon an endowment, which granted to the vicar *all the small tithes* whatever of custom or of right due throughout the said parish; consequently, that the tithe in question, being a *small* one, was due and payable to the vicar, not to the plaintiffs:—Held, that from the evidence produced, the jury were warranted in presuming that

an arrangement was entered into by competent persons, and at a time when such arrangement was lawful, by which an alteration was effected in the original endowment; and potatoes cultivated, as described, were made rectorial tithes:—and that the verdict should not be disturbed. *Gilbert v. Towns*, 3 Law J. (n.s.) C.P. 288, s. c. 1 Bing. N.C. 173; 4 Mo. & Sc. 735.

An answer filed to a bill for an account of tithes, which sets up inconsistent defences in the alternative, is bad.

Thus, where the defence was, that the payments were good and valid as moduses, but if for any reason they were not good and valid moduses from time immemorial, then that they must be taken to have been payable as or by virtue of good and valid real compositions, made by and with the assent of all parties necessary thereto, and before the restraining statute of 13 Eliz.,—the Court held, that such an alternative defence was bad, and also refused to reject the latter part as surplusage. *Jesus College, Oxford, v. Gibbs*, 4 Law J. (n.s.) Exch. Eq. 42, s. c. 1 Y. & C. 145, 445.

In a suit for tithes, by a rector, against the owner and occupier of a farm, part of the demesnes of a manor of which the owner was lord, he, in order to prove that he was entitled to two-thirds of the tithes of the farm, produced a grant, from Queen Elizabeth, to one of his ancestors, of a chapel with the tithes belonging to it within the lordship; and also his title deeds, in some of which tithes, in others tithes of corn, grain, and hay, and, in others, tithes and portions of tithes in the parish and several other places, were conveyed, but in none of them were the tithes of the farm mentioned specifically, except in an old lease of the farm, in which the lord's part of the tithes, together with ingress, egress, &c. were reserved. The witnesses proved, that one third only of the tithes of the farm, and the rest of the demesnes, had been paid to the plaintiff and his predecessors; and that one of them, having employed a person to value the tithes of the parish, pointed out to the valuer the farm and other demesnes as being titheable in the thirtieth only. The Court refused to decree an account, until the plaintiff had established his right at law. *Hughes v. Davies*, 5 Sim. 331.

Mere non-payment of tithes is no answer to a claim of tithes by a lay impropriator. *Andrews v. Drever*, 2 Bing. N.C. 1, s. c. 2 Sc. 1.

A, being at once patron and rector of a benefice with cure of souls, under the value of 8*l.* in the king's books, accepts another benefice with cure, and thereupon presents the plaintiff to the first-mentioned benefice, and he is afterwards admitted, instituted, and inducted upon such presentation. In an action against the defendant for the amount of tithes, from the time of the presentation, under the 28 Hen. 8, c. 11, s. 111,—Held, upon demurrer, that the first-mentioned benefice was vacant *de facto* from the time of the presentation of the plaintiff; consequently that the action was well brought upon the statute, and the plaintiff was entitled to judgment:—Held, also, that the fact of the first-mentioned benefice being under the value of 8*l.* in the king's books, was immaterial, inasmuch as the party by whom the vacancy was created, was himself the patron; and, consequently, there was no necessity.

for a sentence in the Ecclesiastical Court, and notice to inform him of what he himself had done. *Betham v. Gregg*, 3 Law J. (N.S.) C.P. 121, s.c. 10 Bing. 352; 4 Mo. & Sc. 230.

On a bill by a rector to enforce ancient customary payments for houses, a series of uniform payments for a number of years, in the absence of evidence to the contrary, will raise a presumption that these payments existed from time immemorial.

After long acquiescence, parties will not be at liberty to dispute the legality of payments, and an issue will be refused unless the evidence is very contradictory. *Beresford v. Newton*, 4 Law J. (N.S.) Exch. Eq. 33.

#### (H) PLEADINGS AND EVIDENCE.

[See PRACTICE, Striking out Counts.]

In a suit for tithes by a rector against occupiers, the defendant pleaded a modus to be payable to the vicar for the tithes claimed:—Held, 1st, that a copy of the vicar's endowment, contained in an old book recording the acts of former bishops of the diocese, was admissible for the plaintiff, (the bishop's registry having been searched for the original without success), and that no search was necessary, either in the augmentation office, or in the vicar's house, although it was expressed in the instrument, that one part of it was to remain with the vicar. 2ndly, That a terrier, appearing to be signed by a former incumbent, who was both rector and vicar of the parish, and whose handwriting was proved, and by the churchwardens, was admissible for the plaintiff, though it was produced from the custody of an individual who claimed the tithes of a particular district in the parish, and not from the usual depositories. 3rdly, That the decrees, but not the interrogatories and depositions, in two former suits, one in the Exchequer and the other in Chancery, for the tithes of a particular term in the parish, but which was not included in the present suit, were admissible for the defendants. *Tucker v. Wilkins*, 4 Sim. 241.

In a suit for tithes by an ecclesiastical rector against the occupiers, a terrier signed by the vicar, churchwardens, and inhabitants, and which was tendered by the defendants, was rejected. Old accounts found in the custody of the personal representative of a deceased tithe collector of a former rector, were received, although there was no evidence to shew by whom they were made out. *Harcourt v. Pearson*, 5 Sim. 368.

No presumption of a grant against a lay impropriator can be made by a jury from non-payment of tithes alone.

Leases of all tithes, and evidence of the perception of hay tithes by a lay impropriator proved to be entitled to all tithes, and to have received them up to a certain time, are evidences in an action for not setting out hay tithe, by a party who from that time is proved to have received the corn tithe. *Bayley v. Drever*, 3 Law J. (N.S.) Exch. Ch. 369, s.c. 1 Ad. & E. 449; 3 N. & M. 885.

A public document which the plaintiff had proved having come into the hands of the defendant, may be produced as evidence for the defendant.

Entries in the books of parish overseers, of sums therein stated to be for rates payable in respect of

a modus, admissible as evidence of modus. *Ward v. Pemfret*, 2 Law J. (N.S.) Chanc. 22, s.c. 6 Sim. 475.

#### TITLE DEEDS.

[See TROVER.]

#### TOBACCO—IRELAND.

Provisions for sale, manufacture, and consumption of tobacco grown before the 1st of January 1832. 2 Will. 4, c. 20; 10 Law J. Stat. 27.

#### TOLLS.

[See ASSUMPSIT—MARKET—PORT DUTY—RATE—TONNAGE DUES—USE AND OCCUPATION.]

On turnpike roads;—explanation of certain provisions in local acts relating to double toll. 2 & 3 Will. 4, c. 124; 10 Law J. Stat. 318.

Exemption of carriages carrying manure. 5 & 6 Will. 4, c. 18; 13 Law J. Stat. 17.

By the Hagley Turnpike Act, 58 Geo. 3, which recited a previous act, and that sums of money had been borrowed on the security of the tolls on that road, the trustees were empowered to put up toll-gates, and to take additional tolls to pay off the sums so borrowed, and also to repair, amend, and widen the road when necessary. It contained the usual exemption of persons passing not more than 100 yards along the said road. By a subsequent act, 9 Geo. 4, for improving the town of Birmingham, the trustees were prohibited from repairing so much of the Hagley road as lies within the town of Birmingham. The debts charged upon the tolls on that road are not yet paid off:—Held, that a person, who passed more than 100 yards on that road, including a portion of that part lying within the town, but not 100 yards exclusive thereof, was nevertheless liable to pay the toll. *Phipsen v. Harrett*, 4 Law J. (N.S.) Exch. 36, s.c. 1 C. M. & R. 473; 5 Tyr. 54.

The 13 Geo. 3, c. 84, s. 23, (general,) required the trustees of the roads to demand and take for every waggon, wain, cart, &c. having the fellies of the wheels thereof of less breadth or gauge than six inches from side to side at the least, at the bottom or sole thereof, and for the horses, &c. drawing the same, one-half more than the tolls or duties, which are or shall be payable for the same respectively. The 1 & 2 Geo. 4, c. 85, (local,) under which the action was brought, enacted, that the tolls to be taken for every horse, &c. drawing any waggon, &c. having the fellies of the wheels of less breadth than six inches, and drawn by four horses, should be 4d. the horse. The 3 Geo. 4, c. 126, General Turnpike Act, repealed all the then existing general turnpike acts, and enacted in sect. 4, that from and after the 1st of January 1823, all the provisions and enactments of that act should be extended to all acts of parliament then in force, and to all that should thereafter be passed for regulating, &c. turnpike roads. Section 7, gave power to the trustees of all local acts, to take, after the 1st of January 1823, for every waggon, &c. having the fellies of the wheels of less breadth than four and a half inches, or for the horses, &c. drawing the same, one-half more

than the tolls payable by such local acts, for any carriage of the same description, having the wheels thereof of the breadth of six inches. 4 Geo. 4, c. 95, s. 5, (general,) enacted, that where the trustees of any road should not, previously to the passing of the act 3 Geo. 4, c. 126, have taken and collected the additional tolls directed by the 3 Geo. 4, and the local act should not have provided a scale of tolls applicable to the road, such trustees should from the 1st of January 1824, continue to take and receive for every waggon, &c. having the felloes of the wheels of less breadth than four and a half inches, the same tolls as were by such local act payable in respect of such waggon, and other such carriage. By sect. 6, where any local act should have a prescribed rate of toll, in respect of the breadth of the wheels of carriages, and where the additional toll authorized to be taken by 13 Geo. 3, c. 84, should not have been collected and imposed, the trustees should, after the 1st of January 1824, continue to collect the tolls prescribed in the local act, and should not collect the increased tolls under the 7th section of 3 Geo. 4, c. 126:—Held, that though the increased toll paid by the plaintiff was illegal under the 13 Geo. 3, yet it was made the legal toll by the 4 Geo. 4, c. 95, and the party was not relieved by the 5th or 6th sections, as the conditions required by those sections were not complied with. *Pickford v. Davis*, 3 Law J. (n.s.) C.P. 263, s. c. 1 Bing. N.C. 141; 4 Mo. & Sc. 683.

Where the enacting clause of a turnpike act imposed a toll on the horses drawing a coach, and there was a proviso, that no person should be liable to pay toll more than once in the same day for passing or repassing with the same horses, cattle, beasts, or carriages:—Held, that a party repassing with the same coach drawn by different horses was not within the exception. *Hopkins v. Thorogood*, 1 Law J. (n.s.) K.B. 56, s. c. 2 B. & Ad. 916.

A local act, 39 Geo. 3, c. 49, authorized the taking of certain tolls, and also made it lawful for the collector to seize or distrain any horse, &c., or stop and detain any carriage with its loading, upon which toll was by that act imposed, if the tolls were not paid. Another clause gave an exemption from the payment more than once in the twenty-four hours within each district, for or in respect of any carriage or any horse, &c. Another local act, 58 Geo. 3, c. 82, recited the former, and enacted, that it should remain in full force in all things therein contained, except as to certain amendments, alterations, and additions in this act contained. It then, in section 4, enacted, that the tolls specified in the former act should be increased; and that there should be taken for every horse or other beast drawing a waggon, &c. 6d.; for every horse or beast drawing any coach, &c. 4d. (omitting all mention of the word "carriage.") The excepting section 5, provided, that the tolls should not be demanded at more than one toll-gate in one day from any person for the same horses or other cattle, &c. (omitting also the word "carriage.") The 8th section enacted, that none of the tolls should be demanded or taken for or in respect of any carriage, horse, cattle, employed in, &c. In an action to recover the toll paid for four horses which passed a second time through the gate within the twenty-four hours, drawing a different carriage, and carrying different passengers

from those which passed the first time, and for which the regular toll was paid:—Held, that the plaintiff was entitled to recover; inasmuch as it was the evident intention of the legislature to impose the toll on the horses, not on the carriage; and the introduction of the word "carriage" in one section of the statute, was not sufficient to warrant the imposition of the toll upon it. *Niblett v. Potlows*, 3 Law J. (n.s.) C.P. 251, s. c. 1 Bing. N.C. 81; 4 Mo. & Sc. 596.

A person who passes along more than one hundred yards of turnpike road, according to the description of the road in the local act, is not exempt from toll, on the ground that he has not passed one hundred yards, unless a part be taken into account, which the trustees are expressly forbidden to improve, and upon which they are forbidden to erect any toll-gate. *Pope v. Langworthy*, 2 Law J. (n.s.) K.B. 170, s. c. 1 N. & M. 647; 5 B. & Ad. 464.

A local turnpike act provided for a considerable line of road, including bridges, which, and the one hundred yards at the end of which, were repaired by the county. The act provided for toll, and contained the usual exemption clause, that toll should not be demanded for any carriage, &c., which should only cross the said road, and which should not pass more than one hundred yards thereon:—Held, that this exemption did not extend to a case, where more than one hundred yards had been passed on the road, including so much as had been passed on the part repaired by the county; although the trustees of the road did not contribute to the county repairs. *Bussey v. Storey*, 2 Law J. (n.s.) K.B. 166, s. c. 1 N. & M. 639; 4 B. & Ad. 98.

A local turnpike act imposed tolls for every horse drawing any coach, and other tolls upon every horse not drawing; it provided, generally, that if the tolls had, in any one day, been paid for the passing of any horse, such horse should, on that day, be permitted to re-pass once toll free; but enacted, that the tolls for horses drawing any stage-coach, should be payable every time of passing. The trustees let the tolls, with power to collect them, according to the act, and subject to such rules and restrictions as should be made by the trustees; and the lessee covenanted with the trustees, to permit the owners of stage-coaches, waggons, &c. to pass in the following manner, viz. horses drawing any such carriage, as thereinbefore mentioned, to be respectively allowed to pass along the road on payment of full toll going, and quarter toll returning, at any time during the same day.

Horses passed through a gate, drawing a stage-coach, and full toll was paid for them; they returned the same day, drawing another stage-coach, and the lessee exacted full toll:—Held, that the lessee ought, by his covenant, to have demanded quarter-toll only. *Fenton v. Swallow*, 1 Ad. & E. 723.

A mere claim of a right to take certain tolls without shewing clearly that it is a *bona fide* claim, is not sufficient to oust justices of the jurisdiction to convict for taking them improperly. *Rea v. Justices of Hampshire*, 3 Dowl. P.C. 47.

An embankment company was, by an act of parliament (not limited in duration), empowered to, make a road, and to erect turnpikes upon or across "any lanes or ways leading, or that might thereafter lead out of the same," and to take tolls at such

turnpike. By subsequent acts, another company was empowered to make a railway; and it was enacted, that all persons should have free liberty to use the same, with carriages properly constructed upon, payment only of such rates and tolls as should be demanded by the railway company, not exceeding the sums mentioned in that act. The railway was afterwards made, and it crossed the embankment company's road:—Held, first, that the railway, though made and opened to the public by act of parliament, was a "way" within the meaning of the first-mentioned act. Secondly, that the clause in favour of the public in the railway act, did not take away the vested right of the embankment company to their tolls, and, consequently, that they might take toll of persons crossing their road upon the railway. *Rowe v. Shilton*, 4 B. & Ad. 726, s. c. 1 N. & M. 734.

Where a canal is made pursuant to act of parliament, the right of the proprietors to toll is derived entirely from the act, and is to be considered as if there was a bargain between them and the public, the terms of which are expressed in the statute; and the rule of construction is, that any ambiguity in the terms of the contract must operate against the company of adventurers and in favour of the public. The proprietors, therefore, can claim nothing which is not clearly given to them by the act. A canal was formed upon the two levels, which were connected by a chain of locks. Upon the upper level there was no lock whatever.

By the act of parliament for making the canal, all persons were to be at liberty to navigate thereupon with boats, upon payment of such rates or dues as should be demanded by the company, were authorized to take certain rates and duties for every ton of iron and other goods navigated on any part of the canal, and which should pass through any one or more of the locks; and power was given to the owners of adjoining lands to use pleasure boats on the canal, without paying dues, so as the same did not pass through any lock, and were not used for carrying goods:—Held, that this act gave no right to demand toll for boats navigating the upper level of the canal, in which there were no locks. *The Proprietors of the Stourbridge Canal v. Wheeley*, 2 B. & Ad. 792.

Under charters, granting to a dean and chapter, "that they and all their men shall be quit of toll, passage, cheminage, &c. in city and borough, fair, and market, in the passage of bridges, and all ports of the sea, in all places throughout England," their lay tenant of lands included in the charters, is exempt from toll and toll traverse, not only for articles going to or coming from the lands for the necessary manurance and enjoyment of them, but also for goods sent out or coming in for the purpose of merchandise.

*Quare*, whether, in the latter case, the exemption could have been claimed by ecclesiastical persons.

*Quare*, also, whether the exemption from toll claimable at common law by ecclesiastical persons and tenants in ancient demesne, extends to goods bought and sold, or carried, for the mere purpose of trade. *Lord Middleton v. Lambert*, 1 Ad. & E. 401, s. c. 3 N. & M. 841.

A corporation, in 1637, let the quay duties, profits, and advantages as anciently have been gotten,

and, at the expiration of the lease, continued letting them to various people down to 1730, when they let them annually, at a survey held by the town steward until 1782, from which time they were collected by the corporation. The first lettings were evidenced by the town clerk producing old books containing memorandums of lettings. Of the annual lettings no lease was ever prepared or executed within the recollection of any one. This was held proof of a regular prescriptive usage, for the Court would not presume that the tolls of which the leases were granted, were of a different nature from the tolls collected.

The acceptance of a charter containing only an affirmative grant, does not take away a pre-existent prescriptive right. *Aliter*, if it contains an express renunciation of former grants.

A variation in modern times of a fixed ancient toll, will not affect the right to such toll.

A grant, that "burgesses and inhabitants may be quit of toll, passage, pontage, murage, &c. throughout our whole realm of England except the city of London," is no exemption from toll in their own town. *The Mayor and Burgesses of the Borough of Truro v. Reynolds*, 1 Law J. (n.s.) C.P. 62, s. c. 3 Bing. 275.

The jury having found that the sum of 1d. a pig had been usually taken as a toll in the market of Bishop's Stortford,—the Court held such a toll not to be unreasonable. *Wright v. Bruister*, 2 Law J. (n.s.) K.B. 6, s. c. 4 B. & Ad. 116.

In an action of debt by the lessee of the corporation of N, for toll traverse for a waggon, and a market toll for cattle, it was held, that an information *quo warranto* by the Attorney General of Queen Elizabeth against the corporation, in respect of the customs they claimed and used, was not receivable in evidence, as it did not appear that it was prosecuted, such an information, like an indictment, not being evidence, unless there be a finding of a jury upon it. *Lancum v. Lovell*, 6 C. & P. 437. [Tindal]

Held, also, that an exemplification of a judgment in an action of trespass by the corporation, for setting up a stall in a market, with a justification pleaded of such right without paying toll, was not inadmissible, as it might connect itself with the issue in the progress of the cause. *Ibid*.

If the lessee of toll under a corporation vary, by temporary agreement, the amount of toll claimed of individuals, it will not affect the right to the tolls, if it appear to have been a variation, not for the purpose of claiming more at one time than another, but for the convenience of both parties. *Ibid*.

## TONNAGE.

[See SHIP AND SHIPPING.]

Tonnage rates, reduction of, in London. 4 & 5 Will. 4, c. 32; 12 Law J. Stat. 56.

By statute 14 Geo. 3, c. 56, s. 42, the following tonnage duties were imposed on every ship or vessel (except those in the king's service) coming into or going out of the harbour, basin, or docks of the port of Kingston-upon-Hull, or loading or unloading—1. For every ship coming or going between the said port, and any port to the northward of Yarmouth, or southward of Holy Island, 2d. per



ton. 2. For every ship coming to or going between the said port and any port or place between the North Foreland and Shetland, on the east side of England, except as above, 3*d*. For every ship trading between the said port, and any other port or place in Great Britain, not before described, 6*d*. The duties to be paid on the ship's entry inwards, or clearance or discharge outwards; or, if there were no entry, then to be paid at the Custom House at any time before the vessel proceeded:—Held, that the first clause related only to ports on the east side of England, between the places there named; that it extended to the port of Goole, though situate twenty-five miles inland from Hull, on the river Ouse; and, therefore, the vessels taking all or part of their cargoes at Goole, and going to Hull, or *vice versa*, were liable to the duty of 2*d*.; and this, though they did not enter or clear at the Custom House.—Held, also, that the first clause did not apply to vessels loading at Leeds or other places, not ports, situated above Hull, and going directly thither; that the third clause (if those places were contemplated by it) did not refer to them with the precision necessary for imposing a duty; and (Parke, J. *dubitante*) that the vessels so loading at Leeds did not become liable to duty by merely passing through the entrance basin of the Goole docks, without taking in goods or making any stay there. *Hull Dock Company v. Priestley*, 4 B. & Ad. 178, s.c. 1 N. & M. 85.

#### TOWER HAMLETS.

[See REQUESTS, COURT OF.]

#### TRADE.

[Offensive,—see COVENANT, Construction of.]

In British possessions abroad, act for the regulation of. 3 & 4 Will. 4, c. 59; 11 Law J. Stat. 110.

An usage of trade must be proved by instances, and cannot be supported by evidence of opinion merely.

*Semble*, that there is, in fact, a usage of trade between the printers and proprietors of newspapers, that the latter should give to the former four weeks' notice of taking the work from them, or pay them four weeks' wages; but such usage seems not to be mutual. *Cunningham v. Fonblanque*, 6 C. & P. 44. [Park]

#### TRANSFER OF STOCK.

A person transferred 8,000*l*., 3*l*. per cent. consols., and 4,500*l*. South Sea stock, into the names of his illegitimate daughter and her husband, and her two eldest children; and by parol declarations, confirmed by an entry in a memorandum book, declared the investment to be for the benefit of all his daughter's children who should attain twenty-one. He afterwards transferred 900*l*. long annuities into his own name, jointly with the names of his illegitimate daughter and her two eldest children, and made a parol declaration that he did not intend to part with the controul over his stock, and he dis-

posed of it by a codicil to his will:—Held, after the death of the daughter and her husband, and her two eldest children under twenty-one, that two surviving children, who had attained twenty-one, were entitled to the consols. and the South Sea stock; and that the long annuities passed by the testator's codicil. *Kelpin v. Kelpin*, 1 M. & K. 520.

#### TRANSPORTATION.

[See DEATH.]

Judges enabled to add to the punishment of, in certain cases of forgery. 3 & 4 Will. 4, c. 44; 11 Law J. Stat. 104.

#### TREASON.

If a true bill be found against a person for high treason, the Judge will, on the application of the counsel for the Crown, order the sheriff to furnish the solicitor to the Treasury with a list of the persons to be summoned on the jury, that a copy of it may be delivered to the prisoner. *Semble*, that counts charging a party with high treason in "compassing, &c., the maim and wounding" of His Majesty, and with "compassing, &c. the wounding" of His Majesty, are bad.

The prisoner, in case of high treason, has a right to address the jury in addition to the speeches of his counsel; and *semble*, that both the prisoner's counsel have a right to address the jury, although there be no evidence on the part of the defence. *Rex v. Collins*, 5 C. & P. 305. [Gurney]

#### TREATY.

[See COMPENSATION—CURRENCY—NATIONAL CHARACTER.]

Under a treaty providing for the liquidation of the claims of the subjects of his Britannic Majesty upon the French government, for the value of moveable and immoveable property unduly confiscated by the French authorities, as well as for the loss, either total or partial, of their debts or other property, held under sequestration since the year 1792:—Held, that a British subject was entitled to compensation for a debt which, under a decree confiscating all debts due to British subjects, his French debtor had acknowledged, before the proper French authorities, to be due from him, and which those authorities had excused the debtor from paying to them, although the decree was subsequently repealed, and the debt was never, in fact, paid to the French authorities. *Pilkington v. Commissioners for claims on France*, 2 Kn. 7.

Under the same treaty, held, that a loss by a British subject, arising from a forced loan, notwithstanding a nominal repayment in a depreciated currency, entitles the loser to compensation. *Johnston's case*, 2 Kn. 336.

Under the same treaty, held, that the French government having, under a decree for the confiscation of all property belonging to British subjects, seized the books and papers of a British mercantile house, amongst which were the obligations for certain rents, the property of the house, but pur-

chased in and standing in the name of a French subject, the partners of the house were entitled to compensation for the rents. *Genesse's case*, 2 Kn. 345.

Under the same treaty, held, that a loss arising from the depreciation of the currency, during the imprisonment of a British subject, by which he was prevented from recovering his debts in the undepreciated currency, was not such a loss as entitled him to compensation. *Salvin's case*, 2 Kn. 350.

Under the same treaty, held, that in order to establish a claim to compensation for a loss under a decree confiscating all debts, it must be shewn that the confiscating government exercised some control over the debt in question. *Bourdieu's case*, 2 Kn. 353.

Under the same treaty, held, that the mere declaration of his debt to a British subject by a Frenchman to the French government, would not entitle the British subject to compensation. *De Tasse's case*, 2 Kn. 358.

Held, that this treaty did not extend to losses suffered by British subjects from confiscations by the French government, in countries belonging to Holland, taken possession of by France during a war between France and England. *Webster's case*, 2 Kn. 386.

### TREBLE DAMAGES.

What, in replevin on distress for a poor-rate. *Newman v. Bernard*, 10 Bing. 274, s. c. 3 Mo. & Sc. 748.

### TRESPASS.

[See CONSTABLE—NEGLIGENCE—TROVER—ANIMAL—ASSAULT—JUSTICES.]

- (A) WHERE MAINTAINABLE.
- (B) PLEADINGS.
  - (a) Declaration.
  - (b) Plea.
  - (c) Replication and Rejoinder.
  - (d) New Assignment.
- (C) EVIDENCE.
- (D) VERDICT AND DAMAGES.
- (E) COSTS.

#### (A) WHERE MAINTAINABLE.

[See SHERIFF, Duties and Liabilities.]

A person who knowingly receives from another a chattel which the latter has wrongfully seized, and afterwards, on demand, refuses to give it back to the owner, does not thereby become a joint trespasser, unless the chattel was seized to his use. *Wilson v. Barker*, 4 B. & Ad. 614, s. c. 1 N. & M. 409.

The defendant hires a vessel from the owner for a day, for the purpose of performing a certain voyage, and entertaining a stipulated number of friends. No change is made with regard to the captain and crew, who, as upon ordinary occasions, perform the duties of the vessel:—Held, that under the circumstances, the defendant had not such a possession of the vessel as justified the forcible expulsion of a stranger, who had come on

board by the permission of the captain. *Dean v. Hogg*, 3 Law J. (n.s.) C.P. 113, s. c. 10 Bing. 345; 4 Mo. & Sc. 188; 6 C. & P. 54.

The defendant having obtained a magistrate's warrant against the plaintiff, on a charge of felony, the plaintiff was apprehended, and taken to a police office, where the charge was heard, and the case adjourned, on the plaintiff's promise to appear at a future day. As he was about to depart, the defendant said he had another charge for forgery against him, whereupon he was again placed at the bar, without the express direction of the magistrate, and the second charge investigated:—Held, that trespass did not lie for the second detention. *Barber v. Rollinson*, 2 Law J. (n.s.) Exch. 101, s. c. 1 Cr. & M. 330; 3 Tyr. 266.

Where the plaintiff had the superintendence of a boat belonging to the proprietors of the Aire and Calder Canal, and hired the man who assisted him in the navigation of it:—Held, that he might maintain trespass for any injury done to the boat. *Moore v. Robinson*, 1 Law J. (n.s.) K.B. 4, s. c. 2 B. & Ad. 817.

A man is not justified in entering the close of another person to take away his own goods and chattels, through any wrongful or negligent act of his own, standing and being in that close. *Anthony v. Hawey*, 1 Law J. (n.s.) C.P. 81, s. c. 8 Bing. 186; 1 Mo. & Sc. 300.

A defence to an action of trespass for destroying a machine, that it was on the defendant's ground without his licence, and that it was injured in removing it, must be specially pleaded. A man is liable in trespass, on the general issue, for the injury done to the machine in such removal by himself, with his assistants. Damages are peculiarly for the jury. *Page v. Rattcliff*, 1 Law J. (n.s.) C.P. 57.

An attorney, who is arrested on a writ of *capias*, cannot maintain an action of trespass against the plaintiff and the officer for such arrest: his only remedy is an action on the case. *Noel v. Isaac*, 4 Law J. (n.s.) Exch. 56, s. c. 1 Cr. M. & R. 753; 5 Tyr. 376.

An officer acting under a warrant granted by Commissioners of Excise under stat. 10 Geo. 1, c. 10, is not liable as a trespasser, although no goods are found; nor is it necessary for him to prove that he had reasonable grounds of suspicion. *Cooper v. Boot*, 4 Doug. 339.

The use of an open space of ground in a particular way requiring light and air, for twenty years, does not give a right to preclude the adjoining owner from building on his land, so as to obstruct the light and air. *Roberts v. Macord*, 1 M. & Ro. 230. [Patteson]

A entered the police with a good character, signed by the colonel of his regiment. Upon his dismissal, it was returned to him (in a letter signed by the commissioner), with the words "dismissed the police service" stamped upon it:—Held, that trespass was not the proper form of action; and that there was no evidence against the commissioner that the act was done by him, or by his authority. *Taylor v. Rowan*, 7 C. & P. 70. [Abinger]

A kept a shop, in the window of which goods were ticketed at certain prices. B entered the shop, and demanded one of the articles at the price

marked, which the shopman refused to let him have, and desired him to leave the shop. B refused, and the shopman struck him. Upon this, A came into the shop, and gave B into custody:—Held, that B was a trespasser, in remaining in the shop after he had been told to leave it by the agent of the owner.—Held, also, that A was not liable for the assault committed by the shopman before he came into the shop. *Timothy v. Simpson*, 4 Law J. (n.s.) Exch. 81, a.c. 1 C. M. & R. 757; 6 C. & P. 499. [Parke]

If a person does not assist in a trespass, either in word or deed, he is not liable for it. *Ibid.*

## (B) PLEADINGS.

### (a) Declaration.

Declaration in trespass commencing "A B and C D complains," &c., and stating that the defendant was summoned to answer the plaintiff, not demurrable. *Lyng v. Sutton*, 4 Mo. & Sc. 417.

### (b) Plea.

[See BUILDING ACT.]

In trespass against the defendants, for beating, pulling the plaintiff about, turning him out of a certain close, &c., and dragging him into and through a certain pond, the defendants pleaded the general issue, and justified the turning out of the close, beating, and pulling about, without referring or alluding to the dragging into and through the pond. Verdict for the plaintiff on the general issue, and for the defendants on the remainder of the record. On motion to enter up judgment for the defendants, *non obstante veredicto*, on the ground that the plea on which the verdict was found for them was an answer to the whole complaint, and that the dragging through the pond being mere aggravation, need not be justified:—Held, that the plea was not an answer to the whole charge, as the dragging into and through the pond was a distinct substantive trespass, and not mere aggravation, and consequently that it should be justified. *Bush v. Parker*, 3 Law J. (n.s.) C.P. 242, a.c. 1 Bing. N.C. 72; 4 Mo. & Sc. 588.

In an action of trespass for taking weights, &c., the defendants justified under a custom, by which a jury was sworn at the court leet of a manor, to inquire and true presentment make of all persons within the manor, who sold goods, and to see that their weights and measures were lawful and just, and to seize all such as were false and deceitful. They then stated, that the plaintiff being resident within the manor, sold goods by weight; that "they, the said defendants, being on such jury," made inquiry and saw the weights, &c. of the plaintiff, that they were false and deceitful—therefore, &c. Held, that in order to bring themselves within the custom, all the jury must be present at the inquiry; and that the allegation, not necessarily importing that they were all there, was insufficient—whereupon judgment was entered for the plaintiff, *non obstante veredicto* for the defendants. *Sheppard v. Hall*, 1 Law J. (n.s.) K.B. 152, a.c. 3 B. & Ad. 362.

To a declaration in trespass containing a count for seizing and carrying away certain goods, chattels, and effects of the plaintiff, to wit, &c., and a

count for tearing away, severing, and removing divers fixtures of the plaintiff, the defendants pleaded, first, not guilty; and, secondly, justified, as to the first count, that the goods and chattels were taken as a distress for rent due from the plaintiff as tenant to one of the defendants. The plaintiff replied, denying the tenancy, on which issue was joined. At the trial, the Judge directed the jury, that the second plea covered the whole declaration; but the jury found a verdict for the plaintiff, with one farthing damages:—Held, that, if the plaintiff intended to rely upon the fact of some of the articles mentioned in the first count being fixtures, in order to take them out of the operation of the second plea, he should have replied that fact; but that the plea did not cover the trespasses alleged in the latter count.

The Court, however, refused to grant a new trial, as the jury had rectified the misdirection of the Judge, and had given damages. *Twigg v. Potts*, 3 Law J. (n.s.) Exch. 336, a.c. 1 C. M. & R. 89; 3 Tyr. 969.

In trespass against the defendant, for breaking and entering his close, the defendant, amongst other pleas found against him, pleaded, that the close in question was not the close of the plaintiff, and the jury found that the close did not belong to either party:—Held, that the plaintiff was entitled to have the verdict entered for him, he having proved possession, and possession being sufficient against a wrong-doer.

Held, also, that though the meaning of the word "close" is ambiguous, and may mean the quality or description of land, as well as the land itself, yet as the plaintiff used the word in the latter sense, to the knowledge of the defendant, the defendant was bound to apply the same signification, and was not at liberty to apply to the word a different meaning. *Heath v. Milward*, 4 Law J. (n.s.) C.P. 292, a.c. 2 Bing. N.C. 98; 2 Sc. 160.

A plea alleging that the plaintiff held and enjoyed the premises as tenant to the defendant, and justifying the trespass, under a distress for rent in arrear, need not state that the reversion was in the defendant. *Hooker v. Nye*, 3 Law J. (n.s.) Exch. 340, a.c. 1 C. M. & R. 258; 4 Tyr. 777.

Where a declaration alleges several distinct assaults and false imprisonments, a plea assuming to justify all, must allege a distinct cause for each separate trespass.

Thus, on a declaration charging several assaults and false imprisonments, a plea professing to justify all under process, and alleging that the plaintiff, at the time when, &c., opposed the execution thereof; wherefore the defendants, in order to arrest the plaintiff, and to overcome his forcible resistance and opposition, and because they could not otherwise arrest him, nor overcome his resistance and opposition, committed the several trespasses in the declaration mentioned:—Held, bad on special demurrer. *McCurday v. Driscoll*, 2 Law J. (n.s.) Exch. 184, a.c. 1 C. & M. 618; 3 Tyr. 571.

To a declaration in trespass for an assault, a plea justifying in defence of the defendant's dwelling-house, with a *quæ est eadem*, &c., and a traverse of any other place than the said dwelling-house, is bad on special demurrer, as the traverse is unne-

cessary. *Hamble v. Bailey*, 2 Law J. (N.S.) Exch. 55, a.c. 1 C. & M. 294; 5 Tyr. 152.

To an action of trespass, the defendant justified under a judgment of the Court (*salutis precavimus* est):—Held, that he was bound to prove an appearance by the plaintiff in the court below. The judgment of a Court, not of record, is not conclusive of an appearance having been entered. *Thompson v. Blackhurst*, 2 Law J. (N.S.) K.B. 97, a.c. 1 N. & M. 267.

Trespass against two for assaulting plaintiff, and tearing his clothes. The fourth plea stated, that before the committing those trespasses, plaintiff was found by defendant on the land of W S; and that plaintiff had in his possession a hare which appeared to have been recently killed; whereupon one defendant, as servant of, and by command of W S, demanded the hare, which plaintiff refused to deliver, and had in his possession; that afterwards, and just before committing the trespasses, the said defendant demanded the hare from the plaintiff; and because he refused to deliver it, and kept it in his possession, both defendants, as such servants, and by such command, in order to take the same for the use of W S, seized the plaintiff, and took it from him, according to the form of the statute—viz. 1 & 2 Will. 4, c. 32, s. 36.

The fifth plea stated, that just before the trespasses, the plaintiff had in his possession a dead hare belonging to W S, without his leave and licence; wherefore defendants did, as his servants, by his command, demand the same from the plaintiff, which he refused to deliver, and detained, whereupon the defendants, as such servants, &c., seized the plaintiff (concluding as in the former plea). On demurrer to the replication, it was held, that the fourth plea was bad, for not sufficiently shewing when the second demand was made, or that it was made on the land of W S; and that the fifth plea was also bad, for not stating that the defendants gently laid their hands on the plaintiff in order to take the game, and that because he resisted, they necessarily committed the trespass complained of, doing as little damage, and using as little violence to the plaintiff, as they could on that occasion. *Wisdom v. Hodson*, 3 Tyr. 811.

#### (c) Replication and Rejoinder.

*Lucas v. Neckells*, 2 Y. & J. 304, 4 Bing. 729; 1 Law J. Dig. 482, 518. Affirmed in the House of Lords, 1 C. & F. 438, a.c. 7 Bligh, n.s. 140.

Trespass for assault and battery. Plea, that plaintiff was defendant's apprentice, and conducted himself improperly, wherefore the defendant moderately chastised him. Replication, *de injuriis*:—Held, that on these pleadings the plaintiff could not recover on the ground of the chastisement being excessive, for the replication *de injuriis* puts in issue only the cause alleged in the plea; that is, in this case, whether the plaintiff misconducted himself as an apprentice. *Penn v. Ward*, 4 Law J. (N.S.) Exch. 304, a.c. 2 C. M. & R. 338.

*De injuria*, &c. is a bad replication on general demurrer to a plea in trespass, claiming an interest in land. *Hooker v. Nye*, 3 Law J. (N.S.) Exch. 340, a.c. 1 C. M. & R. 258; 4 Tyr. 777.

The sheriffs of London having issued their warrants under a *ca. sa.* against the plaintiff to their

officer, the son of the officer caused the plaintiff to be taken into custody, and conveyed to a police station-house, under a false charge of felony, and the officer then executed the writ, and removed the plaintiff to prison.

In an action for assault and false imprisonment, the sheriffs pleaded the general issue, and justified the arrest at the station-house, and subsequent proceedings; to which the plaintiff replied, admitting the writ, warrant, &c., and *de injuriis* *sad propriis abque residuo cause*.

The plaintiff having obtained a verdict with damages for the entire grievance,—Held, that the defendants were entitled to a new trial, inasmuch as damages had been given as well for that part of the alleged cause of action which was justified, as for that which was not, as it was incumbent on the plaintiff to reply specially, to make the sheriffs trespassers *ab initio*. *Price v. Pook*, 4 Law J. (N.S.) C.P. 76, a.c. 1 Bing. N.C. 380; 1 Sc. 205.

An affidavit of debt stating, that a party is indebted in the sum of 20*l.* and upwards, on a promissory note payable to one C M at a day now past, and indorsed to the defendant, is insufficient, and the defendant would be entitled to be discharged on filing common bail, *comme semble*, as it does not appear that the note was drawn for 20*l.*; and that sum might be composed partly of interest, for which no arrest could take place.

But that irregularity is no answer to a justification in trespass under the writ of *copias* issued upon that affidavit, as long as the writ itself is in existence, and not set aside. *Reddell v. Pakeman*, 4 Law J. (N.S.) Exch. 180, a.c. 2 C. M. & R. 30.

In an action of trespass for breaking and entering the dwelling-house of the plaintiff and taking his goods and chattels, the defendants suffered judgment by default as to the breaking and entering, and pleaded a special plea, wherein they alleged a fraudulent transfer of the goods to the plaintiff by a bankrupt, setting forth the proceedings in bankruptcy, and that the property in the goods became vested in his assignees, by whose command the defendants took the goods, &c. In his replication the plaintiff merely traversed the property of the goods in the assignees:—Held, that this only put in issue the single fact of property in the assignees, and that a verdict for the defendants, on the ground that the transfer to the plaintiff was not *bona fide*, ought not to be disturbed. *Jones v. Brown*, 4 Law J. (N.S.) C.P. 124, a.c. 1 Bing. N.C. 484; 1 Sc. 453.

In trespass *de bonis asportatis* in respect of the removal of several articles, a plea justifying the removal, *quia damage feasant*, enures as a several plea in respect of each article, and the plaintiff may reply severally. Thus the plaintiff may traverse the justification as to one article, and as to another he may reply *excess*. So, if the plea justifies the removal of goods of similar description enumerated in different counts, if the identity of the goods in the different counts be not alleged, the plaintiff may reply severally in respect of the articles in each count. The insufficiency of one of such sectional replications demurred to for duplicity in putting in issue the whole plea by a traverse *abque tali causa*, where in respect of matter of title disclosed by the defendants, the plaintiff should have put in issue a

portion only of the plea by traversing *abque residue cause*, does not affect the validity of the other replications to the same plea.

Where in trespass *de bonis asportatis* the defendant justifies *quia damage fecerant*, and the plaintiff replies *excess*, such replication, if filed before Easter term, 1834, (when the rules of Hilary term, 4 Will. 4, came into operation,) should conclude with a prayer of judgment.

In trespass *quare clausum fregit*, the defendant sets out a possessory title in A B, giving colour to the plaintiff, and justifies as servant of A B, and the plaintiff puts the whole plea in issue, by replying *de injuriâ sud propriâ, absque tali causâ*:—such replication is bad for duplicity. *Vivian v. Jenkin*, 5 Law J. (N.S.) K.B. 27, s. c. 5 N. & M. 14; 3 Ad. & E. 741.

Where, to an action of trespass, the defendant, under 21 Jac. 1, c. 16, s. 5, pleads that the trespass was involuntary, and that before action he tendered a certain sum, (naming it,) being sufficient amends; the plaintiff may reply, either that that sum was not tendered, or that it was not sufficient amends. He cannot reply generally, that the defendant did not tender sufficient amends. *Williams v. Price*, 1 Law J. (N.S.) K.B. 258.

Trespass by lessor against lessee for removing a cornice fixed to the freehold; plea, that the cornice was of wood, was put up by the defendant, was fixed by screws only, was for ornament, and that it was carefully removed during the term, and that all injury was amended; replication, that the cornice was not removable by law:—Held, that the issue raises a question of fact, and not of law, and that the question was substantially, whether the cornice was so affixed to the freehold, that it could be removed without injury to the freehold. *Avory v. Cheslyn*, 5 N. & M. 372, s. c. 3 Ad. & E. 75.

In an action of assault and battery, *de injuriâ* is a good replication to a plea, stating that J E and S B were possessed of a close, and that the plaintiff was making a noise, &c., and the defendants as servants of J E and S B, and by their command, requested him to depart, and he refused, whereupon defendants, as the servants of J E and S B, gently laid hands, &c. and because plaintiff resisted defendants as servants, &c. and by command, &c., a little hurt, &c. *Piggott v. Kemp*, 1 C. & M. 197, s. c. 3 Tyr. 128; 2 Dowl. P.C. 20.

#### (d) New Assignment.

In an action of assault and false imprisonment by taking before a magistrate, the defendant pleaded defence of possession, and an assault by the plaintiff in the presence of a police officer. The plaintiff replied *de injuriâ*. The defendant proved his justification as to the first branch of the plea, but failed to prove the assault by the plaintiff:—Held, that the plaintiff was entitled to recover damages for the false imprisonment, without new assigning. *Reece v. Taylor*, 4 Law J. (N.S.) K.B. 74, s. c. 4 N. & M. 469.

Where a plea professes to justify the principal acts of trespass alleged in the declaration, but excepts the residue, a new assignment is unnecessary; but the plaintiff may obtain damages in respect of the residue on the general issue. *Neville v. Cooper*, 2 Law J. (N.S.) Exch. 225, s. c. 2 C. & M. 329.

#### (C) EVIDENCE.

##### [See BUILDING ACT.]

Under "not guilty" in trespass, that only can be given in evidence which shews that the defendant did not do the act complained of. *Pearcy v. Walter*, 6 C. & P. 232. [Oaselee]

Trespass for breaking and entering close and digging coals. Plea, that the close was part of fee-farm lands of R, that (10 Jac. 1.) the mines under those lands were granted, &c., and derives title under the grant, and justifies. Replication, that no right of entry accrued within twenty years of the trespass. Issue thereon. Evidence, that the grantees had dug, within twenty years, under other fee-farm lands in R, but no evidence of digging under plaintiff's. Evidence also, that plaintiff, or his predecessors, had not dug:—Held, that the defendants were not barred. *Hodgkinson v. Fletcher*, 3 Doug. 81.

Trespass for assault and battery. Plea, that plaintiff was defendant's apprentice, and, having misconducted himself, the defendant moderately chastised him. Replication, *de injuriâ*:—Held, that the plaintiff could not, on those pleadings, give in evidence excessive chastisement. *Pena v. Ward*, 4 Law J. (N.S.) Exch. 304, s. c. 2 C. M. & R. 388.

The plaintiff, in the first count of the declaration, alleged an assault, battery, and imprisonment upon a false charge of assault with intent to commit a felony. The defendant pleaded many special pleas in justification, in one of which, the eighth, he justified the assault, battery, and imprisonment, in aid of the officer who apprehended the plaintiff, on a charge of assaulting him, the defendant. Upon the trial, the allegations in the first count were proved by the plaintiff, and those in the eighth plea were proved by the defendant:—Held, that such proof by the defendant was not an answer to the action, inasmuch as the justification of an imprisonment for an assault, did not cover an imprisonment upon a charge of assault with intent to commit a felony; the act imputed by the plaintiff being in its nature and description different from that justified by the defendant. *Stammers v. Yearsley*, 2 Law J. (N.S.) C.P. 256, s. c. 10 Bing. 35; 3 Mo. & Sc. 410.

In a declaration in trespass *quare clausum fregit*, the plaintiff's close is described by abutments; plea, seisin in fee in the defendant, and issue thereon. The plaintiff is entitled to recover for a trespass done in a close in his lawful possession, answering to the description in the declaration, although the defendant also has a close answering to the same description. So, although the abutments are stated with such generality that the declaration would have been bad on special demurrer, and it is only by reason of such generality of description that the plaintiff's close comes within the description: as where the *locus in quo* is described as abutting, in the direction of the four cardinal points, towards certain closes, and the plaintiff proves a trespass on a close of a triangular shape abutting towards such closes. When in a declaration in trespass *quare clausum fregit*, the *locus in quo* is described as abutting towards certain closes, the defendant may demur specially, or may obtain a Judge's order for a more certain description of the close. But such defect cannot be taken advantage of at the trial of

an issue, raised upon a plea of *seisin in fee* or *liberum tenementum*. Nor could the objection have been taken, though the defendant had pleaded in denial of the plaintiff's possession of the alleged close, *semble*. *Lempriere v. Humphrey*, 4 N. & M. 638, 3 Ad. & E. 181.

Declaration for seizing pigs; plea, that defendant was possessed of a close named H, in which the pigs were eating, &c., and were taken damage feasant: replication, that the defendant was not possessed of the said close in the said plea mentioned, in which the pigs were alleged to be eating, &c.; and issue thereon. There were several adjacent closes called H:—Held, that the defendant was bound to shew that he was possessed of a close in which the pigs were eating, &c., and that it was not enough for him to shew his possession of a close named H. *Bond v. Downton*, 2 Ad. & E. 26.

To a declaration containing one count only in trespass for assault and false imprisonment, the plea justified the apprehending the plaintiff on a charge of felony, and proceeded to aver that the plaintiff resisted, whereupon he beat him, &c.; at the trial, the justification as to the apprehension for felony was proved; but the defendant did not prove the resistance of the plaintiff. The jury having found for the defendant:—Held, that the verdict was right: the defendant having proved as much of his plea as was necessary to cover the declaration, and it not being necessary for him to prove what was unnecessarily alleged. *Atkinson v. Warne*, 1 C. M. & R. 827, s. c. 5 Tyr. 481.

Trespass and expulsion against three, with a count for imprisonment. The expulsion having been proved against the three defendants, the plaintiff's counsel went into evidence of the imprisonment, but that appeared to have been by one of the defendants only:—Held, that the plaintiff's counsel could not abandon the first trespass proved against all three, and go on with the case as to the imprisonment by the one defendant alone. *Tait v. Harris*, 6 C. & P. 73, s. c. 1 M. & Ro. 282. [Lyndhurst]

If yarn, of a description liable to be condemned, has been found in the house of the plaintiff, magistrates have jurisdiction to condemn it under the statute, and to convict the plaintiff, although the yarn was not found on the execution of a search warrant previously granted; and in an action by the plaintiff for taking it, the conviction is evidence for the defence, although it is founded on the evidence of one of the defendants.

In trespass against ten defendants for breaking the house of A, and taking his woollen yarn, the defendants may, under the general issue, shew that the yarn was afterwards condemned under stat. 17 Geo. 3, c. 56, in order to make out that A could have no property in it; but the condemnation of the yarn, unless the parties had a search warrant, will not justify the entering of a house. *Davis v. Nest*, 6 C. & P. 167. [Tindal]

It being opened by the defendant in an action of trespass, that L had committed a felony by hiring a pianoforte, and selling it immediately:—Held, that the defendant could not give evidence respecting optical instruments, which were alleged to have been obtained by L from another tradesman.

In trespass for taking a pianoforte, which the

plaintiff had bought of L, the defendant pleaded that it belonged to him, and had been feloniously stolen from him by L, and that he retook it:—Held, that whatever would be evidence against L, if he were on his trial for the felony, was evidence in this action to prove the felony to have been committed by L. *Wilton v. Edwards*, 6 C. & P. 677. [Lyndhurst]

#### (D) VERDICT AND DAMAGES.

[See *ante*, Plea, *Twigg v. Potts*.]

Where a verdict was found in trespass against one only of several defendants, the evidence applying equally to all, but no leave was given at the trial to enter a verdict against the other defendants:—Held, that a verdict could not be entered against them. *Starling v. Cozens*, 3 Dowl. P.C. 790.

The costs of an application to set aside a judgment for *irregularity*, which was granted without costs, cannot be recovered, by way of aggravation of damages, in an action of trespass, for seizing goods under colour of such judgment. *Lotus v. Devereux*, 1 Law J. (N.S.) K.B. 103, s. c. 3 B. & Ad. 343.

#### (E) COSTS.

[See COSTS—SET-OFF, COSTS.]

Where several defendants are sued in trespass, and a verdict is found for the plaintiff on some of the issues against some of the defendants, and against him on all the other issues, the plaintiff is entitled to the balance only of the costs after deduction of all the costs of all the defendants. Where there are several defendants, and one alone employs an attorney for all, the others are not entitled to claim any costs. *Starling v. Cozens*, 3 Dowl. P.C. 782.

Trespass *qu. claus. fregit*. Pleas, 1st. General issue; 2nd. Justification under right of way. Replication, traversing the right of way, and new assignment. Issue on the right of way, and judgment by default on the new assignment. Damages for plaintiff 1s. on new assignment, and verdict for defendant on the special plea. Defendant is not entitled to the costs of the trial. He should have withdrawn the general issue. *Broadbent v. Shaw*, 1 Law J. (N.S.) K.B. 42, s. c. 2 B. & Ad. 940.

Trespass for breaking and entering plaintiff's close. Pleas, *lib. ten.* and four special pleas; Replication, issue on all the pleas, and a new assignment. Judgment by default on all the trespasses new assigned, and a relinquishment of the four last pleas, as far as they relate to the new assigned trespasses. One shilling damages assessed on the judgment by default. Record went down for trial, and verdict found for plaintiff on the plea of *lib. ten.*, and for the defendant on all the other pleas:—Held, that as the defendant had left the plea of *lib. ten.* to the declaration on the record, the plaintiff was forced to go down to trial; and therefore was entitled to the general costs of the cause. *Forester v. Dale*, 1 Dowl. P.C. 412.

#### TRIAL.

[See PRACTICE.]

[Costs for not proceeding to—See COSTS, Defendant's Right to.]

## TRINIDAD.

[See EXCHEQUER BILLS.]

## TROVER.

[See BILL OF EXCHANGE—TRESPASS—LIEN.]

- (A) WHERE MAINTAINABLE.
- (B) DEMAND AND REFUSAL.
- (C) CONVERSION.
- (D) PLEADING AND EVIDENCE.
- (E) PRACTICE.

## (A) WHERE MAINTAINABLE.

The finder of a lost bank note got it changed by the defendant, and afterwards, on being apprehended, gave the owner a part of the change:—Held, in an action of trover by the owner, that the receipt of the change did not affirm the conversion, or waive the tort, but only went in diminution of the damages.

What is sufficient evidence to go to the jury of identity, in trover for a lost bank note. *Burn v. Morris*, 3 Law J. (N.S.) Exch. 193, s. c. 2 C. & M. 579; 4 Tyr. 486.

The right to title deeds of an estate follows the right to the estate. And, where the purchaser of an estate (in the absence of any fraudulent motive,) suffered the vendor to retain the title deeds, and the latter mortgaged the estate, and delivered over the title deeds to the mortgagee, it was held, that the mortgagee was equally guilty of negligence, in not ascertaining who was in possession of the estate to which the deeds related, as the purchaser was in not getting possession of the deeds; and that there was nothing to deprive the latter of the right, which, by the above proposition of law, he had: that, therefore, he might maintain trover for the deeds against the mortgagee. *Harrington v. Glenn*, 1 Law J. (N.S.) K.B. 122, s. c. 3 B. & Ad. 170.

A, a manufacturer at Stockton-upon-Tees gives goods to the carrier there to have delivered at the defendants' wharf, London, and receives the usual receipt. He then hands over to the plaintiffs, in consideration of an advance of money, the carrier's receipt, invoice, and an order upon the defendants to deliver the goods in question upon their arrival:—Held, that upon disobeying such order, &c., (previously lodged with and acknowledged by them,) the defendants were liable in trover; though the plaintiffs were never in actual possession of the goods, and the measure of damages was the value of the goods, not the sum actually advanced. *Holl v. Griffin*, 3 Law J. (N.S.) C.P. 17, s. c. 10 Bing. 246; 3 Mo. & Sc. 782.

If a person having a lien on goods wrongfully parts with them, the owner's right to the possession revives, and he may maintain trover for them. *Scott v. Newington*, 1 M. & Ro. 252. [Tindal]

*Semble*—That a general acceptance, by a wharfinger, of an order to deliver a quantity of goods, is such an admission that he has that specific quantity in his possession belonging to the party making the order, as will vest a property in the deliverer sufficient to entitle him to maintain trover against the wharfinger.

Accordingly, the defendants, who were wharfing-

gers, on receiving an order signed by O to deliver twenty sacks of flour to the plaintiff, said they had but five sacks to spare, but the plaintiff should have the remainder when they had some on the wharf. The order was filed in the usual course of business, without any indorsement of a limited acceptance or reservation of a right by the defendants to select the flour, and the five sacks were delivered to an order by plaintiff to deliver "five sacks *ex* twenty as per order lodged." The defendants afterwards refused to deliver the remaining fifteen sacks, on the ground that at the time when the first order was lodged, they had no more than five sacks of O's unappropriated. In trover for the value of the fifteen sacks, the jury found that the order was accepted generally:—Held, that the action was in the proper form. *Gillett v. Hill*, 3 Law J. (N.S.) Exch. 146, s. c. 2 C. & M. 580; 4 Tyr. 290.

A charge for warehouse rent by the vendor, in the invoice of goods sold, does not amount to a constructive delivery, so as to entitle the vendee to maintain trover, without payment or tender of the stipulated price.

Neither will the vendor be deprived of his lien for the price, by receiving and negotiating a bill of exchange, and delivering a part of the goods, by the request of the vendee, to a sub-vendee, during the currency of the bill, if the original vendee become bankrupt, and the bill be dishonoured at maturity.

Accordingly, the defendants sold twenty-two pockets of hops, which were in their warehouse, and sent an invoice, containing the words "at rent," to the purchaser, from whom they received a bill of exchange, which they negotiated. During the currency of the bill, by order of the vendee, they delivered ten pockets to a sub-vendee, who paid the amount charged for warehouse rent; but before the bill was due, the vendee became bankrupt, and at maturity the bill was dishonoured:—Held, that the assignee of the bankrupt vendee could not maintain trover for the residue of the hops remaining in the defendant's warehouse, without a tender or payment of the price agreed on, and of the warehouse rent. *Miles v. Gorton*, 3 Law J. (N.S.) Exch. 155, s. c. 2 C. & M. 504; 4 Tyr. 295.

A party who was indebted to the defendant's mother, having received a bill of exchange from the drawer and payee, for the purpose of getting it discounted, indorsed and delivered it to the defendant, who, with a knowledge of all the circumstances, placed it to the credit of the party in the account with his mother:—Held, that an action of trover was maintainable by the drawer and payee against the defendant for the amount of the bill. *Cranck v. White*, 4 Law J. (N.S.) C.P. 118, s. c. 1 Bing. N.C. 414; 1 Sc. 314.

Trover will lie by the owner of goods and chattels upon another man's close, against the owner of the close after demand and refusal, or after demand and neglect to deliver. *Anthony v. Haney*, 1 Law J. (N.S.) C.P. 81, s. c. 8 Bligh, 186; 1 Mo. & Sc. 300.

A person who buys a chattel, upon which creditors have a lien by express agreement with the vendor, in ignorance of such agreement, but after the purchase assents to it, is bound by his assent; and though he has paid the purchase-money to the

vendor, he cannot maintain trover for the chattel against a creditor, who detains it for his lien. *Norris v. Williams*, 2 Law J. (N.S.) Exch. 267, a. c. 1 C. & M. 842.

A let a horse on hire to B for one month, B kept it for two months, and then sold it to C:—Held, that A might recover the value of the horse from C, although C had acted *bona fide*, and had paid B the full value. *Shelley v. Ford*, 5 C. & P. 313. [Bosanquet]

A, a tenant, owed rent to B, his landlord; B distrained for more rent than was due, and removed the goods to the auction rooms of C; A gave C notice not to sell, and C delivered the goods back to the person from whom he received them:—Held, that, as some rent was due from A to B, C was not liable to A in an action of trover. *Whitworth v. Smith*, 5 C. & P. 250, a. c. 1 M. & Ro. 193. [Tenterden]

It is the regular and usual course of business in commercial transactions to deliver out a bill of exchange, left for acceptance, to any person who mentions the amount, and describes any private mark or number upon it; and if the clerk of the party leaving it, by his conduct enables a stranger to discover the mark or number, in consequence of which the bill is delivered out to him, the party leaving it cannot maintain trover for the bill against the party who so delivered it out. *Morrison v. Buchanan*, 6 C. & P. 18. [Littledale]

A having been bail for D, went accompanied by B and C to the lodgings of D, telling her that B and C were officers, who would take her to gaol if she did not give him security for his debt. B and C were not officers, and had no authority to take D. D gave A a number of articles, and signed a paper stating, that the articles were deposited with A for security, and that he might sell them if he was not paid in forty-two days:—Held, that D might recover the value of the articles in trover; and that as B and C acted in concert, the verdict must pass against all three, although it appear that C and D never had any of the goods. *Bloomfield v. Blake*, 6 C. & P. 75. [Lyndhurst]

In trover for goods the defendant pleaded payment of money into court, and the plaintiff replied that he had sustained more damages; the defendant paid into court the cost price of the goods, having offered the goods in specie to the plaintiff two days only after they ought to have been delivered. The plaintiff proved, that he had sustained inconvenience and loss, by not having the goods delivered at a proper time. The jury however found for the defendant, and the Court refused to set aside the verdict. *Evans v. Lewis*, 3 Dowl. P.C. 819.

A person having a bill to take up applied to a firm for assistance, who, not having cash, drew and indorsed a bill, and gave it to him to get discounted, that they might be able to lend him the money. The person so entrusted also indorsed the bill, and left it with a broker for discount. The bill-broker, being indebted to a widow, who carried on business as a coal-merchant, took the bill to her counting-house and indorsed it, and there gave it to her son, who managed her business, and who entered it in her cash book as so much received on account. There was contradictory evidence as to the son's knowledge at the time he received the bill, of the

circumstances under which it had been obtained; but he, on being informed of them afterwards, refused to give the bill to the drawer, who brought an action of trover against him for it. The jury found that the bill was not taken *bona fide*, and without notice of the circumstances; and it was held, that the action was maintainable against the son, and need not be brought against the mother. *Cranck v. White*, 6 C. & P. 767. [Tindal]

If a tenant of land, during his tenancy, remove a dung heap, and, at the time of so doing, digs into and removes virgin soil that is beneath it, the landlord may maintain either trespass *de bonis asportatis*, or trover for the removal of the virgin soil. *Higges v. Mortimer*, 6 C. & P. 616. [Parke]

#### (B) DEMAND AND REFUSAL.

A written demand in trover made by A B, stated that he held the plaintiff's power of attorney: and the defendants' attorney said in the presence of the defendants, that he would admit the service of demand and tender of the charges, but that the defendants declined to deliver the goods, and would leave A B to seek such remedy as the law would give him:—Held, it was not necessary on the trial of the cause to produce the power of attorney. *Leuchart v. Cooper*, 7 C. & P. 119. [Tindal]

#### (C) CONVERSION.

The defendants had in their possession a boiler belonging to the plaintiffs. The plaintiffs demanded it, and the defendants at first refused to restore it, but afterwards and before the issuing of the writ tendered it:—Held, no conversion. *Hagyard v. Seaward*, 1 Mo. & Sc. 459.

In an action of trover for a chaise, it appeared that one B had hired the chaise in question from the plaintiff, and had placed it at livery with the defendant, and that whilst it was in the defendant's possession, in the city of London, it was attached by process out of the Sheriff's Court. The plaintiff demanded the chaise, but the defendant, alleging that it had been attached, refused to deliver it:—Held, that there was no evidence of a conversion by the defendant, the chaise being at the time of the demand in the custody of the law, and not of the defendant. *Verrall v. Robinson*, 2 C. M. & R. 495.

Tenant mortgages a leasehold, which he afterwards assigns and delivers possession to the assignees, and afterwards the mortgagee takes forcible possession from the assignees:—Held, that taking such forcible possession of the house, was no conversion of the fixtures and other articles, to which the assignees of the tenant were entitled. *Longstaff v. Meagoe*, 4 Law J. (N.S.) K.B. 28, a. c. 2 Ad. & E. 167; 4 N. & M. 211.

The plaintiff having pledged goods at a pawnbroker's, delivered the duplicates to the defendant, to take them out of pawn. On a demand of the goods, the defendant admitted he had had the duplicates, and the possession of the goods, but had delivered them to a third person, whom he did not name:—Held, that trover might be maintained without a tender of the money paid by the defendant to redeem the goods. *Jones v. Cliff*, 2 Law J. (N.S.) Exch. 189, a. c. 1 C. & M. 640; 3 Tyr. 576.



If a bailee of a pipe of wine, without any directions from the owner, but of his own accord and on his own account, put the wine into bottles, the bottling is a conversion, and the Statute of Limitations will begin to run from the time at which it was bottled. *Quere*, whether drinking a portion of the wine, had it been bottled by the direction of and for the owner, would be a conversion of the whole; *semble*, not—(*per* Patteson J. and Coleridge, J.)

A, through C, bought a pipe of wine, and C deposited it for him in the cellar of his relation D. C became bankrupt, and his assignees applied to D for the wine, but it was not delivered up to them. A's attorneys, in November, wrote a letter to D, in which letter they referred to a demand of the wine made in March preceding, saying, that, if that demand were not complied with, they should take steps to recover it:—Held, that it was not necessarily to be inferred from that letter, that a demand and refusal had been made in the March preceding; but that it was a question for the jury. *Philpott v. Kelley*, 4 Law J. (N.S.) K.B. 189, s.c. 4 N. & M. 611; 3 Ad. & E. 106.

If the defendant, by his acts, prevents the plaintiff from obtaining access to a chattel, to which he is entitled, such prevention by the defendant is evidence of a conversion. *Wansborough v. Maton*, 4 Law J. (N.S.) K.B. 164, s.c. 4 Ad. & E. 884.

Where the drawer of a bill of exchange deposits it with a creditor, giving him authority to receive the proceeds and apply them in a specified way, if the creditor after an act of bankruptcy by such drawer, gives up the original bill to the acceptor, (taking another bill in lieu of it,) this is a conversion by the creditor, and the assignees of the drawer may support trover. *Robson v. Rolls*, 1 M. & Ro. 239. [Tindal]

#### (D) PLEADING AND EVIDENCE.

To a count in trover the defendant pleaded not guilty, and at the trial proposed to offer evidence to shew that he was tenant in common, with the plaintiff, of the property claimed in the declaration, and had disposed of it in payment of partnership debts:—Held, that the Judge was right in refusing to admit it, not because the defendant had, by his plea, admitted the plaintiff's right of property to such an extent as precluded him from setting up the community of interest therein, but because the present defence was one which confessed the conversion, but avoided it by a justification, and therefore ought to have been pleaded specially.

*Quere*, whether the defendant must plead specially a right to detain goods on the ground of a lien. *Stancliffe v. Hardwicke*, 4 Law J. (N.S.) Exch. 161, s.c. 2 C. M. & R. 1; 5 Tyr. 551.

Where, in an action of trover, the defendant, in addition to the plea of Not guilty, pleaded a general lien, by virtue of the custom of his trade; also a general lien by virtue of a special contract; also that a third person was enabled by the conduct of the plaintiff, to appear as the true owner of the goods; also that the defendant had incurred expense by defraying costs and charges for the landing, &c. of such goods at the desire of such

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supposed owner:—Held, that these pleas were not substantially the same, and that they might be retained upon the record. *Leukhart v. Cooper*, 4 Law J. (N.S.) C.P. 166, s.c. 1 Bing. N.C. 509; 1 Sc. 481.

Where the plaintiff in trover claims under a sale, the defendant under a plea that the goods are not the plaintiff's property, cannot shew the sale to have been fraudulent. The fraud must be pleaded. *Howell v. White*, 1 M. & Ro. 400. [Patteson]

The carriage of A being on the premises of B, was seized by C for rent, due by B to his landlord, D. In an action of trover brought by A against C, a witness proved that B had held the premises of D for more than a year, but that he had a lease of them:—Held, that the lease must be produced and given in evidence, and that B's acquiescence in the distress would not dispense with such proof. *Shepherd v. Cafe*, 5 C. & P. 418. [Parke]

If a defendant in trover plead that the goods "are not nor were the property" of the plaintiff, in manner and form as in the declaration is alleged, (concluding to the country,) this will be taken to be an informal plea, traversing the allegation of the declaration, that the plaintiff "was possessed" of the goods "as of his own property," and, therefore, on this plea, it will be a good defence to shew that the goods, though the property of the plaintiff, had been pledged by him as a security for money. Whether this plea would not be bad on special demurrer—*quere*. *Samuel v. Morris*, 6 C. & P. 620. [Alderson]

#### (E) PRACTICE.

[See BAIL, By Judge's Order.]

### TRUST AND TRUSTEE.

#### (A) TRUST.

- (a) Construction.
- (b) Creation and Execution.

#### (B) TRUSTEE.

- (a) Appointment.
- (b) Power, Rights, and Duty.
- (c) Disclaimer.
- (d) Liability.
- (e) Construction of, and Proceedings under 1 Will. 4, c. 60.

#### (C) COSTS.

#### (D) SHIFTING TRUST.

[See DEVISE, Construction of.]

#### (A) TRUST.

##### (a) Construction.

A testator gave his residuary personal estate to the trustees named in his will, their executors, administrators, and assigns, upon trust to apply the same as he should appoint, and in default of appointment as to any part, he directed the trustees to sell such part at their discretion, either for pious and charitable purposes, or otherwise for the bene-

fit of the testator's sister and her children:—Held, that this was a personal trust, which a representative of the surviving trustee could not execute, and that a sum which remained at the decease of the surviving trustee, and which had not been applied either to charitable purposes, or for the benefit of the testator's sister and her children, was undisposed of, and belonged to the testator's next-of-kin. *Down v. Worrall*, 1 M. & K. 561.

### (b) Creation and Execution.

Words of expectation, in a will, not amounting to recommendation, will not create a trust. *Lechmere v. Lavis*, 2 M. & K. 197.

An estate created for the performance of certain trusts, remains vested in the trustee, so long as any object of the trust may spring up, though, for the present, all the purposes of the trust have been satisfied. *Darker v. Darker*, 2 Law J. (N.S.) Exch. Eq. 22.

The Court will not make a declaration that a person is entitled to a legal estate in fee, unless there is also some trust to be performed. *Brookes v. Turner*, 4 Law J. (N.S.) Chanc. 48.

### (B) TRUSTEE.

[See ATTORNEY, Connexion between, and Client.]

#### (a) Appointment.

Appointment of new trustees. See *Anonymous*, 4 Law J. (N.S.) Chanc. 48.

A person who is requested, and agrees to permit a transfer of trust stock, from the name of the surviving executrix, under a will, into their joint names, and at the same time obtains a copy of the will, is thereby constituted a trustee of the stock, and is not merely an agent for the executrix. And so, where the co-transferee acts with the privity of all parties, in the execution of the trusts of the will, though no declaration of trust has been executed, he is a trustee, and not removeable at the pleasure of the persons interested in the trust property. *Cocks v. Smith*, 2 Law J. (N.S.) Chanc. 205.

The surviving trustee under a marriage settlement becomes bankrupt, and is outlawed. On the application of the *cestuis que trust*, the Court ordered the assignees to transfer the trust stock to new trustees. *In re Remington*, 3 D. & Ch. 24.

#### (b) Power, Rights, and Duty.

[See BANKRUPT, Proof of Debt, Trustees—ISSUE, Where directed.]

[*Chennel v. Martin*, 2 Law J. Dig. 286, s.c. 4 Sim. 340.]

If there is a dispute as to the inheritance, the Court will not compel the trustee of an outstanding term, attending the inheritance, to lend his name to either party in an action of ejectment. *Doe d. Prosser v. King*, 2 Dowl. P.C. 580.

A fine may be levied by a trustee, substituted for a missing trustee, under 6 Geo. 4, c. 74, s. 5. *Jackson v. Ward*, 9 Bing. 399, s.c. 3 Mo. & Sc. 566.

A trustee paid 10l into a banker's hands, with directions to the banker's clerk to pay that sum to his *cestui que trust* upon receiving a receipt for 27l, as he claimed 17l for repairs done under the trust deed:—Held, a sufficient acknowledgment to entitle the *cestui que trust* to maintain an action at law for the sum of 10l. *Roper v. Holland*, 4 Law J. (N.S.) K.B. 156, s.c. 3 Ad. & E. 99; 4 N. & M. 668, (called *Soper v. Holland*).

Under 6 Geo. 4, c. 74, s. 5, a fine by a substituted trustee for an absent feme covert trustee, is a mode of assurance authorized by such act. *Jenskyn dem., Ward and Wife def.*, 2 Law J. (N.S.) C.P. 38.

A testator directed his trustees, "as soon as conveniently might be after his decease, to sell his real estates," and invest the produce in government or real securities. The trustees postponed the sales for eleven and thirteen years. The value of the estates, at the testator's death, was 1,580l, which would then have produced 2,630l consols. The estates, however, realized 2,122l, but which only produced 2,300l consols:—Held, first, that under the terms of the will, the trustees had a discretionary power of postponing the sales; and secondly, that such discretion had been discreetly exercised.

Where trustees have a discretion, the test of a negligent breach of trust is, what would have been the course of the Court under similar circumstances. *Warner v. Torkington*, 4 Law J. (N.S.) Chanc. 193.

Where a covenant is entered into by a trustee for a third person, and the *cestui que trust* is bound to sue in a court of law in the name of his trustee, acts and admissions by the latter are conclusive evidence; and the plaintiff cannot be admitted to say for the benefit of another, that his own act is not binding, on the ground that it was a fraud upon the *cestui que trust*. *Gibson v. Winter*, 2 Law J. (N.S.) K.B. 130, s.c. 5 B. & Ad. 97; 2 N. & M. 737.

*Quære*—whether a *cestui que trust*, or his assignee, suing in the name of trustees, is not bound, before action commenced, to offer them a sufficient indemnity; and whether the Court will not, under some circumstances, set aside proceedings commenced before such offer against the consent of the trustees. *Spicer v. Todd*, 1 Law J. (N.S.) Exch. 59, s.c. 2 C. & J. 165; 2 Tyr. 172; 1 Dowl. P.C. 306.

B, having made a post-nuptial settlement on his wife, obtained from the trustees the title deeds of the property thereupon and deposited them with his bankers as a security for money advanced:—Held, that the trustees were entitled to recover the deeds, the bankers not being purchasers within the 27 Eliz. c. 4, s. 2. *Kerrison v. Dorrien*, 1 Law J. (N.S.) C.P. 166, s.c. 9 Bing. 76; 2 Mo. & Sc. 114.

C was appointed, with five other trustees, under a deed which provided that every act done under the trust should be with the concurrence of at least three of the trustees. Three of the trustees advanced part of the trust fund to K, one of the parties interested, upon the security of an insurance upon his life, in which act O refused to concur. Upon the death of K, the insurance office, before payment of the money, required a discharge from

all the trustees, of whom only three remained alive, in which discharge O having refused to concur,—upon a suit in the Court of Session, it was decreed that he should execute the discharge, and concur in all lawful and necessary acts to give effect to the trust. *Ouchterlony v. Lynedoch*, 7 Bligh, n.s. 448.

A, upon his marriage, executed to the trustees of his marriage settlement a bond, and also a mortgage of his estates at S, for securing to them a sum of 15,000*l.*, the trusts of which were declared to be for A for life, and afterwards for the benefit of his wife and children. A not having paid this sum at the time specified in the bond, without notice to the trustees, assigned his life interest therein to B, as a security for a debt due from A to B. A having afterwards become bankrupt, B filed his bill against the trustees and the assignees under the bankruptcy, to obtain the benefit of his security; and a decree was made in that suit, directing the life interest of A, in the 15,000*l.*, to be sold, and the produce to be paid to B. In the course of the proceedings in the bankruptcy, the assignees sold the S estates, but the proceeds of the sale did not amount to 15,000*l.*:—Held, that the trustees were entitled, as against B, to retain the annual produce of the sum for which the S estates were actually sold, until the whole of the 15,000*l.* should be reinstated. *Smith v. Smith*, 1 Y. & C. 338.

Where one of several plaintiffs dissents to bringing the action, the Court will not interpose, unless upon a suggestion of fraud. *Emery v. Mucklow*, 10 Bing. 23, s. c. 3 Mo. & Sc. 384.

(c) *Disclaimer.*

[See DISTRESS, Who may distrain.]

A trustee and executor under a will, not having formally disclaimed or renounced, is not chargeable as a trustee merely because he assists the executrix in the disposition of the property, where by his conduct he clearly shews his intention not to act.

A trust estate does not vest in the devisee in trust against his will: and a deed of disclaimer is only necessary or useful as evidence of the fact, so as to rebut the contrary presumption. *Stacey v. Elph*, 2 Law J. (n.s.) Chanc. 50, s. c. 1 M. & K. 195.

(d) *Liability.*

[See POWER, Execution of,—*Wade v. Coz.*]

Lands directed by a will to be sold and the produce divided. The lands were not sold, but were divided, and the share of A B remained vested in the trustees, one of whom was her father. Subsequently, this share was sold, and the money was not given over to the *cestui que trust*, nor invested for her benefit, but was paid to the father. On a bill filed for recovery of the money, the Court held, that both the trustees were liable, (although one of them signed the receipt for the sake of conformity only,) and refused to make any allowance to the father for maintenance: and decreed that the trustees should repay the amount of the purchase-money with interest at five per cent. *English v. Willats*, 1 Law J. (n.s.) Chanc. 84.

An executor and trustee, having adopted a loss which happened through the failure of an agent—by suppressing the fact of his having allowed the

agent to receive the money—by declaring to his co-trustees the money to be in his own hands—by taking securities and proving them on the agent's estate—by actually replacing the amount by an investment of his own money—and by charging himself, in an answer in Chancery, with the amount, as received by him; was not allowed, afterwards, to throw the loss on the trust estate, on the ground that the indemnity clause in the will would have saved him from liability; the Court holding, that, by his conduct, the sum lost was to be deemed not the money of the trust, but his own. *Abercrombie v. Gordon*, 1 Law J. (n.s.) Chanc. 33.

A trustee and her solicitor held liable to the *cestui que trust*, for the loss occasioned by the failure of a bank in which the trust fund had been deposited, whilst a release to the trustee was preparing, there being no actual necessity for paying the money into the bank, and the money not having been paid in to the account of the *cestui que trust*, but to the general account of the solicitor, who gave notice to the *cestui que trust*, that the money had been paid in in this manner. *Mac Donnell v. Harding*, 4 Law J. (n.s.) Chanc. 70.

The fair exercise of their judgment by trustees, is a protection, whether the consequence be good or bad.

An administratrix not permitted to raise a question of breach of trust against executors in reviving, many years after her husband's death, a suit which he had instituted, but in which no complaint was made against them. *Garrett v. Noble*, 3 Law J. (n.s.) Chanc. 159.

Under the circumstances, the sale by trustees of a policy of insurance, for a price, which at the time seemed to be beneficial for the *cestui que trust*—Held, to be a discreet exercise of their power, although it eventually turned out, that the sale was prejudicial to the interest of the *cestui que trust*. *Hanchett v. Smith*, 1 Law J. (n.s.) Chanc. 218.

Trustees, who, with the concurrence of the tenant for life, had committed a breach of trust, by lending the trust monies on an improper security, were directed to replace the amount, and to reimburse themselves out of the life-interest of the tenant for life:—Held, that they were not entitled to charge interest on the money replaced by them, from the time of replacing it to the time of the repayment, out of the life-interest. *Monk v. Druce*, 4 Law J. (n.s.) Exch. Eq. 61.

Where a trustee permits trust-money to remain in the hands of his co-trustee, he will be liable for it to the *cestui que trust*, though it appears they had notice of the circumstance, unless there be an express assent on their part. *Child v. Giblett*, 3 Law J. (n.s.) Chanc. 124, s. c. 3 M. & K. 71.

Where, by the terms of a settlement, it appears to be the intention of the parties that there should at all times be two trustees of the property comprised in the settlement, the appointment of a single trustee in the place of two original trustees, and the transfer, by them, of the trust property to such single trustee, is a breach of trust, and the original trustees are responsible accordingly. *Hulme v. Hulme*, 2 M. & K. 682.

Where, in a trust deed for the satisfaction of debts, a discretion is vested in the trustees to

refuse the benefit of that deed to any creditor, although his claim may be lawful, the Court cannot empower the Master to ascertain who are entitled to the benefit of the deed; but, if the trustees have no such absolute discretion, no creditor can be entitled to the benefit of the deed, until he has submitted his claim to the investigation and allowance of the trustees, and they have allowed it: or unless upon such application the trustees have refused to act in the execution of the trusts. *Wain v. Earl of Egmont*, 3 M. & K. 445.

The commercial correspondents of executors, acting under a power of attorney, held to be responsible to the testator's estate for the amount of the produce of stock, part of such estate, sold by them, and applied by the direction of the executors in payment of a balance due from the latter, as partners in a commercial concern, to their correspondents, with full knowledge on the part of the correspondents that the stock was part of the testator's assets.

There is no primary liability in respect of breaches of trust, all parties to a breach of trust being equally liable; and it is no objection to a suit brought by parties seeking relief against a breach of trust, that one of the defendants, against whom no relief is prayed, may have been a party to such breach of trust. *Wilson v. Moore*, 1 M. & K. 126.

Trustees who were directed to sell an estate as soon as conveniently might be after their testator's death, refused, by desire of one of the parties interested, an offer of 6,600*l.* for the estate, but they afterwards sold it for 3,600*l.* The Court charged them with the loss, but gave them their costs, as their conduct had not been wilful or perverse. *Taylor v. Tabrum*, 6 Sim. 281.

(e) *Construction of, and Proceedings under 1 Will. 4, c. 60.*

The statute 1 Will. 4, c. 60, intituled, 'An Act for amending the law respecting conveyance and transfer of estates, and funds vested in trustees and mortgagees,' applies only to *cestui que trust*, who are named in the instrument upon which their title depends, or to persons who claim directly under such *cestui que trust*, as real or personal representatives, or as assignees. *In re Merry*, 1 M. & K. 677.

The 1 Will. 4, c. 60, s. 8, enacts, "that if it shall be uncertain, where there are several trustees, which of them was the survivor, or it shall be uncertain whether the trustee last known to have been seised as aforesaid, be living or dead, or if known to be dead, it shall not be known who is his heir, &c., then and in every or any such case, it shall be lawful for the said Court of Chancery to direct any such person whom such Court may think proper to appoint for that purpose, in the place of the trustee or heir, to convey such land, &c., as the said Court shall think proper."

*Quare*—If the trustee be illegitimate, and die without issue, and, consequently, it is known that he has no heir—is such case within the 8th section, "if known to be dead, it shall not be known who is the heir"? *Mather v. Thomas*, 2 Law J. (n.s.) C.P. 234, s. c. 10 Bing. 44; 3 Mo. & Sc. 684.

Copyholds which were mortgaged in fee, descended to the customary heir of the devisees of the mortgagee, who was also beneficially interested therein under the mortgagor; the mortgage money was afterwards paid off to the personal representative of the mortgagee:—Held, that such customary heir, who was residing out of the jurisdiction, was not, under the circumstances, within the act of 1 Will. 4, c. 60; and the Court refused to appoint a person in his stead, to be admitted, and to surrender the copyholds in his absence. *In re Newman*, 4 Law J. (n.s.) Chanc. 124.

In a bill filed to obtain a transfer of stock, from an infant trustee, under 1 Will. 4, c. 60, the decree must declare that the infant is a trustee. *Kidd v. Kidd*, 2 Law J. (n.s.) Chanc. 24.

A plaintiff who goes abroad on a voyage, is not out of the jurisdiction of the Court within the meaning of the Trustee Act. *Hutchinson v. Stephens*, 3 Law J. (n.s.) Chanc. 239.

A mortgagee in fee died intestate as to his real estate before the mortgage money was paid, it not being known who was his heir:—Held, that his heir was not the heir of a trustee within the meaning of 11 Geo. 4. & 1 Will. 4, c. 60, s. 8. *In re Stanley*, 3 Law J. (n.s.) Chanc. 240, s. c. 5 Sim. 320.

A mortgagee is not a trustee within the meaning of the act 1 Will. 4, c. 60, s. 8, until the mortgage money has been paid. *In re Goddard*, 2 Law J. (n.s.) Chanc. 16, s. c. 1 M. & K. 25.

The 22nd section of the 1 Will. 4, c. 60, only applies to those cases where jurisdiction has been given by the previous sections of that statute. The Court, therefore, has no jurisdiction on petition to appoint a new trustee in the room of one desirous of being discharged, though no power is contained in the settlement applicable to such a case. *Ex parte Humble*, 4 Law J. (n.s.) Chanc. 21.

A feme sole, trustee, marrying, and her husband refusing to join her in a proper conveyance to the *cestui que trust*, is a refusal within 1 Will. 4, c. 60, s. 8. *Phillips v. Cornish*, 4 Law J. (n.s.) Chanc. 27.

The devisees of an equity of redemption, but whose title did not depend on the devise simply, presented a petition under 1 Will. 4, c. 60, for the purpose of obtaining a conveyance of the legal estate of the mortgaged premises, from the heir-at-law of the mortgagee, on whom the legal estate had descended, who was living out of the jurisdiction. The petitioner stated, that they had paid, or were about to pay, off the mortgage:—Held, that this case was not within the statute of 1 Will. 4, c. 60. *In re Dearden*, 4 Law J. (n.s.) Chanc. 186.

The proper reference under the Escheat Act is, "whether the party is within the meaning of the Escheat Act, and also within the meaning of the 1 Will. 4, c. 60. *Anonymous*, 4 Law J. (n.s.) Chanc. 73.

A decree declared a defendant, against whom the bill had been taken *pro confesso*, to be a trustee of stock for the plaintiffs; but the Court declined to refer it to the Master to appoint a person to transfer the stock, in the place of the defendant, except upon a petition presented under 11 Geo. 4. & 1 Will. 4, c. 60. *Fellows v. Till*, 5 Sim. 319.

A B claimed, adversely, a sum of stock standing in the names of A and two other persons as trustees. A filed an amicable bill to have the rights and interests of himself and B declared; A was beyond sea, commanding a merchant vessel on a voyage to India. B presented a petition, under 11 Geo. 4. & 1 Will. 4, c. 60, praying that the stock might be transferred into court in the cause. Petition refused, the case not being within the act. *Hutchinson v. Stephens*, 5 Sim. 498.

Testator gave an annuity to his widow, and the residue of his estate to his children. The executors paid the testator's debts and legacies, and purchased stock in their names to answer the annuity, and paid the dividends to the widow. One of the executors went to reside abroad, and the other died:—Held, that they were trustees of the stock within 11 Geo. 4. & 1 Will. 4, c. 60. *Ex parte Dover*, 5 Sim. 500.

Where the Court, in any proceeding in a cause, declares a party to be trustee within 11 Geo. 4. & 1 Will. 4, c. 60, it may, by the same order, direct a conveyance to be made. *Walton v. Nerry*, 6 Sim. 328.

### (C) COSTS.

[See BANKRUPT, Actions at Law—DEVISE, Construction of—FORFEITURE—FRAUDS, Statute of—INSURANCE BROKER—POWER—PRACTICE, Stay of Proceedings—WILL.]

One of the trustees in a marriage settlement declined to join with his co-trustee, in calling upon the husband to perform his covenant therein contained, and also declined to join as plaintiff in a bill to compel him: such trustee was consequently made a defendant. The Court refused to allow him costs out of the fund, by reason of misconduct in refusing to concur. *Holcombe v. Jones*, 1 Law J. (N.S.) Chanc. 46.

Under a direction in a will to sell "as soon as conveniently may be," the trustees offered for sale and bought in the estate in 1818 at 6,000*l.*; there was no further attempt to sell until 1823, when the property sold for 3,580*l.*:—The Court decreed that the trustees should make up the difference, and directed them to pay the costs. *Taylor v. Tabrum*, 1 Law J. (N.S.) Chanc. 189.

A mortgagor having conveyed his equity of redemption to trustees on trusts for sale, by a deed of even date, (referred to in the conveyance,) declared the trusts of the money produced by the sale, which trusts were first to pay expenses of the trusts, and then debts generally, and afterwards to divide the remainder of the money among several persons.

The trustees having sold the estate, made application, and paid the mortgagee the debt and interest due to him, applied to him to convey the legal estate to a trustee for them. The mortgagee, acting by the advice of counsel, refused to execute the deed, unless the *cestuis que trust* were made parties:—Held, that they were not necessary parties.

And as to costs, a person acting wrongfully, is not to allege the advice of counsel, as an excuse to screen him from costs. But inasmuch as this was a trustee acting honestly and *bona fide*, costs should not be given against him. *Angier v. Stannard*, 3 Law J. (N.S.) Chanc. 216.

Trustees for sale of lands in settlement, which lands are afterwards sold under the provisions of the London Bridge Act (10 Geo. 4, c. 136,) are entitled to their costs out of the corpus of the fund arising from the sale. *Ex parte Layfield*, 1 Y. & C. 79.

Where the plaintiff is suing as a trustee, and there are circumstances of suspicion in the case, the Court will stay proceedings on payment of the debt into court, and on payment of costs, leaving the plaintiff to apply to the Court to have his extra costs out of the fund in court. *Jones v. Bramwell*, 3 Dowl. P.C. 488.

### TURNPIKE.

[See HIGHWAY—TOLLS.]

Lease by trustees of. See POWER, of Leasing. Annual statement by trustees to the Secretary of State, to be laid before Parliament. 3 & 4 Will. 4, c. 80; 11 Law J. Stat. 151.

Continuance of acts relating to, which expire in June 1836, to the end of the session of the same year. 4 Will. 4, c. 10; 12 Law J. Stat. 19.

Amendment of 3 Geo. 4, c. 126, s. 12, as to weights upon waggons with springs. 4 & 5 Will. 4, c. 81; 12 Law J. Stat. 163.

Continuation and amendment of acts relating to, in Ireland. 4 & 5 Will. 4, c. 91; 12 Law J. Stat. 191.

Two persons filled the office of clerk to the trustees of a turnpike road, and one only joined in executing a contract on the part of the trustees:—Held, that, under 3 Geo. 4, c. 126, s. 57, both such clerks should have joined. *Bell v. Nizom*, 2 Law J. (N.S.) C.P. 29, s. c. 9 Bing. 393; 2 Mo. & Sc. 534.

By the 3 Geo. 4, c. 126, s. 134, in actions against trustees of turnpike roads, evidence of trustees having acted, together with the order, or copy of the order, in case they were appointed by the trustees, is to be sufficient proof of their appointment:—Held, to extend to an appointment *de facto*.

Where, therefore, a local act required that new trustees should be appointed under the hands and seals of the remaining trustees, and, that any security for the tolls should be executed by five of the trustees; in an action of ejectment by a mortgagee, under a deed, purporting to be so executed, proof that those trustees were acting as such at the time of executing the deed, together with the order for their appointment, was held sufficient, without proving that an appointment did take place under seal. *Doos d. Baggeley v. Hares*, 2 Law J. (N.S.) K.B. 88, s. c. 1 N. & M. 237; 4 B. & Ad. 435.

### UNIFORMITY OF PROCESS.

[See PROCESS.]

### UNIVERSITY OF OXFORD.

The warrant of the Chancellor of Oxford for arresting a party, does not extend to a party not resident, at the commencement of the suit, within the precincts of the university; and an arrest under it of such person is illegal. *Perrin v. West*, 4 Law J. (N.S.) K.B. 232, s. c. 5 N. & M. 291; 3 Ad. & E. 405.

## UNLAWFUL OATH.

[See OATH.]

## UNLAWFUL COMBINATION.

An association, the members of which are bound by oath not to disclose its secrets, is an unlawful combination and confederacy, (unless expressly declared by some act of parliament to be legal,) for whatever purpose or object it may be formed. And the administering of an oath not to reveal anything done in such association, is an offence within the 37 Geo. 3, c. 123, s. 1. The enacting part of the 37 Geo. 3, is not restrained by the preamble. The precise form in which the oath is administered, is not material; it is an oath within the meaning of the act, if it was understood by the party tendering and by the party taking it, as having the force and obligation of an oath. *Res v. Loveless*, 1 M. & Ro. 349. [Williams]

## USAGE OF TRADE.

[See TRADE.]

## USE AND OCCUPATION.

[See LANDLORD AND TENANT.]

In an action for use and occupation, the plaintiffs gave in evidence a joint agreement to let the premises to the defendant, and an account stated between one of the plaintiffs only and the defendant. In the particulars of demand the defendant was credited for a sum paid as rent, considerably exceeding the amount of rent due subsequent to the date of that agreement. It also appeared, that, on the execution of that agreement, another written agreement, under which the defendant had previously occupied, was delivered up to one of the plaintiffs.—Held, that it was not necessary for the plaintiffs to produce the last-mentioned agreement to establish their joint right of action, but that *prima facie* the account stated coupled with the joint agreement entitled them to recover. *Davys and Harries v. Davies*, 1 Law J. (N.S.) Exch. 10.

*Nil habuit in tenementis*, is not a good plea to a declaration in debt for use and occupation. *Curtis v. Spitty*, 3 Law J. (N.S.) C.P. 233, s.c. 1 Bing. N.C. 15; 4 Mo. & Sc. 554.

Where, in an action for use and occupation, it appears, that there is an unexpired term, granted by the plaintiff to a third party, payment of rent, and actual occupation, by the defendant, is not a sufficient acknowledgment of his being tenant to the plaintiff, to entitle him to maintain his action. If there is evidence of the defendant's having entered into a new agreement with the plaintiff, to become his tenant, the defendant cannot then set up such outstanding term as a defence to the action. *Hyde v. Moakes*, 1 Law J. (N.S.) K.B. 71.

The declaration was assumpsit on a special agreement to take a certain messuage, &c., with the right of exclusive shooting over a manor, to hold for a certain time. It alleged, then, that the defendant entered and became "possessed" of the premises for the term granted:—Held, that the plaintiff could

not recover as for use and occupation under this count. *Bird v. Higginson*, 4 Law J. (N.S.) K.B. 124, s.c. 2 Ad. & E. 696; 4 N. & M. 505.

Where a tenant from year to year becoming involved in his circumstances, assigned to trustees for the benefit of creditors, and they held the premises, and sold the stock in trade upon them, and paid a quarter's rent, and offered to deliver up the keys:—Held, in an action for use and occupation brought against them for the subsequent quarter, that it was a question for the jury, whether they retained possession as tenants; and that it was properly left for them to say, whether the defendants accepted the term, and did anything to induce the plaintiff to believe that they did accept it. *How v. Kennett*, 4 Law J. (N.S.) K.B. 220, s.c. 3 Ad. & E. 659; 5 N. & M. 1.

In an action for use and occupation since the new rules, it cannot be left to the jury to say whether the evidence produced by the defendant does not amount to an admission by the plaintiff, that he has been paid, and that nothing is due, without a plea of payment or settlement; and such evidence is inadmissible under a plea of set-off for money due on an account stated between the parties. *Linsley v. Polden*, 3 Dowl. P.C. 780.

A corporation aggregate may maintain assumpsit for the use and occupation of tolls, although they did not grant the tolls to the occupier by any instrument under their common seal. *The Mayor, &c. of Carmarthen v. Lewis*, 6 C. & P. 608. [Parke]

Counts for use and occupation, and money had and received, are sustainable, where the defendant has received rents and obtained attornments from tenants in possession, under an executory contract for a lease to be executed to him by the plaintiff at a rent, and from a period to be afterwards ascertained. *Neale v. Sweney*, 1 Law J. (N.S.) Exch. 118, s.c. 2 Tyr. 464; 2 C. & J. 377.

## USURY.

[See BANKRUPT, Petitioning Creditor's Debt—BILL OF EXCHANGE, Validity—SECURITIES—WARRANT OF ATTORNEY.]

[*King v. Hamlet*, 2 Dig. Law J. 288, s.c. 4 Sim. 223.]

Bills not having more than three months to run, not subject to the usury laws. 3 & 4 Will. 4, c. 98, s. 7; 11 Law J. Stat. 198.

A lends B 60*l.*, and at the same time takes a note from B at three months for 65*l.* 5*s.*; in an action for money lent,—Held, that A could not recover the 60*l.* *Scott v. Nichol*, 4 Doug. 314.

A banker lent a customer 4,000*l.* at 5*l.* per cent.; and it was agreed that a balance of 1,000*l.*, at least, should always be left:—Held, under the circumstances of the case, not usurious. *Ex parte Patrick*, 1 M. & A. 385, s.c. 3 D. & Ch. 638.

A bill-broker got a bill discounted at 4*l.* per cent., but was obliged to indorse it: he charged his principal 5*l.* per cent. for discount, and 10*s.* per cent. for his commission, &c.—Held, not usury. *Ex parte Goss re Wessen*, 2 Law J. (N.S.) Bankr. 96, s.c. 2 D. & Ch. 240.

Time is of the essence of an usurious bargain; proof, therefore, must be given of the precise day on which

the loan was advanced, in order to entitle the plaintiff to recover; and it is not sufficient, that, from the facts proved, it is incontrovertible that usury existed. *Fox g. t. v. Keeling*, 4 Law J. (n.s.) K.B. 104, s.c. 4 N. & M. 523; 2 Ad. & E. 670.

Whether a contract is usurious or not, depends upon whether it is a corrupt bargain to obtain more than the legal rate of interest, &c. Where the solution of that question may depend upon a nice calculation, the Court will not take upon themselves, without the intervention of a jury, to say, that a contract is usurious, although *prima facie* it may seem clear, on the face of it, to have been made to raise a loan at an interest higher than is allowed by law.

Thus, where an action of debt was brought for arrears of an annuity of 20*l.* per annum, granted to the plaintiff for the term of sixty years, in consideration of 200*l.*: upon demurrer to the declaration, it was held, that the Court would not of themselves pronounce that contract usurious; but that the defendant ought to have pleaded that it was an usurious contract. *Ferguson v. Sprang*, 3 Law J. (n.s.) K.B. 177, s.c. 1 Ad. & E. 576; 3 N. & M. 665.

An agreement between A and B, that A shall transfer to B 12,000*l.* 3*l.* per cent. consols, which, at the date of the agreement, were selling at 63*l.* 10*s.* per cent.; and that B, in consideration of the transfer, should give security to pay to A 10,000*l.* sterling, when the 3*l.* per cent. consols should be sold at 83*l.* 10*s.* per cent., but with liberty to retain the loan for two years and six months after such event, and in the meantime to pay interest upon the 10,000*l.* at 5*l.* per cent., is not an usurious contract. *Farguharson v. Barstow*, 4 Bligh, n.s. 560.

Where the defendant has become the purchaser of goods under an usurious contract, and has paid money for them to the plaintiff, the latter, in an action of trover, is entitled to recover the full amount of the value of those goods; and the Court cannot grant a rule to reduce the damages, by deducting the sum so paid. *Hargreaves v. Hutchinson*, 4 Law J. (n.s.) K.B. 17, s.c. 2 Ad. & E. 12; 4 N. & M. 11.

#### VACANT POSSESSION.

[See EJECTMENT.]

#### VAGRANT.

[See SESSIONS.]

#### VALUATION.

Amendment of acts for uniform valuations of lands, &c. in Ireland. 2 & 3 Will. 4, c. 73; 10 Law J. Stat. 98.

Amendment of acts relating to, in Ireland. 4 & 5 Will. 4, c. 65; 12 Law J. Stat. 109.

#### VALUE.

Action for double value. See TENANTS IN COMMON.

#### VARIANCE.

[See AMENDMENT—BAIL, Affidavit—Discharge of—PLEADING—PRACTICE, Trial.]

- (A) BETWEEN AFFIDAVIT OF DEBT AND PROCESS.
- (B) BETWEEN AFFIDAVIT OF DEBT AND DECLARATION.
- (C) BETWEEN PROCESS AND COPY.
- (D) BETWEEN PLEADINGS AND PROCESS.
- (E) BETWEEN PLEADINGS AND EVIDENCE.
- (F) IN CRIMINAL PROCEEDINGS.

#### (A) BETWEEN AFFIDAVIT OF DEBT AND PROCESS.

An affidavit of debt described the deponent as clerk to Lewis Joseph John Noel, and stated that the defendant was indebted "to the said John Noel:" a *quo minus* issued at the suit of Lewis Joseph John Noel:—Held, that there was no variance between the affidavit of debt and the writ. *Noel v. Williams*, 1 Law J. (n.s.) Exch. 133, s.c. 2 C. & J. 379; 2 Tyr. 388.

#### (B) BETWEEN AFFIDAVIT OF DEBT AND DECLARATION.

Where the affidavit of debt and writ stated the debt to be due to the plaintiffs, "executors of," and not "as executors of," and the declaration stated it to be due to them in their own right:—Held, no variance. *Executors v. —*, 1 Dowl. P.C. 97.

#### (C) BETWEEN PROCESS AND COPY.

In an action against four defendants, the copies of the writ of summons served upon the parties differed from each other:—those served upon two of the defendants being in case, whilst those served upon the other two were upon promises. The *præcipe* was in trespass.

The Court ordered those copies which differed from the writ, but not the writ itself, to be set aside, with costs. *Jacobs v. Stovel*, 3 Law J. (n.s.) C.P. 65.

The writ upon which a defendant was arrested was directed to the sheriffs of London. The copy, which, according to the 4th section of the statute for the Uniformity of Process, must be delivered to the defendant, was directed to the sheriff of London:—Held, that the defendant was entitled in consequence of such variance, to be discharged upon entering a common appearance. *Nicol v. Boyne*, 3 Law J. (n.s.) C.P. 72, s.c. 10 Bing. 339; 3 Mo. & Sc. 812.

#### (D) BETWEEN PLEADINGS AND PROCESS.

[See BAIL, Discharge of.]

Where the plaintiff sues out process as assignee, and declares in his own right, the proceedings may be set aside; but the Court will allow the plaintiff to amend on payment of costs. *Meggs v. Ford*, 4 Doug. 259.

Where the writ was in debt, and the declaration was jointly in assumpsit, the Court refused to set them aside as being irregular, but left the party to demur. *Rotton v. Jeffery*, 2 Dowl. P.C. 637.

A writ being general, and the declaration special,—Held to be no ground for setting them aside as irregular. *Knowles v. Johnson*, 2 Dowl. P.C. 653.

A writ was to answer the plaintiff "in a special action," the declaration was "on promises." A rule to set aside the declaration for irregularity was discharged with costs. *Moore v. Archer*, 4 Dowl. P.C. 214.

#### (E) BETWEEN PLEADINGS AND EVIDENCE.

A claim of a general right in the tenants and occupiers of a messuage to fasten lines and hang linen over the close of the defendant, is not supported by proof of a right in the tenants and occupiers of the messuage, to fasten lines, and hang linen thereon, for the private and domestic purposes only of such tenants and occupiers. *Drewell v. Towler*, 1 Law J. (n.s.) K.B. 228, s.c. 3 B. & Ad. 735.

An allegation, that certain persons were seized in fee of the premises, and used the same as a school-house, and also as and for the residence of the schoolmaster of the said school-house, is not inconsistent with evidence of a trust deed, limiting the nature of the appointment, and regulating the manner of dismissal; and possession of the premises is incident to the appointment of schoolmaster, whilst that employment continues.

Evidence of an appointment as schoolmaster at a salary of 20*l.* a year to himself for teaching boys, and 20*l.* a year to his wife for teaching girls, satisfies an allegation of an appointment at a salary of 40*l.* *Wilkinson v. Malin*, 1 Law J. (n.s.) Exch. 234, s.c. 2 C. & J. 636; 2 Tyr. 544.

The special count of the declaration stated a contract for goods at the then *usual* and *shipping* price at the port of loading. Such count is not supported by the memorandum of an agreement which is silent as to the price altogether. Neither can the count be maintained by the presumption that the law will affix a *reasonable* price (that is, such a price as the jury, upon the trial of the cause, shall, under all the circumstances, decide to be reasonable) to the commodity, where the memorandum is silent as to the price, inasmuch as the then *usual* and *shipping* price at the port of loading and the reasonable price affixed by the law, may be totally different. *Accebal v. Levy*, 3 Law J. (n.s.) C.P. 98, s.c. 10 Bing. 376; 4 Mo. & Sc. 217.

The declaration alleged the guarantie to be against the *printing and publishing* of a work,—Held, that there was no material variance, though the word "printing" was not in the guarantie. *Morley v. Tinkler*, 4 Law J. (n.s.) Exch. 84, s.c. 1 C. M. & R. 692; 5 Tyr. 416.

The contract stated in a plea was, that if the plaintiff did not do the work within a fortnight before Michaelmas day, he was not to be paid:—Held, that this was not supported by proof of a contract, that if the work were not done a fortnight before Michaelmas day, the plaintiff was not to be paid. *Thomas v. Lambert*, 4 Law J. (n.s.) K.B. 153, s.c. 4 N. & M. 592; 3 Ad. & E. 61.

The plaintiff declared, that the defendant was possessed of a close, (contiguous to a close and pond of water possessed by the plaintiff,) used and enjoyed by the defendant as a private way, and that the defendant, by wrongfully constructing a sewer or drain in his close, so used as a private way, drew

off the water of the plaintiff's pond, to the injury, &c. of the plaintiff:—Held, that proof that the defendant's close was not used by him as a private way, at the time of committing the injury, but that the private way was not constructed until afterwards, was not a substantial variance between the declaration and the proof, inasmuch as the mode of using the close was immaterial, and did not constitute the gravamen of the action:—Held, also, that it was not competent to the defendant, under the plea of not guilty, to take such objection, as the new rule of pleading of Hilary term, 4 Will. 4, limited the effect of such plea to a denial of the breach of the duty or wrong imputed, and does not extend to a denial of the facts stated in the inducement; and no defence other than such denial should be admissible under that plea. *Dukes v. Gosling*, 4 Law J. (n.s.) C.P. 211, s.c. 1 Bing. N.C. 588; 1 Sc. 570.

In an action on recognizance of bail, the plaintiff alleged, that the recognizance was entered into in an action of debt. Upon *nil tiel record* pleaded, and production of the record, the action was found to be in assumpsit, not debt:—Held, to be a fatal variance; but the Court, upon a distinct motion being made with that object, gave the party leave to amend. *Mushinbrook v. Bushnell*, 4 Law J. (n.s.) C.P. 257, s.c. 1 Sc. 569.

The declaration stated a general covenant to pay money; and the breach was general, that the defendant had not paid it. The deed being set out on oyer, the covenant was, to pay in the porch of G church:—Held, that, as the deed became part of the declaration, and the breach was applicable to the limited covenant as well as the general one, the whole declaration was good.

*Semble*, there was no material variance between the covenant in the declaration and that in the deed. *Paine v. Emery*, 4 Law J. (n.s.) Exch. 250, s.c. 2 C. M. & R. 304.

A being arrested and in custody of the sheriff at the suit of B, upon a writ indorsed "Oath for 76*l.*" C, in consideration of B discharging A, undertook to give his promissory note at six months, "for 10*l.* in the pound for the debt," on the arrival of the discharge:—Held, that this sufficiently appeared to be a promise to pay 10*l.* in the pound upon the debt for which A was arrested, and then in custody, and was properly declared on as such. Held also, that the sum indorsed on the writ was sufficient evidence of the amount for which A had been arrested, and that no demand of the note was necessary to enable plaintiff to commence this action. *Brown v. Dean*, 5 B. & Ad. 848, s.c. 2 N. & M. 316.

An allegation of slanderous words, accompanied with an assertion of a fact, as the foundation of the words, is not supported by evidence of the words, accompanied with an assertion of the speaker's belief only of the fact. *Cook v. Stokes*, 1 M. & Ro. 237. [Denman]

In stating the termini of the journey in declaring against a carrier, the word "London" will be taken as a *nomen collectivum*, including all that is commonly so called, and not the city merely. *Beckford v. Crutwell*, 5 C. & P. 242, s.c. 1 M. & Ro. 187. [Tenterden]

An allegation that A is tenant for the life of M, is supported by proof that A and B, being joint tenants for life of M, conveyed their estate by lease



and release to A, without an intermediate party.  
*Avery v. Cheslin*, 3 Ad. & E. 75.

(F) IN CRIMINAL PROCEEDINGS.

[See CONSPIRACY—INDICTMENT—RIGT ACT.]

VENDOR AND PURCHASER.

[See COMPENSATION—FRAUDS, STATUTE OF—  
GOODS SOLD AND DELIVERED—INCLOSURE—  
INTEREST, Where payable—PLEADING.]

(A) VENDOR.

*Lien.*

(B) PURCHASER.

(a) *Rights and Protection.*

(b) *Duties and Liabilities.*

(c) *Lien in case of Sub-sale.*

(C) SALE.

(a) *In general.*

(b) *Particulars and Conditions.*

(c) *Extent of Property.*

(d) *Biddings.*

(e) *Where void or set aside.*

(f) *Resale.*

(D) DELIVERY.

(E) TITLE.

(a) *In general.*

(b) *Costs.*

(F) ACTIONS AND SUITS.

(a) *In general.*

(b) *Pleadings.*

(c) *Costs.*

(A) VENDOR.

*Lien.*

A vendor's lien, on the estate for the unpaid purchase-money, held, under the circumstances, to have been waived by taking personal security.

Three trustees contracted for the purchase of an estate for 11,000*l.*, which sum was intrusted to A, (one of them,) to complete the purchase. The vendor executed the conveyance, and signed a receipt thereon for the whole sum; but, in fact, received only 9,000*l.*

The Court, being of opinion, from the circumstances, that the vendor had relied on the personal security of A, for this balance,—held, that he had lost his lien upon the estate. *White v. Wakefield*, 4 Law J. (N.S.) Chanc. 195.

(B) PURCHASER.

(a) *Rights and Protection.*

Whether a purchaser for valuable consideration, without notice from an intruder or wrong-doer, can be protected against the persons claiming rightfully, under the rule that purchase for value, without notice, is a bar in equity; or, whether that rule applies only in case of a purchase from the persons who, but for some secret act, would be entitled to dispose of the property—*quære*.

Meredith being in possession of property, (the legal estate in which was outstanding,) as the alleged devisee from Jones, under a forged will, mortgages to Hall in fee, and Meredith and Holbrooke, a satisfied mortgagee, (in whom the legal estate was vested,) by his direction join in conveying the fee to Hall to secure his mortgage debt. This property,

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subject to Hall's mortgage, and to the supposed right of redemption under that mortgage, comes to the defendant Powles as a purchaser for value, and Powles takes a conveyance from the parties-claiming the right of redemption; in which conveyance Hall's representative also joins (as mortgagee and tenant of the legal fee,) in consideration of 600*l.* then due on Hall's mortgage, and which is paid by Powles in part of the purchase-money.

Upon a bill brought by the heir of Jones, the alleged deviser,—held, that Meredith, and those claiming under him, were trustees for Jones; and *semble*, that *quoad* the 600*l.*, Powles might claim protection from the legal estate under Hall's mortgage.

Informality in the attestation of a will purporting to pass freehold estate, is no ground for fixing a party with constructive notice of the will being forged. *Jonas v. Powles*, 3 Law J. (N.S.) Chanc. 210.

Testator devised his estates charged with debts and legacies. The devisee mortgaged the estate to A, subject expressly to the legacies. A having called in his money, and the devisee requiring a further advance, they joined in mortgaging the estate to B, but not expressly subject to the legacies, and B is informed, falsely, by the devisee, that all the legacies had been paid:—Held, that B took the estate subject to the legacies. *Rogers v. Rogers*, 6 Sim. 364.

(b) *Duties and Liabilities.*

On a contract for the sale of an estate, the vendor agreed, on or before the 1st of July 1831, upon receiving the purchase-money, to execute conveyances; and the purchaser agreed, on having a good title made out, to pay the purchase-money; and it was further agreed, that, upon payment of the purchase-money, the purchaser should be let into possession. The purchaser, with the consent of the vendor, entered into possession, and afterwards objected to the title:—He was ordered, on motion, either to give up possession or pay the purchase-money into court. *Tindal v. Cobham*, 4 Law J. (N.S.) Chanc. 98, s. c. 2 M. & K. 385.

In a bill filed for substantiating a charge on real estate, the defendant, the purchaser, contending that he had no notice of the deed creating the charge, evidence of a conversation proving the notice being given on the part of the plaintiff, an issue was directed to try whether the conversation took place before or after the time of the purchase. *Earle v. Pickin*, 1 Law J. (N.S.) Chanc. 178.

A purchaser from a devisee, subject to debts and legacies, is bound to see his money applied in payment of the legacies, if the circumstances of the transaction afford evidence that the debts have been paid, and that the devisee is dealing with the estate as owner. *Johnson v. Kennett*, 6 Sim. 384.

(c) *Lien in case of Sub-sale.*

Upon a sale, at Liverpool, of a quantity of rum, lying in bonded vaults, the purchasers made a sub-sale of part, to a person who was clerk to the first vendor. The usual course of transfer at Liverpool, of this species of property, is by a delivery order. The first purchasers did not give any delivery order to their vendee, the clerk. He, however, made sub-sales, and received the money for them, but made no actual delivery. The bills he gave in payment

having been dishonoured:—Held, that the first purchasers had a lien upon the goods, notwithstanding the sub-sales. *Dixon v. Yates*, 2 Law J. (N.s.) K.B. 198, s. c. 2 N. & M. 177; 5 B. & Ad. 313.

(C) SALE.

(a) In general.

The donees of a power of sale and exchange, may pay money for owelty of exchange, although they are not expressly authorized to do so. *Bartram v. Whitchote*, 6 Sim. 86.

(b) Particulars and Conditions.

Where a misdescription in the particulars on a sale by auction, although unintentional, is in a material and substantial point, and of such a nature as to lead to a reasonable inference, that, but for such misdescription, the purchaser would never have entered into the contract of sale, he is not bound to resort to the usual clause of compensation in case of error, &c., but may rescind the contract, and recover back his deposit.

Thus, where the particulars, on the sale of the lease of a house, under the Piazza in Covent Garden, stated, that the lessee was restricted from carrying on any offensive trade, or the trade of a coffee-house keeper, or working hatter; and the lease contained a clause of forfeiture for carrying on several other trades not offensive, *inter alia*, that of a fruiterer or herb-seller:—Held, that the purchaser was entitled to recover back his deposit, by reason of the omission in the particulars of the restriction as to the other inoffensive trades. *Flight v. Booth*, 4 Law J. (N.s.) C.P. 66, s. c. 1 Bing. N.C. 370; 1 Sc. 190.

In the particulars of sale of certain premises by auction, they were described as comprising a "yard," and to be held for a term of which twenty-three years were unexpired, at 55*l.* per annum. It turned out that the yard was held under a lease from year to year, at an additional rent of 8*l.* One of the conditions of sale was, that if there was any error or mistake in the description of the property, each party should appoint an arbitrator, and that the arbitrators should fix on the sum to be abated from the purchase-money. The jury found that the yard was essential to the occupation of the premises:—Held, that this was not a matter for compensation, but that it was such a defect in title, as to entitle the vendee to vacate the contract. *Dobell v. Hutchinson*, 4 Law J. (N.s.) K.B. 201, s. c. 5 N. & M. 251; 3 Ad. & E. 355.

Where it is provided, by the conditions of sale by auction, that, "if any mistake be made in the description of the premises, or any other material error shall appear in the particulars of sale, such mistake or error shall not annul the sale, but a compensation shall be made," the vendee is not released from his contract by reason of a misdescription in the particulars of sale, obvious on inspection of the premises, unless such misdescription was wilful and designed. *Wright v. Wilson*, 1 M. & Ro. 207. [Parke]

(c) Extent of Property.

A, being entitled to nine-sixteenths only of an estate, agrees, by mistake, to sell the entirety to B. *Semble*, that a specific performance will not be de-

creed as to the nine-sixteenths, with an abatement out of the purchase-money, especially where C has a lien on the estate for a debt which would exhaust nearly the whole of the purchase-money. *Wheatley v. Slade*, 4 Sim. 126.

The Court will not refuse the specific performance of a contract, by reason of the defendant having made a mistake as to the extent of the property, where there is no proof of misrepresentation by the vendor. *Nock v. Newman*, 4 Law J. (N.s.) Chanc. 175.

(d) Biddings.

Biddings opened on an advance of 300*l.* on 5,030*l.* *Lawrence v. Halliday*, 6 Sim. 296.

Two persons joining in one notice of motion to open the biddings against several purchasers of distinct lots: motion refused for irregularity. *Goodall v. Pickford*, 3 Law J. (N.s.) Chanc. 23, s. c. 6 Sim. 376.

Motion to open biddings, by a person appearing to be employed by the defendant, who had been present at the sale—refused. *Shallcross v. Hibberston*, 3 Law J. (N.s.) Chanc. 105.

Motion granted to open the biddings upon a sale of coal-mines; the mines not having been worked for ten years, and being filled with water. *Jeffereys v. Smith*, 4 Law J. (N.s.) Chanc. 38.

An estate was put up to sale in four lots, and the timber on each lot was to be paid for by the purchaser, according to a valuation which had been made. A purchased lot 1; the other lots were not sold. B opened the biddings, and, on the resale, purchased lots 1 and 2 for 2,140*l.*, and lot 3 at 380*l.* The Court refused to open the biddings for lots 1 and 2 on the application of A, unless he would advance 10 per cent. on the price of the timber as well as the land, and would take lot 3 (in case B should retire from it) at the price it had been sold for, in case it should not fetch the same price at the resale. *Bates v. Bonnor*, 6 Sim. 380.

(e) Where void or set aside.

[*Earl of Portmore v. Taylor*, 2 Dig. Law J. 292, s. c. 4 Sim. 182.]

The purchase of a reversion at an under-value was set aside; and, under the special circumstances, was set aside with costs. *Bawtree v. Watson*, 3 M. & K. 339.

A contract for the sale of certain iron mines rescinded, on the ground of fraudulent mis-statements, made by and within the knowledge of the vendor, as to the price of ironstone and other materials; the quantities of materials required, and the expense of the conversion of iron into refined iron, &c.; the suppression of yield accounts called for, but not furnished, though the mining accounts afforded the means of producing such accounts; notwithstanding possession had been taken, and the mines worked, and other acts of ownership exercised by the purchasers, and some acts had been done by them in confirmation of the purchase. *Small v. Atwood*, 2 Law J. (N.s.) Exch. Eq. 1.

The sale of a reversionary life-interest, with power of disposition in stock, expectant on the death of the survivor of two persons, for inadequate price, and when the vendor's distress was known to the purchaser, not permitted to stand.

In cases where there is no pretence to say that distress has been taken advantage of, provided there is no material difference between the real value and the price paid, the contract will be sustained. *Meller v. Hall*, 1 Law J. (N.S.) Chanc. 219.

A sale, by private contract of a reversionary interest in a sum of stock, set aside, on account of inadequacy of price, and the unjust and oppressive conduct of the purchaser. *Newton v. Hunt*, 5 Sim. 511.

(f) *Resale.*

*Quare*—If the vendor of goods, upon an alleged breach of contract by the vendee, resell the goods to another, can he maintain an action for goods bargained and sold against the vendee? *Acebal v. Levy*, 3 Law J. (N.S.) C.P. 98, s. c. 10 Bing. 376; 4 Mo. & Sc. 217.

(D) DELIVERY.

The defendant having agreed to purchase a quantity of cigars of the plaintiff, for ready money, saw them packed in his own boxes in the plaintiff's shop, and desired the plaintiff to keep them until he called for them, the plaintiff observing, that "he could not afford to give credit for them:"—Held, that there was no sufficient delivery to sustain a count for goods sold and delivered. *Boydler v. Arnold*, 2 Law J. (N.S.) Exch. 97, s. c. 1 C. & M. 333; 3 Tyr. 267.

A sold to B all the ash trees which were lying on C's land, where they had grown and had been felled, at 1s. 7½d. per foot cube, on credit. Some trees were measured and taken away, then all the residue were marked, and the length and girth of each tree were taken; but the total cubic contents of the trees were not ascertained:—Held, that as nothing remained to be done, but the adding together of the different measurements, the property passed to the purchaser.

Many of the trees were taken away by the vendee as he pleased, from all parts of the grounds, until he became insolvent, when the vendor prevented his servants from drawing any more trees, and the vendee acquiesced therein. Some time after, the vendor drew the residue of the trees, which were lying where they had been felled, to his own sawpits:—Held, that the vendee's assignee was entitled to the possession of the trees, they having been fully delivered by the vendor, the vendee not having any right to relinquish the contract, as he was at the time in a state of insolvency. *Tansley v. Turner*, 4 Law J. (N.S.) C.P. 272, s. c. 2 Bing. N.C. 151; 2 Sc. 238.

(E) TITLE.

[See SETTLEMENT, Marriage, in general.]

(a) *In general.*

[*Hicks v. Morant*, 2 D. & Cl. A.C. 414; 2 Law J. Dig. 293, s. c. 5 Bligh, N.S. 643.]

A purchaser of a lease, having, with his attorney, had inspection of it, and the purchaser having taken possession, cannot refuse specific performance, on the ground of a covenant in the lease.

It is the duty of the purchaser of a lease to inform himself what covenants are in it; and if he enters into possession without doing so, he must

suffer for his own neglect. *Cosser v. Collinge*, 1 Law J. (N.S.) Chanc. 130.

A sum of money having been given to four trustees, one of them lent a part on mortgage, and there was notice of the trust on the mortgage, which was made to that one trustee only; he subsequently called in the money, which the mortgagor procured from another person, to whom the mortgage was then assigned, and who paid the money to the single trustee alone. The mortgagor afterwards sold the property, and the purchaser objected that the payment of the mortgage-money to the one trustee alone was not a good discharge: but the Court was of opinion that that payment was a good discharge; the true principle being, that no person could be allowed to deal with trust-money to the prejudice of the *cestui que trust*, and the Court being of opinion that there had not been any such dealing by the vendor in this case; yet, inasmuch as equity will not impose the expenses of litigation upon a purchaser, the Court refused to decree specific performance, and dismissed the bill. *Hanson v. Beverley*, 1 Law J. (N.S.) Chanc. 132.

A contract for the sale of a lease implies, that the vendor will shew the title of the lessor; unless there be an express stipulation to the contrary. *Souter v. Drake*, 3 Law J. (N.S.) K.B. 31, s. c. 5 B. & Ad. 992; 3 N. & M. 40.

*Semble*—A purchaser of a property under lease is not bound to make any inquiries beyond the tenant in possession, though he should merely be an under-lessee, and would not be affected by notice of the titles of intermediate lessees. *Hanbury v. Lichfield*, 3 Law J. (N.S.) Chanc. 49, s. c. 2 M. & K. 629.

A condition on the sale by auction of the leasehold property of a bankrupt, by his assignees, that the vendors "shall not be obliged to produce the lessor's title," does not preclude the purchaser from himself investigating and objecting to defects in the lessor's title. *Shepherd v. Keatley*, 3 Law J. (N.S.) Exch. 288, s. c. 1 C. M. & R. 117; 4 Tyr. 571.

A testator devises, by his will, to A, in fee, in trust to sell, and his receipt to be a good discharge. By a codicil, he joins with A, other trustees, B and C, and directs his trustees to sell the same, or such parts as should remain unsold at the time of his decease, in the manner directed by his will. The testator afterwards contracted to sell a part of the property, and received a part of the purchase-money. After his death, his trustee executed a conveyance to the purchaser, and received the remainder of the purchase-money. B, one of the trustees, executed the conveyance by attorney: the power of attorney was afterwards lost. Upon a subsequent sale of the property, an objection was taken to the title, that a good discharge for the purchase-money had not been given by the trustees, because B had not executed the conveyance. B being dead, A and C sign a memorandum, declaring that the purchase-money had been paid:—Held, that this was a sufficient discharge.

Property, subject to a mortgage, is conveyed to S to hold, &c., subject to the mortgage, to such uses as S should appoint. Upon a sale by S, an objection to the title was taken, because there were unsatisfied judgments against him:—Held, that the exercise by S of his power of appointment displaced

the judgments, and would entitle the purchaser to take the estate discharged of them. *Eaton v. Saxter*, 3 Law J. (N.S.) Chanc. 197.

A testator devises lands in trust for the payment of his debts generally, and desires that his estate at A shall be sold first, and if the produce of that estate be insufficient, then his estate at B. A purchaser will not be compelled to accept the title to B, unless the Court is satisfied beyond suspicion that the debts have not been paid. *Pierce v. Scott*, 4 Law J. (N.S.) Exch. Eq. 36, s. c. 1 Y. & C. 257.

To verify the abstract, a vendor produced an attested copy of a deed of settlement, dated 1752, together with a covenant of a third party to produce the original:—Held, first, that this was not a sufficient verification of the abstract of the title; and secondly, that it was necessary to prove that the original could not be produced before the purchaser was bound to receive secondary evidence of its contents. *Turner v. Rawlinson*, 4 Law J. (N.S.) Chanc. 109.

The assignee of a lease of certain premises put it up to sale by auction, one condition being, that he should prove no title prior to his own. In an action against the defendant for not completing the purchase,—Held, under the circumstances of the case, that the plaintiff was obliged to prove the execution of the lease, as well as of the assignment, the declaration stating that he was possessed of such lease, and such allegation being the foundation of the action. *Laythorpe v. Bryant*, 4 Law J. (N.S.) C.P. 108, s. c. 1 Bing. N.C. 421; 1 Sc. 327.

A father, tenant for life, with remainder to his son, in tail, joined with his son in conveying the estate to trustees in trust to sell, and to pay 30,000*l.* to the father, and the residue to the son; and it was declared that the trustees' receipts should be sufficient discharges. The trustees contracted to sell to defendant, and afterwards judgments were entered up against the father:—Held, that the existence of the judgments was no objection to the title. *Lodge v. Lyseley*, 4 Sim. 70.

Testator by his will, in his own hand-writing, devised an estate to Anne Aspinall and her heirs, if she should be then living, but, if not, then to her issue and their heirs. He afterwards made a codicil commencing thus: "This is a codicil to the last will and testament of me, J S, and which I some time since made in my own hand-writing, and thereby devised to John Aspinall as therein mentioned." At the date of the codicil Anne Aspinall had a son named John. Part of the testator's estates having been sold in pursuance of a direction in the will, the purchaser objected to the title, on the ground that the reference in the codicil afforded strong presumption of the existence of a subsequent will. But, as the will contained a gift which might take effect in favour of John Aspinall, the objection was overruled. *Howarth v. Smith*, 6 Sc. 161.

On a sale by auction of leasehold property, one of the conditions of sale was, that the vendor "should not be obliged to produce the lessor's title." The vendee having *aliunde* discovered certain defects in the lessor's title,—Held, that notwithstanding the above condition, he was entitled to insist upon those defects. *Shepherd v. Keatley*, 3 Law J. (N.S.) Exch. 288, s. c. 1 C. M. & R. 117; 4 Tyr. 571.

A power of sale is not void, although the exer-

cise of it is not expressly confined within the line of perpetuity. *Biddle v. Perkins*, 4 Sim. 135.

A purchaser at an auction cannot recover from the vendor the expense of preparing the deeds of conveyance of the property after he has refused to complete the purchase on account of the non-production of certain title deeds, though his attorney prepared the conveyances on the faith of a note written in the margin of the abstract by the vendor's solicitor, stating that all the title deeds were examined by them on the original purchase, and that, if it should be required, they would apply to the solicitor for the original seller, in whose custody they were. *Jermain v. Egelstone*, 5 C. & P. 172. [Parke]

#### (b) Costs.

An abstract of a title to an estate sold by auction disclosed a conveyance in fee, and a deed assigning terms to attend the inheritance dated in 1737, (shewing some terms outstanding which occasioned considerable expense,) and a perfect title by possession for sixty years:—Held, that the costs thus occasioned were allowable on taxation:—Held, also, that the costs of attested copies of the will of the vendor's father ought not to be allowed. *Ex parte Quick*, 2 Sc. 184.

### (F) ACTIONS AND SUITS.

#### (a) In general.

[See TROVER, Where maintainable.]

The plaintiffs, who were brokers, bought goods of the defendant, on account of H, and by his authority. The purchase was made in their own names, but the vendor was told that there was an unnamed principal. The plaintiffs afterwards, under a general authority from H, contracted to sell the same goods, which the defendant had not yet delivered. H, on hearing of the latter contract, told the plaintiffs that he would have nothing to do with the goods, either as buyer or seller; and in this they acquiesced. The defendant then refused to deliver the goods, and the plaintiffs sued him for damages sustained by them in consequence:—Held, that the renunciation of the contract by H, and the plaintiff's acquiescence in it, formed no objection to the right of the plaintiffs to recover. *Short v. Spackman*, 2 B. & Ad. 962.

Testator devised his real and personal estate to trustees, to be sold for the benefit of his children, and directed that their receipts should be sufficient discharges. The children filed a bill to have the will established and the trusts performed. At the hearing, the bill was dismissed against the heir, and the Court did not establish the will, but made a decree affecting the personal estate only. The suit afterwards became abated, and was not revived. On the death of the surviving trustee, another suit was instituted for the appointment of new trustees, which was done. The new trustees then sold part of the testator's real estates to the plaintiff, who filed a bill for the specific performance:—Held, that the former suit having been dismissed as against the heir, without the will being established, no suit was pending for the administration of the testator's real estates; and that the new trustees had the same

power of giving receipts as the original trustees had. *Drayson v. Pocock*, 4 Sim. 283.

Where a party had contracted to purchase, and had been eight years in possession of premises, to which the vendor was unable to make a good title, and refused either to abandon the agreement, or accept such title as the vendor could give, having paid no part of the purchase-money, and no rent; the Court upon a bill filed by the vendor for relief, directed the agreement to be delivered up to be cancelled, and the rents and profits received by the purchaser to be accounted for, and ordered the purchaser to pay the costs of the suit. *King v. King*, 1 M. & K. 442.

Where goods are sold on a credit obtained by fraud, *indebitatus assumpsit* cannot be maintained until the time of credit has expired, but the proper form of action is trover.

Accordingly, the vendors sold goods "at 7½ per cent. discount, bill at three months; 10½ per cent. discount, cash in fourteen days;" and before the expiration of fourteen days, brought *indebitatus assumpsit*, on the ground that the sale had been procured by fraud on the part of the vendee:—Held, that the action was not maintainable, as the vendee, under the contract, had an option until the expiration of fourteen days, to pay in cash or by a bill. *Strutt v. Smith*, 3 Law J. (n.s.) Exch. 357, a. c. 1 C. M. & R. 312; 4 Tyr. 1019.

#### (b) Pleadings.

Vendor covenanted under seal to vendee, that he would on or before the 30th of November then next deduce a good title to the premises sold; and would on or before the 8th of January execute a proper conveyance for conveying the fee-simple; and it was stipulated that the conveyance should be prepared by and at the expense of the vendee; and further, that if the vendor should not verify the title to the vendee or his agent, by production of deeds, &c. at Norwich, Lynn, or London, before the 30th of November, the agreement should be void.

In an action of covenant by the vendee, two breaches were assigned; first, that the vendor did not on or before the 30th of November deduce a good title; secondly, that the defendant did not on or before the 8th of January execute a proper conveyance.

Plea, first, that the vendor did, before the 30th of November, produce and shew divers deeds in part deducing a good title, and that until and upon that day he was ready and willing to produce and shew to the vendee other deeds, completing such title, and would on or before that day have produced such deeds to the vendee or his agent attending, whereof the vendee had notice, but that he would not by himself or agent attend:—Held, on special demurrer, that the plea was bad, inasmuch as the vendor's covenant was general, and therefore the facts stated were no excuse: and that if the covenant could be read, as qualified by the subsequent stipulation as to place, the plea ought to have averred notice to the vendee, at which of the three places the vendor would be ready to produce his deeds.

Plea, secondly, to the first breach, that by a subsequent agreement made before any breach committed, the time for deducing title had been en-

larged; and that the vendor was ready to deduce title within such enlarged time. Thirdly, the defendant pleaded a similar agreement after breach, and that plaintiff accepted such agreement as a substitution for the former, and as a satisfaction of the damages resulting from the breach; and that defendant was ready to fulfil such agreement, but plaintiff refused, &c.:—Held, on special demurrer that the second plea was bad, in not stating the new agreement to have been under seal. Leave given to amend the third plea, by stating the new agreement to have been in writing; but, *quære*, if it were so, whether the facts amounted to a good accord and satisfaction.

Plea to the second breach of covenant, that the vendor until and on the 8th of January, was ready and willing to execute proper conveyances, and would have executed the same if the plaintiff would have prepared and tendered them, but that he did not do so. Replication, that the vendor did not deduce a good title, wherefore the vendee did not prepare the conveyances.

Rejoinder, that although the vendor within a reasonable time before the 8th of January, was ready and willing, and offered to deduce a good title, so that the vendee might before the 8th of January have prepared and tendered conveyances, whereof the vendee had notice, yet the vendee refused to have such title deduced, and discharged the defendant from deducing such title. Surrejoinder, that the vendor was not ready and willing to deduce, &c.

On general demurrer, held, that, upon this breach the matter pleaded by the vendee was no answer to the pleas of the vendor, and that the latter was entitled to judgment. *Ripplinghall v. Lloyd*, 5 B. & Ad. 742, a. c. 2 N. & M. 410.

A plea by a vendor to a bill by the purchaser for specific performance, that he had not sufficient title to sell, is bad.

A bill alleged that the vendor treating himself as the absolute owner of an estate, had contracted to sell it to the plaintiff, and charged that the defendant pretended that the consent of some other person was necessary to enable him to sell it; and it further charged, that if such person existed, the defendant had obtained or could obtain his consent. To this bill, the defendant put in a plea, shewing that he was only tenant for life, with a power to trustees, with his consent, to sell; and it averred that the trustees had never sold or contracted to sell the estate to the plaintiff:—Held, that such plea was bad, and it was, therefore, overruled. *Thomas v. Dering*, 4 Law J. (n.s.) Chanc. 149.

In an action of assumpsit for not completing the purchase of a house, the defendant cannot under the general issue, set up as a defence, that the sale was a sale by auction, and void on the ground of puffing, as this must be specifically pleaded. *Icely v. Grew*, 6 C. & P. 671. [Denman]

#### (c) Costs.

Though the exception to a title is one, yet where some of the grounds of exception are allowed, and some are overruled, the Court may order the deposit to be divided. *Whitton v. Peacock*, 3 Law J. (n.s.) Chanc. 163.

Where a vendor from inability to make out a title,

fails to complete a contract for the sale of an estate, the purchaser cannot recover as damages expenses incurred previously to entering into the contract, nor the expense of a survey of the estate, nor the expense of a conveyance drawn in anticipation of a completion of the purchase, nor the extra costs of a Chancery suit touching the purchase, in which the vendor is defeated, nor losses sustained by the purchaser in the resale of stock prepared for the estate. But he is entitled to recover the expense of comparing deeds, of searching for judgments, and of journeys for that purpose, and interest on his deposit money. *Hodges v. Earl of Litchfield*, 1 Bing. N.C. 492, s. c. 1 Sc. 443.

### VENUE.

- (A) IN GENERAL.
- (B) WHERE LAID.
- (C) CHANGING.
- (D) RETAINING.

[See LANDLORD AND TENANT, Repairs—PRACTICE, Setting aside Proceedings.]

#### (A) IN GENERAL.

The county in the margin of the declaration, held a sufficient venue, on special demurrer. *Duncan v. Passenger*, 1 Law J. (N.S.) C.P. 104, s. c. 8 Bing. 355; 1 Mo. & Sc. 508.

In an action by the drawer against the acceptor of a bill of exchange, the want of a venue in the general count is not a ground of special demurrer, there being a venue laid in the margin. *Lyon v. Wall*, 2 Law J. (N.S.) C.P. 47, s. c. 9 Bing. 660; 2 Mo. & Sc. 393, 579, 736.

The venue in the margin in the declaration is immaterial, if the venue in the body of the declaration is correct. *Doe d. Goodwin v. Roe*, 3 Dowl. P.C. 323.

Statement of the venue in the body of the declaration, no cause of special demurrer. *Farmer v. Champneys*, 3 Law J. (N.S.) Exch. 325, s. c. 1 C. M. & R. 369; 4 Tyr. 359; 2 Dowl. P.C. 680.

The improper introduction of a venue in a declaration, contrary to 8 Reg. Gen. Hilary term, 4 Will. 4, is not a ground of demurrer, but of application to a Judge to strike it out. *Fisher v. Snow*, 3 Dowl. P.C. 27.

#### (B) WHERE LAID.

The plaintiff in his declaration alleged, that defendant committed the trespass complained of with force and arms, to wit, in the county of Middlesex, in a certain room and apartment of the plaintiff, in and parcel of a certain dwelling-house, situate and being in London. On special demurrer, upon the ground that though an action in itself local was brought in Middlesex, yet the circumstance in which such action originated, was said to have taken place in London:—Held, that the Court was not obliged to notice judicially that there was only one London; that there might be such a place as London in Middlesex; consequently, the action was well brought, and the demurrer should be overruled. *Smith v. Smyth*, 3 Law J. (N.S.) C.P. 111, s. c. 10 Bing. 405; 4 Mo. & Sc. 180.

Where by consent of both parties the venue was laid in L,—held, that no objection could afterwards be taken to the venue, notwithstanding it ought under an act of parliament to have been laid in S. *Furnival v. Stringer*, 5 Law J. (N.S.) C.P. 344, s. c. 1 Bing. N.C. 68; 4 Mo. & Sc. 578.

#### (C) CHANGING.

[See NEWSPAPER.]

Where the venue has been changed merely for the advantage of the plaintiff obtaining a more speedy trial, on the granting of a new trial, he is entitled as of course to bring it back. *Alexander v. Barker*, 1 Law J. (N.S.) Exch. 68.

The rule, that the defendant cannot change the venue after an order for time to plead "on the usual terms," does not depend upon the loss of a trial or the delay of judgment; but is a general rule applicable as well to country as to town causes.

But, where, in a country cause, the defendant had obtained such order, and it appeared that the plaintiff could not be delayed by changing the venue, the Court allowed the defendant to amend the order, by inserting special terms, saving his right to change the venue, on payment of costs. *Notts v. Curtis*, 1 Law J. (N.S.) Exch. 101, s. c. 2 C. & J. 345; 2 Tyr. 307; 1 Dowl. P.C. 845.

An order for time to plead, "pleading issuable," does not prevent the defendant from changing the venue. *Russell v. Hurst*, 2 Law J. (N.S.) Exch. 81, s. c. 1 C. & M. 184; 3 Tyr. 218.

An order for time to plead, pleading issuable, and taking short notice of trial, is no objection to a special application by the defendant to change the venue.

Terms imposed on changing the venue, in an action on a life policy, where all the witnesses to facts resided in the county to which the defendant sought to change it, and medical men, whose opinions were required by the plaintiff, resided where it was originally laid—*inter alia*, abandoning a retainer to one of several leading counsel. *Bowering v. Bignold*, 2 Law J. (N.S.) Exch. 175, s. c. 1 Dowl. P.C. 685.

The Court will not change the venue from London to the city of Norwich without special ground. *Scruton v. Dawson*, 1 Law J. (N.S.) C.P. 66, s. c. 8 Bing. 28.

In an action of covenant on a mortgage deed, the Court will not grant the defendant a rule to change the venue, on the special ground, that the plaintiff's and defendant's witnesses reside in the county to which he applies to change it; unless the affidavit to support the motion state that it is necessary to call witnesses to prove his defence. *Anonymous*, 1 Law J. (N.S.) Exch. 151; s. c. as *Crompton v. Stewart*, 2 C. & J. 473.

Where the defendant is out of the kingdom, the venue may be changed on the common affidavit by the defendant's attorney. *Biddell v. Smith*, 3 Law J. (N.S.) Exch. 63.

An affidavit to change the venue, on special grounds, need not state, in terms, that there is a "good defence upon the merits," if the defence sworn to is a good defence upon the merits. *Johnson v. Beresford*, 3 Law J. (N.S.) Exch. 37, s. c. 2 C. & M. 222; 4 Tyr. 57.

Venue changed upon terms, to favour the discharge of a prisoner. *Keys v. Smith*, 10 Bing. 1, s. c. 1 Mo. & Sc. 338.

A motion to change the venue on special grounds, ought to be made after plea pleaded. *Cotterill v. Dixon*, 1 C. & M. 661, s. c. 3 Tyr. 705; 2 Dowl. P.C. 112.

In an action for a libel published in a newspaper, the Court will not change the venue to the county in which the paper was published. *Hoskin v. Ridgway*, 3 Doug. 216.

In an action for a libel published in a country local newspaper, the Court allowed the venue to be changed upon a special affidavit. *Robson v. Blackwell*, 2 Dowl. P.C. 645.

If the defendant applies to change the venue after plea, the onus of shewing special grounds for the change lies on him. *Higgins v. Houseman*, 3 Dowl. P.C. 549.

The affidavit whereon to change the venue must not only state that the cause of action arose in the county to which the removal is prayed, but also that it did not arise elsewhere. *Jones v. Pearce*, 2 Dowl. P.C. 54.

An application by the plaintiff to change the venue in a local action under the 3 & 4 Will. 4, c. 42, s. 22, cannot be made till issue is joined. *Bell v. Harrison*, 4 Dowl. P.C. 181.

In an action of covenant on a farming lease, the Court will not change the venue on special grounds, before issue joined, although the affidavits state the nature of the defence. *Bohrs v. Sessions*, 2 Law J. (N.S.) Exch. 354, s. c. 1 C. M. & R. 86; 4 Tyr. 272; 2 Dowl. P.C. 699.

In an action on a deed, the venue may be changed under special circumstances, though an undertaking to try at the sittings has been given; and an affidavit, shewing that there was a good defence on the merits, was held equivalent to a positive affidavit that there was such a defence. *Johnson v. Newison*, 2 Dowl. P.C. 260.

The venue will not be changed in an action on a specialty, on the ground that the cause of action arose in a different county, and that both parties, and all the witnesses, resided there, unless on affidavit of merits, and that it would be necessary to call witnesses resident in the latter county. *Lancaster v. South*, 2 Tyr. 501.

In an action on a promissory note, and for goods sold and delivered, the defendant cannot change the venue, without disclosing his ground of defence; and his application cannot be made before issue joined. *Parmeter v. Otway*, 3 Dowl. P.C. 66.

Where an action is brought on a bill of exchange, and also for any other simple contract, whether it be the consideration of the bill, or a distinct cause of action, the plaintiff may elect his county, and the defendant shall not change the venue without special grounds.

This is the practice of the Exchequer, as well as of the other courts. *Walthew v. Syers*, 4 Law J. (N.S.) Exch. 67, s. c. 1 C. M. & R. 596; 5 Tyr. 217; 3 Dowl. P.C. 160.

In an action on a bill of exchange, the defendant is too late to change the venue, after an order for time to plead on the usual terms, and an undertaking to try at the sittings, though it is sworn that all the witnesses reside in the county to which the venue

is required to be removed. *Haythorn v. Bush*, 2 Dowl. P.C. 240.

Although a promissory note is not made payable to order, the Court will grant a rule to change the venue on the common affidavit. *Smith v. Elkins*, 1 Dowl. P.C. 426.

An application to change the venue, on special grounds, must be made the subject of a distinct motion; and where the venue has been improperly changed on the common affidavit, in a case where part of the demand was on a bill of exchange, such special circumstances furnish no answer to an application to discharge the rule for changing the venue. *Dawson v. Bowman*, 1 C. M. & R. 594.

Where, in an action for a libel, the venue was laid in London, and the defendant moved to change it to Lincoln, on the usual affidavit; and on a rule being obtained to bring back the venue, it appeared from the affidavit, that the libel had been published in London as well as Lincoln:—Held, that the plaintiff was entitled to have the venue brought back to London, without entering into an undertaking to give material evidence there. *Clements v. Newcome*, 1 C. M. & R. 776, s. c. 5 Tyr. 492.

When, on account of political excitement and other circumstances, a fair trial cannot be had in the county where the venue is laid, the defendant can change the venue without paying costs, for they are properly costs in the cause. *Lewis v. Morris*, 2 Dowl. P.C. 60.

After time to plead on the usual terms, the Court will not allow the venue to be changed, except on special grounds. Merely swearing that the cause of action arose, and that the witnesses live, in another county, is not sufficient. *Tonks v. Fisher*, 2 Dowl. P.C. 22.

If a defendant moves to change the venue as of right, it is not sufficient to swear that the cause of action did not arise in the county stated in the declaration, and that it will be inconvenient for him to try there; he must make the ordinary affidavit, shewing in which county the cause of action did arise. *Palmer v. Terry*, 3 Dowl. P.C. 566.

It is not of itself a sufficient objection to an affidavit for changing the venue, that it is made by the attorney in the cause, and not by the defendant; but *semble*, that if defendant is in the country, it ought to be made by him. *Biddell v. Smith*, 2 Dowl. P.C. 219.

If the plaintiff, being an attorney, does not sue as such, but appears by another attorney, the defendant may change the venue as a matter of course on the usual affidavit. *Lowless v. Timms*, 3 Dowl. P.C. 707.

An attorney, when sued, has not the privilege of changing the venue to Middlesex. *Sparke v. Stokes*, 3 Doug. 355.

*Semble*, that the venue may now be changed in a local action. An allegation that an impartial trial cannot be had, must be satisfactorily made out, to induce the Court to interfere. *Briscoe v. Roberts*, 3 Dowl. P.C. 435.

The venue cannot be changed, in an indictment for conspiracy, until issue is joined. *Rez v. Forbes*, 2 Dowl. P.C. 440.

Whether the Court has the power to change the venue in cases of felony—*quære*. *In re Thomas*, 2 Law J. (N.S.) M.C. 42.

## (D) RETAINING.

The undertaking to give material evidence in the county wherein the venue is retained, in an action for goods sold and delivered, is satisfied by proof of letters, containing invoices of the goods, having been put into the post-office in that county, at the same time that the goods were forwarded. *Linley v. Bates*, 1 Law J. (N.S.) Exch. 247, s.c. 2 C. & J. 659; 2 Tyr. 746.

The venue having been changed from London to Hereford, in an action of covenant on a lease for non-payment of rent for premises situate in Hereford, the Court refused to bring it back. *Arden v. Mornington*, 4 Tyr. 56.

If an application to change the venue has been improperly granted on the usual affidavit, and a rule is obtained to discharge it, it is no answer to that rule, that there are special grounds for changing the venue; and the plaintiff will be entitled to retain it, for the special grounds for changing the venue should have been made the subject of a distinct motion. *Dakon v. Trevillion*, 5 Tyr. 216.

In an action for a libel, where the venue is laid in one county, and removed, on the common affidavit, into another, the Court will move it back, on an affidavit stating that the newspaper in which the libel appeared is published as much in one county as the other. *Hobart v. Wilkins*, 1 Dowl. P.C. 460.

Where a defendant had changed the venue to the county where the cause of action arose, it was held to be no reason for bringing back the venue, that the action was for the balance of an election dinner, and that the defendant was treasurer of the county, an electioneering agent, and a person of great influence there, it being a special jury cause. *Hill v. Payne*, 3 Dowl. P.C. 695.

In an action on the case for a libel, published in a county newspaper, called the *Liverpool Chronicle*, the venue having been changed by the defendant upon an affidavit that the cause of action arose in the county of Lancaster, and not elsewhere, and upon special grounds as to the residence of witnesses, the Court refused to bring back the venue to the former county, upon an affidavit that the plaintiff had eight witnesses in London, and that notice of trial had been given and briefs prepared, it appearing that several witnesses for the defendant lived at Liverpool, and the defendant agreeing to withdraw the general issue, rely upon his justification, and furnish the plaintiff with a copy of the newspaper. *Greenslade v. Ross*, 3 Dowl. P.C. 697.

## VERDICT.

[See PRACTICE, Verdict—WRIT OF TRIAL.]

## VESTRY.

[See MANDAMUS—RATE, Church-rate—LIMITATIONS, STATUTE OF.]

Although a parish be governed by a select vestry by prescription, and confirmed by local acts, the

parishioners have a right to exercise the powers of the 59 Geo. 3, c. 12, in all matters not interfering with the previous powers; and for that purpose they may appoint additional select vestrymen. *Rex v. St. Martin's-in-the-Fields*, 1 Law J. (N.S.) M.C. 96, s.c. 3 B. & Ad. 907.

The Justices have no discretionary power as to the appointment of persons nominated and elected by the parishioners as members of the select vestry, under 59 Geo. 3, c. 12, s. 1, but are bound to appoint those whose names are returned to them; even though a person returned may hold an office, the duties of which may be inconsistent with the duties of a select vestryman, as if he be a Magistrate acting within the district in which the parish lies. *Rex v. Kent*, 3 Law J. (N.S.) M.C. 7, s.c. 4 N. & M. 299.

The statute 59 Geo. 3, c. 124, s. 30, enacts, that in every district, parish, or division of any parish or district, in which any church or chapel shall be built, in which there shall not be a distinct vestry belonging to such district or division, a select vestry, consisting of so many persons as shall be directed by the commissioners in that behalf, shall be appointed by the latter out of the substantial inhabitants of the district or division, for the care and management of the concerns of the church, and all matters and things relating thereto:—Held, that a select vestry, appointed pursuant to this provision of the act, has no power to impose a rate for the repair of the district church. *Cockburn v. Harvey*, 2 B. & Ad. 797.

By a local act, the inhabitants of the parish of Clerkenwell paying church and poor-rates were empowered to elect guardians of the poor. In the Vestry Act (58 Geo. 3, c. 69), which regulates the mode of voting in vestries, is a proviso, that that act shall not affect the right or manner of voting in any vestry held by ancient usage or by a special act:—Held, that this proviso did not except the parish of C from the operation of 58 Geo. 3, c. 69; and that to bring a vestry within the exception it must have a peculiar constitution. *Rex v. Clerkenwell*, 3 Law J. (N.S.) M.C. 99, s.c. 3 N. & M. 411; 1 Ad. & E. 317.

When the act for better regulation of vestries, 1 & 2 Will. 4, c. 60, has been adopted in a parish, there must be elected, at each of the first three annual elections, one-third of the whole number of which the vestry chosen under the act is ultimately to consist; and there must be deducted, by lot, from the original vestry, at the first election, one-third of the number of vestrymen then existing (whatever the full regular number of the original vestry would be); at the second election, half the number of the original vestrymen then existing; at the third election, all the remaining original vestrymen.

A parish adopting the act had previously been divided into four districts, for the more conveniently collecting the rates; and this division had been adopted for taking the poll in the election of members of parliament: a small part also of the parish was annexed to a part of an adjoining parish, and separate from the original parish, for ecclesiastical purposes:—Held, that the election of vestrymen and auditors might be made in one place of the parish only.



If a parish adopting the act be within the metropolitan police district, or of the London, or contain more than 3000 resident householders, the qualification for vestrymen is, that they should be resident householders, and should be also rated to the poor of the parish on an annual rental of not less than 40*l.*; but the rental may be made up of tenements separately held, and not in the occupation of the vestrymen.

The qualification must be perfect at the time of election; but if unqualified persons be elected, this does not avoid the election of qualified vestrymen or auditors elected at the same time.

A parish which adopted the act had previously been governed by a vestry established by a local act, which defined the qualification of a vestryman, and prescribed an oath to be taken before any vestryman should be capable of acting in the execution of that local act. By the oath, the person swore to execute the powers reposed in pursuance of the same, and that he was possessed of the qualification prescribed thereby, which was different from that required by 1 & 2 Will. 4, c. 60:—Held, that this oath was not to be taken by the vestrymen elected under the latter act. *Rex v. St. Pancras*, 3 Law J. (N.S.) M.C. 90, s.c. 1 Ad. & E. 80; 3 N. & M. 425.

The trustees appointed and acting under a local act of parliament for building a church, which authorizes them to levy rates upon the inhabitants of the parish, and directs that the accounts shall be audited and allowed by the Quarter Sessions, are, nevertheless, compellable, under section 34 of the General Vestry Act, 1 & 2 Will. 4, c. 60, to produce and explain their accounts before the auditors of the parish accounts, appointed under and in consequence of the adoption of the last-mentioned act.

*Semble*, that all boards, &c. having power to levy rates on the inhabitants of a parish which adopts the General Vestry Act, are compellable to produce and explain their accounts before the auditors.

Auditors of parish accounts, appointed under that act, can hold meetings only in the board-room of the vestry. *Rex v. St. Pancras New Church*, 3 Ad. & E. 535, s.c. 5 N. & M. 219.

A vestry being about to be held in Manchester for the election of churchwardens, notice was given that the meeting would be held in the parish church, but that, if a poll was demanded, it would be adjourned to the Town Hall. At the meeting, there was a show of hands, upon which a poll was demanded; and thereupon the chairman, without taking the sense of the meeting, adjourned the election to the Town Hall, where a poll was taken:—Held, that the proceeding was regular, no business having been interrupted by it, and the adjournment, in a particular event, being part of the original appointment. *Rex v. Archdeacon of Chester*, 3 Law J. (N.S.) M.C. 95, s.c. 1 Ad. & E. 342; 3 N. & M. 413.

Under stat. 59 Geo. 3, c. 12 (Select Vestry Act), the Justice has no discretion as to appointing the persons nominated and elected by the inhabitants as select vestrymen. Therefore, where the inhabitants had nominated and elected twenty select vestrymen, one of whom was a Justice of

Peace for the district, and the other an overseer, and therefore, *ex officio*, a member of the select vestry, and the Justice omitted the names of these two from the appointment, the Court issued a mandamus to compel him to insert the two names, though it was sworn that the district was small, with only five acting Justices; and that injury had already resulted from the union of the offices of select vestryman and Justice. *Rex v. Adams*, 2 Ad. & E. 409.

#### VEXATIOUS ARREST.

[See MALICIOUS ARREST.]

#### VICTUALLING BILL.

Victualling bills are not assignable; but by usage, a power of attorney to the attorney, his substitutes and assigns, to receive the money, authorizes the attorney to assign. Such a power is called a general power, in contradistinction to a special power, which authorizes the attorney only to receive. Where an attorney, acting under the latter power, deposited certain victualling bills with the defendant, as a security for money borrowed from him; in an action of trover by the payee of the bills,—held, that the plaintiff was entitled to recover. *Tonkin v. Fuller*, 3 Doug. 300.

#### VIRTUTE CUJUS.

[See PLEADING.]

#### VOLUNTARY DEED, OR APPOINTMENT.

[See APPOINTMENT.]

A man unmarried cannot recall a voluntary trust deed which he executes for the benefit of future children; nor can he relieve himself from a provision in the conveyance to the trustee, under which the income of the trust property is to be paid to him at the discretion of a third person. *Petre v. Espinasse*, 2 M. & K. 496.

In cases of voluntary settlements, the Court will not interfere where anything remains to be done by the grantor to perfect the title of the grantee; but where the grantor has done all on his part, the Court will interfere.

A voluntary assignment of a policy of assurance without delivery up of the policy, gives a perfect inchoate right to the grantee against the grantor, which courts of equity will recognize.

B, without consideration, assigned a policy of assurance for 1,000*l.*, payable upon his death to a trustee, in trust for W and her children, if they should survive him; but he kept the policy in his own power, and afterwards surrendered it up to the assurance society for value, and kept the proceeds:—Held, that the assignment was a perfect act on his part, and irrevocable by him, to be completed by the trustee giving notice to the assurance society; and that B was bound to replace the policy. *Fortescue v. Barnett*, 2 Law J. (N.S.) Chanc. 106, s.c. 3 M. & K. 36.

Where a debtor executes voluntary deeds, assigning his property to trustees for the payment of

his debts, if creditors be not parties to those deeds, the debtor may revoke the deeds, or alter the trusts, or may arrest the funds in the hands of the trustees;—but, *semble*, where a creditor advances money on the credit of such a trust, the debtor would be bound. *Acton v. Woodgate*, 3 Law J. (n.s.) Chanc. 83, s.c. 2 M. & K. 492.

### WAGER OF LAW

Abolished. 3 & 4 Will. 4, c. 42, s. 13; 11 Law J. Stat. 98.

### WAGER.

A cricket match for 20*l.*, although it occupy more than one day in playing, is illegal within 9 Anne, c. 14, s. 2; and assumpsit for money had and received lies against the stakeholder who has paid over the deposit thereon after notice not to pay it over. *Hodson v. Terrill*, 2 Law J. (n.s.) Exch. 282, s.c. 3 Tyr. 929; 1 Dowl. P.C. 264.

*Quare*, whether a wager of 50*l.* to drive a horse in harness one hundred miles, on a public road, within twenty successive hours, is illegal. *Sanderson v. Bell*, 3 Law J. (n.s.) Exch. 66, s.c. 2 C. & M. 304; 4 Tyr. 244.

### WAGES.

[See APPRENTICE.]

### WALES.

[See ATTORNEY, Qualification and Admission—JURISDICTION.]

A judgment in the Court of Great Sessions, upon a cognovit signed before any proceeding, except the service of a new rule, and seven years prior to the teste of the *queritur*, held regular. *Williams v. Williams*, 1 Law J. (n.s.) Exch. 12, s.c. 2 C. & J. 55.

The plaintiff may take out execution on a final judgment in the Court of Great Sessions, without a summons to shew cause why execution should not issue. *Rees v. Rees*, 1 Law J. (n.s.) Exch. 149, s.c. 2 Tyr. 384.

Upon a plea of *nul tiel record* to a declaration in *scire facias* in the Exchequer, on a judgment obtained in the Court of Great Sessions for Wales, before the passing of the 11 Geo. 4. & 1 Will. 4, c. 70, the plaintiff is entitled to the judgment of the Court upon producing the certificate and affidavit of the record being in the hands of the officer, in pursuance of the rules of M. T. 1 Will. 4, though the actual judgment is not in court. *Howell v. Brown*, 3 Dowl. P.C. 805.

### WARD.

In making settlements for wards, who have been married without consent of the Court, the interest of the ward is alone to be consulted, unless the subordinate purpose of precaution against the husband can be effected without any prejudice to the

ward. Where her interest would suffer, the punishment of the husband is not to be regarded. *Birkett v. Hibbert*, 3 Law J. (n.s.) Chanc. 158, s.c. 3 M. & K. 227.

### WARRANT.

[See CONSTABLE—JUSTICES—MURDER AND MANSLAUGHTER.]

### WARRANT OF ATTORNEY.

[See BANKRUPT, Relation, Judgments—PRISONER.]

- (A) EXECUTION OF.
- (B) DEFEASANCE IN.
- (C) FILING.
- (D) JUDGMENT.
- (E) WAIVER AND SETTING ASIDE.
- (F) ILLEGAL OR VALID.

#### (A) EXECUTION OF.

[See PRISONER; and see, *post*, Judgment.]

#### (B) DEFEASANCE IN.

Where a warrant of attorney makes no mention of interest on the principal, but the defeasance does, the Court will allow execution to be issued for the principal and interest. *Shipton v. Shipton*, 1 Dowl. P.C. 518.

J executed a warrant of attorney to confess judgment; the defeasance recited a mortgage made by M to A, with a proviso for redemption on payment of the principal on a day named, with interest in the meantime; the defeasance further recited that J gave the warrant of attorney as a security for the payment of the interest after the rate, at the time, and in manner appointed by the mortgage deed; and that it was intended that judgment should be entered up forthwith. It further provided, that no execution should be issued till default should be made in payment of the interest at the times, &c. (as before); but that, if default should be made in such payment, execution might be issued, at any time, and from time to time thereafter, for all the arrears of interest then due, and thenceforth to accrue due. Judgment was entered up on the warrant. The interest due up to the day named in the mortgage inclusively was paid soon after the day. Afterwards, demand was made on J for payment of interest accruing after the day. On application to the Court to order satisfaction to be entered on the roll,—held, that the motion was, at all events, premature, execution not having issued; and (per Littledale, J. and Williams, J.) that it was not sufficiently clear, from the defeasance, that the warrant of attorney was intended to cover only the interest up to the day named inclusively, for the Court to interfere. *Atkinson v. Jones*, 2 Ad. & E. 439.

#### (C) FILING.

The copy of the warrant of attorney filed under the 3 Geo. 4, c. 39, is to all intents and purposes

an original, and may be given in evidence as such. *Sykes v. Anthony*, 2 Law J. (N.S.) C.P. 103, s. c. 9 Bing. 746; 3 Mo. & Sc. 191.

#### (D) JUDGMENT.

The circumstance of the Commissioner before whom the affidavit that the party is alive is sworn, being the attesting witness, does not dispense with the necessity of an affidavit by him of due execution, in order to obtain leave to enter up judgment on an old warrant of attorney. *Field v. Bearcroft*, 1 Law J. (N.S.) Exch. 81, s. c. 2 C. & J. 217; 2 Tyr. 283; 1 Dowl. P.C. 308.

A judgment signed on a warrant of attorney, between the essoign day and the first day in full term, of the term subsequent to the death of the defendant, is regular; the three days previous to the day provided by the 11 Geo. 4. & 1 Will. 4, c. 70, s. 6, for the commencement of the term, being now no part of the term. *Price v. Hughes*, 1 Dowl. P.C. 448.

Where a defendant is resident in the West Indies, judgment may be signed against him on a warrant of attorney, if seen alive four months before. *Fursey v. Pilkington*, 2 Dowl. P.C. 452.

A letter, dated within the term, from a defendant, is sufficient proof that he is alive, so as to authorize judgment on an old warrant of attorney. *Sanders v. Jones*, 1 Dowl. P.C. 367.

The Court allowed judgment to be entered up on an old warrant of attorney, on an affidavit that a letter had been received by the party, the two-penny post date on which was within the term. *Anonymous*, 3 Mo. & Sc. 210.

An affidavit by the plaintiff that the defendant was indebted to him on an old warrant of attorney, and that he had not paid the sum secured by it—that he saw the defendant execute it, and that the attesting witness was also present, but was now residing in France, and that the defendant was now alive:—Held, sufficient to entitle the plaintiff to enter up judgment. *Taylor v. Leighton*, 3 Mo. & Sc. 423.

The affidavit in support of a motion to enter up judgment on a warrant of attorney need not now state, as formerly, that the defendant was alive on a day in term. *Cockman v. Hellyer*, 1 Bing. N.C. 3, s. c. 4 Mo. & Sc. 487.

Since the rules of court, Hil. term, 4 Will. 4, judgment may be entered up on a warrant of attorney, the affidavit shewing that the defendant was alive within a reasonable distance of time. The eighth day preceding the day of the application, though not within the term in which the application is made, is at a reasonable distance of time.

On a warrant of attorney, to suffer judgment to be entered up against two, or either of them, judgment may be entered up against one only. *Jordan v. Farr*, 2 Ad. & E. 437, s. c. 4 N. & M. 347.

Since the rules of Hilary term, 4 Will. 4, s. 1, reg. 3, it is not necessary, in order to sign judgment on an old warrant of attorney, to shew that the defendant was alive within the time. *Robinson v. Lester*, 3 Dowl. P.C. 531.

The Court will allow judgment to be entered up on an old warrant of attorney on the 17th of May, although the defendant has not been seen since the

23rd of April previous. *Watts v. Bury*, 4 Dowl. P.C. 44.

Where a warrant of attorney refers to the plaintiff, "his executors and administrators," but the affidavit of execution makes no mention of executors or administrators, the Court will not allow judgment to be entered up. *Baldwin v. Atkins*, 2 Dowl. P.C. 591.

Where a warrant of attorney only authorizes judgment to be entered up at the suit of the plaintiff, without mentioning executors, administrators, &c., the Court will not allow judgment to be entered up at the suit of the plaintiff's executors, although such representatives are mentioned in the defeasance. *Manvill v. Manvill*, 1 Dowl. P.C. 544.

Where a warrant of attorney is given to three, for a joint debt due to them, and no mention is made, either in the warrant or defeasance, of survivors,—judgment, however, may be entered up at the suit of the survivors. *Build v. Wightman*, 1 Dowl. P.C. 554.

On a warrant of attorney to confess judgment to two, judgment may be entered up in favour of a survivor. *Johnson v. Jenkins*, 1 Dowl. P.C. 367.

On a joint and several warrant of attorney, given by two persons, judgment was signed against one only, but as the attorneys were authorized to enter up judgment against both, the Court allowed it to be done:—and held, that an affidavit, stating that the party against whom the judgment was signed, put in an answer to a bill in Chancery, within the term, was sufficient. *Stovell v. Eade*, 3 Mo. & Sc. 361.

Where the attesting witness to a warrant of attorney is the clerk of the attorney preparing it, the want of his affidavit, on signing judgment, is sufficiently supplied by that of his master verifying the handwriting of his clerk and of the defendant, and stating that the former has absconded, and cannot be found. *Young v. Showler*, 2 Dowl. P.C. 556.

A warrant of attorney is only an action for money secured by it, when judgment has been entered up on it. *Davison v. Overend*, 6 C. & P. 222. [Park].

Where, by the defeasance to a warrant of attorney, it appears to have been in the contemplation of the parties that execution should be had after a year and a day from the signing of the judgment, it is not necessary that the plaintiff should sue out a *scire facias* to revive the judgment; but he is at liberty to sue out execution upon the judgment, after a year and a day, without reviving the judgment by *scire facias*. *Hiscocks v. Kemp*, 4 Law J. (N.S.) K.B. 226, s. c. 5 N. & M. 113.

An affidavit by plaintiff's attorney, that the debt is unpaid, is sufficient to support an application to enter up judgment on a warrant of attorney, if he has managed the money, and been in the habit of receiving and paying over the interest. *Ashman v. Bowdler*, 3 Law J. (N.S.) Exch. 23, s. c. 2 C. & M. 212; 4 Tyr. 84.

In order to obtain leave to enter up judgment on a warrant of attorney, it is essential that the plaintiff should make an affidavit, that the money secured thereby remains due and unpaid: the admission of the defendant is insufficient. *Watson v. Law*, 2 Law J. (N.S.) Exch. 215.

A warrant of attorney given by the defen-

dant, for securing the re-transfer of stock, which, by the defeasance, was to be made "on demand":—Held, that judgment could not be entered up after a formal demand, made on the defendant whilst insane. *Capper v. Dando*, 4 Law J. (N.S.) K.B. 97, s.c. 2 Ad. & E. 458; 4 N. & M. 335.

A party cannot enter up judgment upon a warrant of attorney after the death of the defendant, without having it revived by *sci. fa.*, although the warrant of attorney expressly reserve a power to enter up judgment notwithstanding the death of the defendant. *Heath v. Brindley*, 4 Law J. (N.S.) K.B. 68, s.c. 2 Ad. & E. 365; 4 N. & M. 235.

#### (E) WAIVER AND SETTING ASIDE.

The three defendants, one of whom was an infant, entered into a warrant of attorney, on which judgment was entered up; on a rule for setting aside the judgment, upon the ground of one of the defendants being an infant,—The Court ordered the name of the infant to be struck out, and discharged the rule as to the two adults, with costs. *Ashlin v. Langton*, 3 Law J. (N.S.) C.P. 264, s.c. 4 Mo. & Sc. 719.

Where a warrant of attorney was given to secure a sum of money, secured by a bill of exchange not having three months to run, with more than 51 per cent. interest, which bill of exchange is made valid by 3 & 4 Will. 4, c. 98:—Held, that the Court of King's Bench would not set aside the warrant of attorney. *Connop v. Yates*, 4 Law J. (N.S.) K.B. 67, s.c. 2 Ad. & E. 326; 4 N. & M. 302.

The defendant after his bankruptcy gave the plaintiff a warrant of attorney, with two sureties, for the payment of his debt upon a certain day. The plaintiff, by the desire of the sureties, proved under the commission, but no dividend was made. The debt not being paid upon the appointed day, the plaintiff entered up judgment on the warrant of attorney. Upon motion to set aside the judgment, on the ground that the plaintiff had elected to prove under the commission:—Held, that as the sureties induced him to prove, they were not entitled to relief in a summary manner.

*Quare*—Does the 59th section of the 6 Geo. 4, c. 16, which speaks of a demand prior to the bankruptcy, comprehend a demand upon a warrant of attorney, given by the bankrupt after his bankruptcy, to secure a debt due previously? *Duncan v. Sutton*, 4 Law J. (N.S.) C.P. 164, s.c. 1 Bing. N.C. 431; 1 Sc. 338.

Where judgment on a warrant of attorney had been signed, and execution issued, under circumstances of collusion between the plaintiff and defendant, accompanied by fraud and breach of good faith towards the landlord, whose interests were affected by the execution; the Court set aside the judgment. *Martin v. Martin*, 1 Law J. (N.S.) K.B. 224, s.c. 3 B. & Ad. 934.

Where a party gives a warrant of attorney to another, without consideration, in order that the latter may protect the goods of the former from execution, and judgment and execution are signed and issued against good faith, a court of law will not interfere. *Duke v. Saunders*, 1 Dowl. P.C. 522.

#### (F) ILLEGAL OR VALID.

A warrant of attorney, given by a client to his

attorney, to secure future costs, is illegal. *Jones v. Hunter*, 1 Dowl. P.C. 462.

A warrant of attorney, given to secure payment of future costs, and also of costs and money already due and advanced, though void as to the client's future liability, is valid as to his actual liability. *Holdsworth v. Wakeman*, 1 Dowl. P.C. 532.

The statute 3 Geo. 4, c. 39, requiring a warrant of attorney to be filed within twenty-one days after execution, otherwise to be void and fraudulent against assignees, is confined to the case of a valid commission; therefore, such warrant of attorney, though not filed under the statute, is good, against a party acting as assignee under a commission illegally sued out.—*Quere*, on whom does the burden of proving the filing of the warrant lie,—on the party acting under the warrant, or on him who makes the objection? *Airton v. Davis*, 2 Law J. (N.S.) C.P. 89, s.c. 9 Bing. 740; 3 Mo. & Sc. 138.

#### WARRANTY.

[See FALSE REPRESENTATION.]

If the purchaser of a horse on warranty discovers him to be unsound, he should immediately tender him back to the seller; and, if the seller refuse to take him, should sell him as soon as possible, for the best price that can be procured. The seller is liable for his keep, in the meanwhile, for a reasonable length of time. What length of time is reasonable, in any particular case, is a question for a jury. In an action upon such warranty, if defendant wishes to reduce plaintiff's claim for keep on the ground that the time was unreasonable, he must make that point at the trial. If he then defends solely on the ground that there was no breach of warranty, and the jury give damages in respect both of the price and keep, he cannot move to reduce them, because the Judge did not leave it to the jury whether or not the horse was kept an unreasonable time. *Chesterman v. Lamb*, 2 Ad. & E. 129, s.c. 4 N. & M. 195.

A receipt "for a grey four year-old-colt, warranted sound in every respect," is a warranty only for the soundness, and not for the age of the horse. The party giving the receipt is not liable to an action for a misrepresentation of the age, (which was only three years,) unless he knew at the time that it was incorrect. *Budd v. Fairmanner*, 1 Law J. (N.S.) C.P. 16, s.c. 8 Bing. 48; 3 Mo. & Sc. 74.

A party may limit a warranty of soundness of a horse, by requiring it to be returned within a certain time; and if the purchaser fail to comply with the condition, he cannot recover on the warranty, although the seller may have known of the unsoundness at the time of the sale. *Bywater v. Richardson*, 3 Law J. (N.S.) K.B. 164, s.c. 1 Ad. & E. 508; 3 N. & M. 748.

If a person has bought a horse with a warranty, which has been broken, and he tenders the horse back to the seller, who refuses to receive it, the buyer is entitled to keep the horse for a reasonable time, till he can fairly sell it, and may recover against the seller for keeping the horse during that time. *Ellis v. Chinmook*, 7 C. & P. 169. [Cole-ridge]

More badness of shape, though rendering the horse incapable of work, is not unsoundness. *Dickinson v. Follett*, 1 M. & Ro. 299. [Alderson]

A purchaser with a warranty, on breach thereof, has no right, without the assent of the vendor, to return the article purchased, and to bring an action for the price; but his remedy is by an action for damages upon the warranty.

Therefore, where the plaintiff gave the defendant a horse worth 60*l.* and 30*l.* in money, for a horse of the defendant's worth 90*l.*, warranted sound, and on the defendant's horse turning out to be unsound, sent it back to the defendant, demanding the return of his own horse, and the 30*l.*, and on refusal, arrested and held the defendant to bail for the 90*l.*: It was held, that the defendant was entitled to his costs for an arrest without reasonable or probable cause, under stat. 43 Geo. 3, c. 45. *Gompertz v. Denton*, 2 Law J. (N.S.) Exch. 82, s. c. 1 C. M. & R. 207; 3 Tyr. 232.

In an action on a warranty of the soundness of a horse, it is no ground of nonsuit, that the defendant kept the horse several months after discovering the unsoundness. *Petteshall v. Tranter*, 4 Law J. (N.S.) K.B. 162, s. c. 4 N. & M. 649; 3 Ad. & E. 103.

The defendant warranted a horse sound wind and limb, at the time of the contract; the horse, at that time, had a splint on his off fore leg, visible to the plaintiff, and from the effects of which he afterwards became lame. In an action on the warranty, the jury found that he had upon him, at the time of sale, the seeds of unsoundness, and gave their verdict for the plaintiff:—and held, that the splint was an unsoundness, to which the warranty extended. *Margetson v. Wright*, 1 Law J. (N.S.) C.P. 128, s. c. 8 Bing. 454; 1 Mo. & Sc. 622.

An authority to sell, implies an authority to warrant; but where an agent is employed merely to deliver, it is necessary to shew an express authority to warrant, in order to bind the principal.

Thus, where the servant of a horse-dealer, on delivering a horse to the defendant, made certain statements, and signed a receipt, including a warranty; and it appeared, that the contract of sale had been made before the delivery:—Held, that the master was not bound by the statements or receipt of the servant, as no express authority to give a warranty was proved. *Woodin v. Burford*, 3 Law J. (N.S.) Exch. 75, s. c. 2 C. & M. 391; 4 Tyr. 264.

Bone spavin in the hock is unsoundness in a horse, though it may produce no apparent lameness at the time of the warranty, nor for some years after. *Watson v. Denton*, 7 C. & P. 85. [Tindal]

A sold a picture to B as a Rembrandt. There was contradictory evidence in an action on an accommodation bill given for the price, as to whether there was a warranty or only a representation. The picture was kept:—Held, that, if the jury thought there was a warranty, and that it was broken, then they should find their verdict for that sum which they considered to be the actual value of the picture. *De Sevanberg v. Buchanan*, 5 C. & P. 343. [Tindal]

A sold a picture to B, warranting it a Claude; B sold it to J, and warranted it a Claude to him. The picture was not a Claude, and J brought an action against B, on the warranty. B defended

the action, and J recovered damages and costs against him. B then brought an action against A, upon the first warranty:—Held, that B was, in this action, entitled to recover against A the amount of the damages and costs that B had paid to J, and also the costs incurred by B in defending the first action; but that, if the jury should be of opinion that the sale from B to J was not a real sale of the picture, in the ordinary course of business, but merely a colourable sale, on the usurious discount of a bill, they ought to disallow these sums. *Pennell v. Woodburn*, 7 C. & P. 117. [Tindal]

## WASTE.

[See COPYHOLD, Forfeiture—LANDLORD AND TENANT—LEASE.]

The Court refused to grant an injunction to restrain a tenant from mowing old meadow land, although proved by affidavit to be contrary to the custom of the country. *Greenwood v. Bairston*, 4 Law J. (N.S.) Chanc. 245.

Where A was tenant for life without impeachment of waste, except as to "the timber growing in the park, avenues, demesne lands, and woods adjoining to the capital messuage," and cut timber in woods not precisely answering that description, but which were an ornament or shelter to the messuage:—Held, that he was guilty of equitable waste, and an account was directed, and an injunction granted. *Newdigate v. Newdigate*, 2 C. & F. 601, s. c. 8 Bligh, N.S. 754.

## WASTE LAND.

[See EJECTMENT.]

Upon a question whether a piece of waste land, between a highway and enclosures, belonged to the plaintiff, the owner of the adjoining enclosure, or to the lord of the manor,—Held, that the lord might give evidence of grants by him of the waste between the road and enclosures of other persons, at a distance from the spot claimed by the plaintiff, provided such evidence were confined to the road which passed by the spot claimed by the plaintiff. *Doe d. Barrett v. Kemp*, 2 Bing. N.C. 102, s. c. 2 Sc. 9.

## WATCHING AND LIGHTING.

[See RATE.]

## WATER AND WATER-COURSE.

[See EASEMENT.]

At common law, the owners and occupiers of land adjacent to a river, have a right to raise the banks on their own lands from time to time, as may become necessary, in order to confine the flood water, and to prevent it from overflowing those lands, provided they do not thereby occasion any injury to the lands or property of other persons.

And if that right has from time to time been exercised, as occasion required, before the construction of the aqueduct of a public navigation

lower down the river, the aqueduct will be considered to have been constructed subject to the enjoyment of the right; and, consequently, an indictment against the holders or proprietors of such lands for a nuisance in raising mounds and embankments, &c. whereby water which otherwise would have flowed and escaped over the banks, has been forced against the aqueduct, &c. cannot be sustained unless the mounds and embankments were unnecessary for the protection of the lands, were raised to an unnecessary and unreasonable height, or obstructed the usual and ordinary passage of the water in times of flood.

Accordingly, where, upon an indictment against the owners of lands adjacent to the river Mersey, for a nuisance to a public canal navigation, for erecting, raising, and continuing certain mounds, and embankments called fenders, whereby the water was forced against the aqueduct, and the sides and foundations of the canal, it was found by special verdict that the canal was carried across a river by means of an aqueduct and an embankment, in which were several arches and culverts; that a brook fell into the river above the aqueduct; and that, in times of flood, the water which was then penned back in the brook, had frequently overflowed its banks, and was carried by the natural level of the country through the arches into the river, inundating the intermediate lands, and doing much mischief in its course; that the aqueduct was still wide enough for the river water to pass at all times except in high floods, but that the raising by the defendants of certain artificial banks called fenders, which were made to prevent the water in times of flood from overflowing the adjacent land, and which from time to time had been raised as occasion required by the proprietors and occupiers of the adjoining lands, had occasioned a much greater quantity of water to flow to the aqueduct than did or could flow to it for several years immediately after it was built, and had rendered it insufficient for the passage of water in high floods, and thereby greatly endangered the canal;—the judgment of the Court of King's Bench against the defendants was reversed on error, and a *venire de novo* awarded; because it was not stated in the special verdict whether the raising of the fenders was an accustomed and rightful usage; or that the course taken by the flood-water over the banks, was the ancient and rightful course which it ought to take; or that the fenders had been raised without any necessity, or to an unnecessary and unreasonable height. *Trafford v. The King*, 1 Law J. (N.S.) Exch. 90, s. c. 2 C. & J. 265; 2 Tyr. 201; 8 Bing. 204; 1 Mo. & Sc. 401.

User of a stream of water, passing through land, for a less period than twenty years, by the purchaser of the land, is sufficient to give him a title, by appropriation, and a right of action for diverting the water. *Canham v. Fisk*, 1 Law J. (N.S.) Exch. 61, s. c. 2 C. & J. 126; 2 Tyr. 155.

A erected a mill in 1823 on his own land, the former owner of which had, for twenty years before 1818, appropriated the water of a stream running through it, to the purposes of watering his cattle and irrigating his land. In 1818 B had erected a mill near the same stream, and the owner and occupier of A's land then gave a parol licence to B to

make a dam at a particular spot, and take what water he pleased from that point, which water was so taken, and returned by pipes into the stream above the spot where A's mill was afterwards erected. In 1818, B, without licence, conveyed part of the water which had before flowed into the stream from certain springs, into a reservoir for the use of his mill. In 1828 A appropriated to the use of his mill all the surplus water which flowed through and over the dam, and which was not conducted into the reservoir. In 1829 A demolished the dam erected by B, and gave him notice not to divert the water. B then erected a new dam lower down the stream, and by means of it diverted from A's mills, at some times, all the water before appropriated by A, at others a part of it, and the water, when returned into the stream, was in a heated state:—Held, on special verdict,—First, that whether the right to the use of flowing water be in the first occupant, or in the possessor of the land through which it flows, A was entitled to the surplus water, for he was first occupant of that, and also owner and occupier of the land through which it flowed, and might maintain an action for the injury sustained by the abstraction or spoiling of such surplus water. Secondly, that A was in like manner entitled to recover in respect of the water diverted by B at his new dam, because the licence granted to B by the former occupier, was to take the water at one particular point, and not at the place where this dam was made; and further, because if the licence had been general to take at any place, it would have been revocable, except as to such places where it had been acted on and expense incurred; and it was revoked before the last dam was erected. Thirdly, that A was entitled to recover for the water diverted from the springs, and collected in a reservoir in 1818; for the possessor of land through which a natural stream flows, has a right to the advantage of that stream flowing in its natural course, and to use it when he pleases for his own purposes; no adverse right having been acquired by actual grant, or by twenty years' enjoyment. Whether such possessor of land can maintain an action for the mere violation of such general right, by diversion of the water, &c., without having sustained any special injury—*quære*. *Hill v. Mason*, 5 B. & Ad. 1, s. c. 2 N. & M. 747; 2 Law J. (N.S.) K.B. 118 (called *Mason v. Hill*); and see s. c. 1 Law J. (N.S.) K.B. 107; 3 B. & Ad. 304.

If a party, who has a right to the use of running water, as an owner of adjoining lands, has appropriated it, and by his declaration claims the right to it as the owner of a mill not twenty years old, this is bad; and the Judge at the trial will not allow it to be amended; and even if the jury find the plaintiff's right specially, and it be indorsed on the *postea* under the statute 3 & 4 Will. 4, c. 42, s. 24, the Court above will not give judgment for the plaintiff on that finding, because if the plaintiff had stated his right properly, the defendant might have pleaded differently. *Frankum v. Earl of Falmouth*, 4 Law J. (N.S.) K.B. 26, 90; s. c. 2 Ad. & E. 452; 6 C. & P. 529.

If water has been accustomed to flow along a channel from time immemorial, and it has been unappropriated, the first owner of the adjoining lands on both sides, who appropriates it without

doing any injury to any one, either above or below him, acquires such a right by his appropriation, that, though he may not have enjoyed it for twenty years, he may maintain an action against any owner of the lands above him who wrongfully diverts the water from its ancient channel. *Ibid.*

## WAY.

[See PRESCRIPTION.]

If there be an obstruction of a public way, and any person receives a special injury from it, he may maintain an action. *Bateman v. Burge*, 6 C. & P. 391. [Park]

A plea of twenty years' user of a right of way, under 2 & 3 Will. 4, c. 71, is not defeated by proof of an agreed alteration of the line of way, nor by a temporary non-user under an agreement of the parties. *Payne v. Shelden*, 1 M. & Ro. 382. [Paterson]

By deed of partition two several estates were conveyed to a trustee, "together with all ways, paths, passages, easements, &c. to the said messuages belonging or in anywise appertaining, or therewith usually used and enjoyed," it was declared that the uses of the said messuages and tenements before mentioned, &c. with the *appurtenances*, should be as therein declared:—Held, that this did not operate to convey to the *cestui que use* of one of the several estates, a way which had been usually used before the partition by the occupier of that estate over the other. *Plant v. James*, 3 Law J. (n.s.) K.B. 64, a.c. 5 B. & Ad. 791; 2 N. & M. 517.

Plaintiff had a right of way by means of a drain or watercourse, by and through his close, through the close of defendant adjoining to his, to a certain navigable river. At the time of bringing the action, and for sixteen years before, his right of way could not be enjoyed by the plaintiff, in consequence of the mud, which had accumulated in the part of the drain situated in his close. The defendant having built a bridge and tunnel upon his close, so as to prevent the plaintiff from approaching from the river to the mud, by which his right of way was obstructed,—Held, that an action was maintainable for the erection of such works, notwithstanding the impossibility on the part of the plaintiff, of using his right of way for so long a period. *Bower v. Hill*, 4 Law J. (n.s.) C.P. 163, a.c. 1 Bing. N.C. 549; 1 Sc. 526.

From a covenant in the defendant's lease, to contribute with other occupiers of the lessor's property a rateable proportion of the expense of keeping up paths used in common between them, coupled with the fact that the plaintiff had always used a path between his house and the defendant's from a period anterior to the defendant's lease, and that there was no other path to which the covenants could apply, the Court inferred, that the soil of the path, which was included in the demise to the defendant, was demised subject to a right of way to the plaintiff. *Oakley v. Adamson*, 8 Bing. 356, a.c. 1 Mo. & Sc. 510.

When there is evidence of the user of a way over the land of the plaintiffs during the existence of several successive leases, it is a question rightly

left to the jury, whether it was by the permission and sufferance of the tenant only, or under a claim of right. *Bishop v. Springett*, 1 Law J. (n.s.) K.B. 13.

In justifying under a right of way, the plea need not state the intervening closes between the *terminus à quo* and the *locus in quo*.

Where a plea stated that the defendant was seized in fee of land contiguous and next adjoining to one of the closes in which, &c., and claimed a right of way unto, into, through, over, and along the closes in which, &c., and unto and into a certain highway; and the evidence was of a right of way from the defendant's close, into certain other closes, and over these unto the plaintiff's close; and it appeared also, that the plaintiff had a close immediately adjoining the defendant's, over which the latter had used a way, by the plaintiff's permission:—It was held, that there was nothing in the circumstances to take the case out of the general rule; and that the plea was supported by the evidence.

It would, however, be more correct and better pleading, to set out and describe the intervening closes, over which the right of way goes, where that course is practicable, as the defendant would then know the line in which his right of way was established, and the record would be certain evidence of that right—per Parke, J. and Taunton, J. *Simpson v. Luthwaite*, 1 Law J. (n.s.) K.B. 126, a.c. 3 B. & Ad. 226.

## WEIGHTS AND MEASURES.

Amendment of 5 Geo. 4, c. 74, and 6 Geo. 4, c. 12, relating to. 4 & 5 Will. 4, c. 49; 12 Law J. Stat. 79.

Repeal of 4 & 5 Will. 4, c. 49, and substitution of other provisions. 5 & 6 Will. 4, c. 63; 18 Law J. Stat. 137.

## WEIR.

[See FISHERY.]

## WELSH MORTGAGE.

[See MORTGAGE.]

## WESTMINSTER.

[See REGENT'S PARK.]

## WEST INDIAN ISLANDS.

[See DOMINICA.]

Importation of provisions, lumber, &c. into, permitted, and indemnity of governor, &c. provided for. 2 Will. 4, c. 36; 10 Law J. Stat. 54.

The commissioners appointed by the 2 & 3 Will. 4, c. 125, for the purpose of advancing Exchequer bills to the owners of estates in certain of the West India Islands, which were damaged by the hurricanes in 1831, will be restrained from

making advances on the security of other estates than those which suffered damage. *Borrodale v. Brickwood*, 4 Law J. (N.S.) Exch. Eq. 11, s.c. 1 Y. & C. 60.

### WHARFINGER.

[See TROVER.]

### WIFE.

[See BARON AND FEME.]

### WILL.

[See LEGACY AND DEVISE (throughout).]

#### (A) VALIDITY.

- (a) *In general.*
- (b) *Testator's Capacity.*
- (c) *Execution and Attestation.*

#### (B) PROBATE; AND PROOF IN ECCLESIASTICAL COURT.

- (C) PROBATE DUTY.
- (D) PROOF IN GENERAL.
- (E) REVOCATION.
- (F) REVIVAL AND REPUBLICATION.
- (G) CODICIL.
- (H) CONSTRUCTION.

#### (A) VALIDITY.

##### (a) *In general.*

The statute 25 Geo. 2, c. 6, makes void a devise to an attesting witness, although there be three other attesting witnesses to the will. *Doe d. Taylor v. Mills*, 1 M. & R. 288. [Bolland]

Where an attorney, who draws the will of the testator, takes a benefit under it, the case is to be considered with peculiar jealousy; and the jury, who try the validity of the will, must be satisfied that the testator knew its contents; but their consideration need not be confined to direct evidence, and they may find for the will upon circumstantial evidence. *Raworth v. Marriott*, 1 M. & K. 648.

##### (b) *Testator's Capacity.*

Although the instructions for a will may not have originated with a testator, yet his subsequent approval of them is sufficient to render his will valid. Weakness of mind, and forgetfulness, are not sufficient to invalidate a will, if it is proved that the mind of the testator was, when called to exertion, capable of attention and application. *Tufnell v. Constable*, 3 Kn. 128.

*Quære*, whether in an action of ejectment by heir against devisee, letters written to the testator by persons since dead, and found among the testator's papers after his death, are admissible in evidence to shew his competency. *Wright v. Doe d. Tatham*, 3 Law J. (N.S.) Exch. 366, s.c. 1 Ad. & E. 3.

##### (c) *Execution and Attestation.*

[See, *post*, Codicil.]

Will to pass lands in Lower Canada, must be executed either according to the forms required by the French law, or those required by the English Statute of Frauds. *Meiklejohn v. Attorney General of Lower Canada*, 2 Kn. 329.

It is not necessary that a will of lands should be signed by the testator in the presence of the attesting witnesses, or that they should see the signature; and, therefore, a will of lands, subscribed at the testator's request by three witnesses, two only of whom see his signature, is valid. *Johnson v. Johnson*, 2 Law J. (N.S.) Exch. 73, s.c. 1 C. & M. 140; 3 Tyr. 73.

A power to appoint by will to be duly executed and published, under the hand and seal of the testatrix, in the presence of, and attested by three or more credible witnesses, is satisfied by an instrument, signed, sealed, and delivered, as a last will and testament, concluding and attested as follows:—"In witness whereof I have set my hand and seal hereto, this 5th day of August 1801, in the presence of the underwritten. Mary Swift. (L. S.) Signed, sealed, and delivered, this 5th day of August 1801, as the last will and testament of the said testatrix, Mary Swift, who in her presence, and in the presence of each other, have put our names as witnesses thereof." *Ward v. Swift*, 2 Law J. (N.S.) Exch. 46, s.c. 1 C. & M. 171; 3 Tyr. 122.

#### (B) PROBATE; AND PROOF IN ECCLESIASTICAL COURT.

[See ADMINISTRATION—PRACTICE, *In the Ecclesiastical Courts*.]

The husband and wife having been drowned together, the Court (the wife's next-of-kin not opposing) granted probate, in common form, of the husband's will to executors, substituted "in the event of her dying in his lifetime," the will appointing her executrix, "if living at his decease." *In bonis Selsey*, 3 Hag. Ec. 748.

Royal peculiars being altogether independent of the Archbishop, the will of a deceased who left goods in two royal peculiars, in one of which he died, and the other goods in one diocese only within the province, is rightly proved in the royal peculiar where he died. The executor, who so proved the will, and appeared under protest to a citation, calling upon him to take a prerogative probate, dismissed. *Smith v. Smith*, 3 Hag. Ec. 757.

*Quære*, whether the probate of one royal peculiar will authorize administration of goods in another. *Ibid*. 763.

If a deceased died in a royal peculiar, and left *bona notabilia* in two dioceses within the province, the Prerogative Court must grant probate on an official copy or exemplification of the royal peculiar probate. *Ibid*. 765.

A will written eighteen years before the testator's death, containing this passage, "Least I should die before the next sun, I make this my last will," admitted to probate, the Court holding the disposition not contingent, and adherence shewn by careful preservation. *Burton v. Collingwood*, 4 Hag. Ec. 176.

An unattested letter, purporting to dispose of realty and personalty, and conditional on the deceased's dying during a visit to Ireland, not admitted to probate in common form, (the parties prejudiced being minors,) the deceased having returned from Ireland, and having subsequently executed a will attested by three witnesses, disposing of land, (purporting to be bequeathed in the letter,) appointing an executrix and guardian of his children, but



not referring to the letter, nor to his personalty. *In re Ward*, 4 Hag. Ec. 179.

A testator having executed his will, disposing of realty and personalty, and duly attested, subsequently wrote, signed and dated a paper, complete in disposition, but unattested, having the appearance of a draft, and spoken of in a memorandum subjoined, as intended to be settled and transcribed by his attorney, but "if he should have no opportunity, to be acted upon if it could be done fairly; if not, the former to be resorted to." The testator, having the opportunity of completing such paper, which, if admitted to probate, would have been inoperative totally as to the realty, and partially as to the personalty, must be presumed to have abandoned it, and to have reverted to the regular will. *Elsden v. Elsden*, 4 Hag. Ec. 183.

Where a will is not traced out of the deceased's possession, but is not forthcoming, the presumption of law is that he destroyed it, (though that presumption may be rebutted by proof,) and the presumption requires stronger evidence to rebut it, when a charge of spoliation is made. The evidence establishing that the deceased had possession of, and access to his will, and might have destroyed it, and the presumption of law not being rebutted, a copy pronounced against. *Wargent v. Hollings*, 4 Hag. Ec. 245.

Where a paper is unfinished, the party setting it up must satisfy the Court, first, of fixed and final intention; and, secondly, that its completion was prevented by the act of God. The strength of evidence required varies according to the progress which the paper has made towards completion. Pencil memorandum, written by, and in the pocket-book of the person who produced it, but sworn to have been written down from the instructions of the deceased, at a single interview, three days before his sudden death, by apoplexy, not signed, nor ever seen or afterwards referred to by the deceased, nor led up to or confirmed by conduct, declarations, or affections, but resting solely on the evidence of the writer, pronounced against with costs; the Court holding final intention not proved, even if the evidence of the only witness, whose credit was much shaken, had been fully believed.

*Quare*, whether the evidence of a single witness, *omni exceptione major*, but unsupported by any circumstances, makes legal proof of a testamentary act. *Theakston v. Marson*, 4 Hag. Ec. 290.

The deceased, in 1812, regularly executed a will, and, in 1818, two codicils to carry real estate. He, in February 1828, gave instructions for a new will, disposing of real and personal estate. The will was prepared for execution, read over to him, and altered; recopied, and the will again read over after the interval of some days. The deceased postponed the execution, and in March the will was again read over to him; pencil alterations of slight importance were then made. On the 14th of November 1829, further alterations were alluded to; the deceased said he would call and "finish" it on the 19th. He died suddenly on the 17th. The Court refused probate of this instrument, holding final intention not proved. *Gillow v. Bourne*, 4 Hag. Ec. 192.

An entry in an account-book, containing a full disposition of the property, appointment of executor, dated eight months before the testatrix's death,

which was sudden, subscribed, and carefully preserved, pronounced for, though containing these words, "I intend this as a sketch of my will, which I intend making on my return home." *Hattatt v. Hattatt*, 4 Hag. Ec. 211.

A paper beginning "This is the last will and testament of me Charles Abbot, made this 25th day of January 1831," and concluding, "in witness whereof, I have, to this my last will and testament, set my hand and seal, the day and year first above written," but which was not subscribed, nor sealed, (the deceased having lived sixteen months after the same was written,) pronounced against as unfinished and abandoned. *Abbot v. Peters*, 4 Hag. 380.

An allegation, pleading a paper beginning "Elizabeth Mary Hays, (dated, at the top, six months before her death, and disposing of all her property,) but not subscribed, and ending without a stop, written on a half sheet very fairly, without erasure, interlineation, or abbreviation, but containing no words to shew, on the one hand, any intention of doing anything further; nor, on the other hand, that she had finished it,—admitted to proof—the Court reserving all questions to the final sentence. *Salmon v. Hays*, 4 Hag. Ec. 382.

Allegation propounding instructions for a will, signed by the deceased, and written twenty months before his death, rejected, nothing being pleaded to shew that the completion of a more formal will was prevented; the presumption of law that the deceased had abandoned the disposition, being strengthened by his conduct, and the alleged declarations of adherence being too loose to repel the presumption. *Dingle v. Dingle*, 4 Hag. Ec. 388.

The strong presumption of law, is always adverse to an unfinished instrument materially altering and controlling a will deliberately framed, regularly executed, recently approved, and supported by previous and uniform dispositive acts; and this presumption is stronger in proportion to the less perfect state of, and the small progress made in, such instrument. To establish such a paper there must be the fullest proof of capacity, volition, final intention, and interruption by the act of God. Paper pronounced against. *Brewitt v. Brewitt*, 4 Hag. Ec. 410.

An apparent *prima facie* interest is sufficient to entitle a party, claiming as residuary legatee under a testamentary paper, to propound such paper. *Blewitt v. Blewitt*, 4 Hag. Ec. 414.

A will was propounded on behalf of an asserted widow and children, and was opposed by a first cousin. The interest of the opposer was denied. The proxy was "to propound the will, and to do all things necessary, and touching the validity thereof." No allegation propounding the will was given in, but witnesses were examined on an allegation pleading the marriage. The first cousin declared, that she proceeded no further. The Court, under such circumstances, refused to pronounce the allegation proved; and as no allegation propounding the will had been given in, decreed probate only in common form. *Barnes v. M'Bride*, 4 Hag. Ec. 377.

Probate refused to a paper professing to dispose of a testator's real and personal property, and subjecting them both to the payment of his debts and funeral expenses, which was in the testator's hand-

writing, and sealed and signed by himself, but not attested, although an attestation clause was subjoined to it.

The circumstances of a testator having subjected his real estate to the payment of his debts and funeral expenses, in writing, not attested so as to pass real estate, furnishes a strong, though not a completely irresistible, presumption against his final intention that that writing should be his last will. *Douglas v. Smith*, 3 Kn. 1.

A will need not originate with a testator, nor need proof be given of the commencement of such transaction, provided that it be proved that a testator completely understood, adopted, and sanctioned the disposition proposed to him, and that the instrument itself embodied such disposition.

A will opposed on the ground of alleged incapacity, fraud and conspiracy, and revoking a former will and codicils, (which gave the residue between the sister by the half blood and a stranger in blood,) made shortly before, but under circumstances not rendering a departure improbable, pronounced for with costs; though the instructions for such latter will were not proved to have originated with the deceased, though two (out of three) of the attesting witnesses were sons of the respective executors, considerably benefited by the will, and one of which, and three other principal witnesses were children of a niece by the whole blood, (the wife of one of the executors,) which niece and a sister were also largely benefited, and were immediately about the deceased, the credit of the witnesses not being shaken, and the will being sufficiently proved to have been adopted by the deceased, a free and capable testator. *Constable v. Tufnell*, 4 Hag. Ec. 465.\*

Where a testatrix had a power of appointment, and a general probate of her will of 1829, and codicil thereto, had been granted, the delegates, reversing a decree of the prerogative:—Held, that the Court of probate could not also grant an administration, with a will of 1815, and codicils annexed, limited to become a party to proceedings in equity, touching the execution of the power by such wills; but must itself decide whether the will of 1815 was under the circumstances revoked by the will of 1829, and thereupon grant either a probate of the will and codicil of 1829 alone, or a probate of those papers, and of the will of 1815, and its codicils, as together containing the will. *Hughes v. Turner*, 4 Hag. Ec. 30.

Where there is a regularly executed paper disposing of realty and personalty, and an unexecuted paper in which the disposition of real and personal estates are blended and are dependent upon each other, the Court will not grant probate of such unexecuted paper. *Aliter*, where the disposition of the one is not dependent on the other. *Tudor v. Tudor*, 4 Hag. Ec. 199.

Certain alterations and interlineations being pleaded in a will to be forgeries, the Court, on the evidence of a witness, that she had seen the testator make such alterations, or probability arising from the state of his affections, and on a balance of evidence of handwriting, pronounced for probate of the will with such alterations, and condemned the opposing parties in costs. *Wickwick v. Powell*, 4 Hag. Ec. 328.

Probate in common form of an unattested will, granted on the affidavit of one person, only, to

handwriting, and the consent of the sole person in distribution. *In re Keeton*, 4 Hag. Ec. 209.

It has always been the doctrine of the Court, that similitude of handwriting, even with a probable disposition, is not sufficient to entitle a paper to probate without something to connect it with the deceased. *Rutherford v. Maule*, 4 Hag. Ec. 224.

An allegation pleading that a will made at Batavia, containing a revocatory clause, dispositive, and duly executed, was not intended to revoke or dispose, rejected. *Philipps v. Thornton*, 3 Hag. Ec. 752.

When probate of a will and codicil, both prepared by the same person, who was also an attesting witness, was called in, and the executor was put on proof of the codicil by a niece, who pleaded incapacity from apoplexy, without suggesting fraud, circumvention, custody, controul, or the improbability of the disposition, the Court (having, on the admission of a responsive allegation, strongly intimated its opinion, that the opposition was hopeless), at the hearing, the cause being unopposed, condemned the niece in costs. *Waters v. Howlett*, 3 Hag. Ec. 790.

The testatrix possessing a power of appointment, duly by will executed that power. By a later will, duly executed and attested according to the power, but without any recital of or reference to the power, she disposed of a real estate over which the power extended, left all the rest, residue, and remainder of her estates and effects, real or personal, plate, &c. or other property, whether in possession, reversion, or expectancy, or held in trust for her; revoked and made void all and every other will and wills by her at any time theretofore made, and declared this only to be her last will and testament. The Court, holding that the intention to revoke the former will was, taking all the contents of the latter will together, clear, refused probate of the two papers, as together containing her will, and granted probate of the latter paper alone. *Semble*, that the residuary clause in the latter will was not a due execution of the power as to the personalty, and that the revocatory clause would not have revoked the prior will, unless the intention had been clear. *Hughes v. Turner*, 4 Hag. Ec. 52.

A testator executed a will, and thereupon destroyed a former will, and subsequently executed two other wills. The last will was propounded, but abandoned. A decree then issued, calling on all parties interested to shew cause why probate of the instructions for the first will should not be granted; and the Court, on proof *per testes*, that the instructions were of the same effect as the first will, that that will was executed when the deceased was sane, but destroyed, and the other wills executed when insane, pronounced for the instructions, and refused costs out of the estate to persons in distribution, who, by interrogatories, set up insanity when the first will was executed. *In bonis Brand*, 3 Hag. Ec. 754.

#### (C) PROBATE DUTY.

A testator bequeathed certain stock to trustees, subject to a power to be executed by deed or will, with or without power of revocation, and in default of appointment, to pay the dividends to the donee during her life, and, at her decease, to divide the principal amongst her children. After the death of the testator, the donee executed a deed according

to the mode prescribed by the will, wherein, after reciting, that she was desirous of executing the power, she directed the fund to be transferred to herself and a new trustee, with similar trusts, powers, and limitations, as were contained in the will; in pursuance of which deed the fund was transferred into the names of the donee and the new trustee. The donee afterwards, by will, "by virtue and in exercise and execution of the power and authority given and reserved to her in and by the said indenture, and of all and every other power," &c., appointed the fund to be transferred to certain persons, "in trust, that the same might be consolidated with, and become part of, her residuary estate, and follow the dispositions thereof thereafter contained:"—Held, that the deed executed by the donee was an exercise of the power under the original will; and that the fund thereby became her personal estate, in which she had a beneficial interest; and consequently, was liable to the payment of probate duty.

*Semble*, that probate duty attaches on property appointed by will, under a general and absolute power of appointment. *The Attorney General v. Staff*, 3 Law J. (N.S.) Exch. 6, s. c. 2 C. & M. 124; 4 Tyr. 14.

Probate duty is not payable, under 55 Geo. 3, c. 184, in respect of personal assets of an English testator domiciled and dying in England, which being locally situate in a foreign country at the time of his death, were not brought hither till after that event by his executors, though they had obtained an English probate in respect of his personalty situate in England, and proceeded by virtue of that probate to collect and administer in this country the whole of the assets. *The Attorney General v. Hope*, 4 Tyr. 878.

#### (D) PROOF IN GENERAL.

An attesting witness, on proving a will, stated that he had drawn up another paper, subsequently, for the testator, which he had signed:—Held, that the witness could not be asked, whether the testator, upon signing such paper, declared it to be his will, without either proving that the instrument so signed was lost or destroyed, or tracing it into the hands of the opposite party, and giving notice to produce it.

A will having obliterations and alterations upon the face of it, is not void, merely from one of the attesting witnesses saying that he did not observe them at the time when he attested. *Doe v. Phillips v. Morris*, 4 Law J. (N.S.) K.B. 146, s. c. 4 N. & M. 598.

#### (E) REVOCATION.

[See, *ante*, Probate; and, *post*, Codicil.]

Mere partition by agreement is not a revocation of a will, but the slightest addition, as (in the present case,) the payment of a sum of money for owelty of partition, is sufficient to cause revocation.

*Secus*, if such additional act had been done under the direction of the Court. *James v. Hanson*, 1 Law J. (N.S.) Chanc. 221.

A testamentary paper, giving a legacy to A "my executor" (being the person who was named executor in a former will and codicil) and giving "the

interest of all my remaining property to B, and at his decease, the principal to C," is a revocation of a former will and codicils. *Hutchinson v. Hutchinson*, 2 Law J. (N.S.) Chanc. 14.

A testator, after devising an estate in mortgage for a term, entered into an agreement for a loan to pay off the mortgage, and for the advance of an additional sum, it being stipulated that on the lender paying off the mortgage, the term should be assigned to a trustee for the testator; and that on the further advance, the trustee should assign the same to the lender. Accordingly, on the payment of the mortgage money, the term was assigned to the trustee, in trust for the testator, his heirs and assigns, and to be held, assigned, and disposed of, as he or they should direct or appoint; and, on the further advance a short time afterwards, the term was again assigned to the lender, for securing the amount of the loan:—Held, that this second mortgage did not change the estate of the testator, so as to operate as a revocation. *Johnson v. Johnson*, 2 Law J. (N.S.) Exch. 73, s. c. 1 C. & M. 140; 3 Tyr. 73.

A devised estates of which he had only the equitable fee, and, afterwards, agreed to sell part of the estates, and, to remove an objection taken by the purchaser, but which was not well founded, he suffered a recovery:—Held, that, though the recovery was an equitable one, and the purpose for which it was suffered was expressly mentioned in the deed declaring the uses, and though the limitations thereby made of the property not intended to be sold, were precisely the same as before the recovery, and were expressed to be in restoration and confirmation of them, the will was revoked. *Lock v. Cole*, and *Riccard v. Cole*, 5 Sim. 618.

Deceased died on the 19th of October, 1831, having made a will in 1820, and three codicils, all formally executed and attested to carry realty; he destroyed the will, but on each of the codicils was written "June 18, 1830, my will, John Plura," and other indorsements at a subsequent date, inferring that he considered that at such time he had no will. In 1830, he executed a new will and a codicil, the latter subsequent to June 1830, which will and codicil were not forthcoming, and in 1831 he executed a settlement. Three codicils, the settlement, and its envelope, were propounded as together containing the will; the Court, holding, first, that the destruction of the will of 1820, *prima facie* revoked the codicils; that the words written on the codicils were not conclusive of an intention that they should operate as substantive papers; that evidence *dehors* the papers was therefore admissible, and on such evidence that the will and codicils of 1830, must be presumed to have been destroyed by the deceased, but though destroyed, would *prima facie* have been revocatory of the former will and codicils, and that the settlement was intended as a substitution for the codicils, pronounced for an intestacy, and refused costs out of the estate. *Coppin v. Dillon*, 4 Hag. Ec. 361.

A married woman having a power to appoint personal estate, held in trust for her, by her last will and testament, notwithstanding her coverture, made a will in exercise of her power during the life of her husband. She survived her husband, and afterwards took an assignment from her trustee of the personal estate to herself. This assign-

ment does not operate as a revocation of the will. *Clough v. Clough*, 3 M. & K. 296.

J H devised his copyhold premises called P, &c. to the use of trustees, in trust for his wife, during her life or widowhood, or so long as she should reside on the premises; remainder to the use declared of his residue: he devised to the same trustees a freehold estate, charged with an annuity in trust for his daughter for life, remainder to the use of her children in tail, and in default of issue, upon the trust declared as to his residue; he further devised to the same trustees certain freehold premises, and all the residue of his real estate, in trust for his son H for life, charged with an annuity to testator's wife, remainder in tail male to the issue of his son; on failure of such issue, a further annuity being thereupon payable to testator's wife, to the use of his grandson G for life, remainder to the sons of his grandson in tail male; and on failure of such issue, to the use of the sons of his daughter in tail male, remainder in his own right heirs. He bequeathed all his ready money to his wife absolutely; the dividends of all his money in the funds to his wife for life; and all the personal property in and upon the copyhold premises, in trust for his wife, during such time as she should be entitled to the copyhold premises, and on the determination of her estate therein for his son, the devisee of the residuary real estate. The testator, by his codicil, referring to his will, and reciting the death of his son, devised to the husband of his daughter, after her death, the freehold estate devised by his will to her; charged his residuary estate with a further annuity to his wife, over and above those already limited thereout for her benefit; bequeathed two further annuities to his daughter and to her husband, and revoked the bequest of his personal property, in and about his copyhold premises, giving the same and the residue of his personal property absolutely to his wife, and in the event of her death before him, to his nephew. By a second codicil the testator appointed his wife sole executrix and residuary legatee of his personal property; and by a third codicil directed the proceeds of certain shares in the County Fire Office, to be enjoyed by his wife for life; after her death, by his daughter and her husband for life; and after their decease by his heir in possession. By a fourth codicil, revoking and making void several of the dispositions theretofore made by his will and codicils, of all his freehold, copyhold, and personal estate and effects of every kind and description, instead and in place of such devise, disposition, and bequest thereof, gave, devised, and bequeathed all and every his freehold, copyhold, and personal estate and effects of every kind and description whatsoever, and wheresoever situated, to his daughter for life, remainder to his grandson, and his heirs, in strict entail, the rents to accumulate for his benefit till he was twenty-one, and on failure of issue, as by his will directed, he ratified and confirmed the several annuities and donations by his will and former codicils bequeathed, and gave and bequeathed to his wife a further annuity with the like restrictions as the former were payable, in all other respects confirming his will and codicils:—Held, that the devise to testator's wife of the copyhold premises called P was not revoked by the fourth codicil. To revoke a clear devise,

the intention to revoke must be as clear as the devise. *Doe d. Hearn v. Hicks*, 8 Bing. 475, a.c. 1 Mo. & Sc. 759: a.c. 1 C. & F. 28, 6 Blyth, n.s. 37, affirming 1 Law J. Dig. 556; 1 Y. & J. 470.

A testator devised all his real estates to his children equally, and afterwards entered into contracts for the sale of his estates, but died before they were completed. The purchasers afterwards abandoned their contracts, because they were unable to procure a conveyance from some of the devisees, who were infants:—Held that, though the contracts were properly abandoned, the will was revoked as to the premises therein comprised. *Tebbutt v. Folkes*, 6 Sim. 40.

A latter will, disposing of realty and personalty containing a clause of revocation and uncanceled, is not revoked, and a former will revived, by reading over the former will, and by parol declarations, unaccompanied by acts, that it was his last will, the former will being found carefully deposited and locked up in a drawer, and the latter will, though in the same drawer, lying among useless papers; and all the devises and legacies lapsed. *Daniel v. Nockolds*, 3 Hag. Ec. 777.

Where a will is revoked by a second will, for the purpose of thereby making a substitution, and the substitution fails, by reason of a defect in the second instrument, the revocation does not prevail; but where a will is revoked *simpliciter*, and not for the purpose of substitution, the revocation will prevail, notwithstanding the absence of a substitution.

Testatrix devised all her real and personal estate to two trustees, A and B. A afterwards died, and the testatrix, by a subsequent codicil, revoked the estates given to A, and gave to C all the estates, rights, &c. by her will devised to A, as the same were vested in the said A, the same to be vested in C jointly with B; and by the same codicil she gave a legacy to C, and revoked a legacy given to A, and also an annuity given to another party. Between the making of the will and the codicil, she purchased another estate:—Held, by Sir J. Leach, that such estate passed by the codicil; and on rehearing, by Sir C. C. Peppys, that the codicil did not so operate. *Hughes v. Turner*, 4 Law J. (n.s.) Chanc. 141.

#### (F) REVIVAL AND REPUBLICATION.

A testator by his will devised certain freehold property and the residue of his real estates. After his will, he became seized of other real estates, and then made a codicil, executed so as to pass freehold land, reciting the devises in his will, and revoking them, and then made a fresh devise without expressly referring to the after-acquired lands:—Held, that the codicil was not such a republication of the will as would operate upon the after-acquired lands; and that they therefore descended to the heir-at-law.

After the death of the testator, the widow, in whose favour the devise in the codicil was made, supposing she was entitled to the rents of the after-acquired lands, entered into possession thereof and received them to the time of her death:—Held, that the heir-at-law of the testator, although he had acquiesced in ignorance of his rights, was entitled to an account against her executor of those rents and profits from the time of the testator's decease.

*Mongipenny v. Bristow*, 1 Law J. (n.s.) Chanc. 88, s. c. 2 R. & M. 117.

### (G) CODICIL.

The execution of a codicil, referring to an unexecuted will, on the same sheet of paper, according to the provisions of the Statute of Frauds, sets up the will as a will of lands. *Doe d. Williams v. Evans*, 2 Law J. (n.s.) Exch. 39, s. c. 1 C. & M. 42; 3 Tyr. 56.

A paper, in the nature of a codicil, but not attested so as to pass real estate, is not rendered effective as to real estate by a subsequent codicil, properly attested, on a separate paper, containing no reference, in terms, to the unattested paper. *Utterton v. Robins*, 2 Law J. (n.s.) K.B. 210, s. c. 2 N. & M. 821.

A testator gave all his property to trustees, and declared that he had made no provision for his grand-daughter K H, because her deceased father had, in his lifetime, received more than his other children would become entitled to under his will. He then declared trusts of an equal share of his property for each of his surviving children, for their lives, with remainders to their children. He then made a codicil as follows: "My dear daughters, is that you do give my dear grand-daughter, K H, 1,000*l.*, and that you will be kind to E S. And it is my desire that you do give her some part of my table-linen and sheeting. This is my last wish." By a subsequent codicil, he made some alteration in the bequest made by his will, in favour of one of his daughters, and, subject thereto, confirmed his will:—Held, that the second codicil confirmed the first, as being part of the will, and that the concluding sentence of the first codicil was sufficient to create a bequest of the 1,000*l.* to K H, and that, as the articles specifically given by it to E S, passed by the will to the trustees, and not to the daughters, so the 1,000*l.* was to be paid, not by the daughters out of their life interests, but by the trustees, out of the testator's general personal estate. *Hinsman v. Poynder*, 5 Sim. 546.

A testator bequeathed to his daughter 1,000*l.* consols for life, with remainder to her children. By a codicil, he revoked the gift of 1,000*l.* consols; and in lieu thereof he directed his executors to invest such a sum as would produce 40*l.* a year, to be paid to her for life. By a second codicil, he revoked the sum of 1,200*l.* given to her; and in lieu gave her 600*l.* absolutely:—Held, that the second codicil operated as a revocation of the annuity of 40*l.*, and that the daughter was entitled to the 500*l.* only. *Pilcher v. Hole*, 4 Law J. (n.s.) Chanc. 50.

A legacy of a sum certain, payable out of real estate, if given to A by a will properly attested, may, by an unattested codicil, be given to B, B being substituted for A; but where a residue, to arise from real and personal estate, was given to A by will properly attested,—held, that such part as consisted of the produce of realty could not, by a codicil attested by two witnesses only, be taken from A and given to B. *Collins v. Johnson*, 4 Law J. (n.s.) Chanc. 226.

Evidence of hand-writing alone not sufficient to establish testamentary paper. A codicil propounded upon such evidence, without any facts or ceremonies

connecting it with the deceased, pronounced against with costs. *Bussell v. Marriott*, 1 Curt. 9.

### (H) CONSTRUCTION.

A bequest for the use and benefit of A, to be paid to her, and settled on her during her life, at the time of her marriage, or in case if that she does not marry, and in the event of her *not marrying or dying*, the property to go over; A marries and dies without having had any children—*not marrying or dying*, construed to mean, dying unmarried. *Hawkins v. Hawkins*, 4 Law J. (n.s.) Chanc. 9.

A will professing to dispose of all the testator's property enumerated in another instrument—held, under the circumstances, to operate on that and all other property. *Stewart v. Stewart*, 4 Law J. (n.s.) Chanc. 230.

A gift over, on dying without issue:—Issue held to mean *children* from the context; and not too remote. *Ellis v. Selby*, 4 Law J. (n.s.) Chanc. 69.

Construction of a will, as to a power of sale given to trustees being discretionary or imperative. *In re Evans*, 4 Law J. (n.s.) Exch. 301, s. c. 2 C. M. & R. 206.

The supposed rule, that, in construing a will, the particular intent must give way to the general intent, is only to be applied to cases falling within the rule in *Shelley's case*.

*Semble*—that the rule is better expressed, by saying, that that construction will be put upon a will which gives effect to the greatest part of it.

Example in the case reported. *Doe d. Gallini v. Gallini*, 3 Law J. (n.s.) K.B. 71, s. c. 5 B. & Ad. 621; 2 N. & M. 619; s. c. (in error) 3 Ad. & E. 340.

How far, and in what cases, the particular intent in a will must give way to the general intent appearing upon the same instrument, when the two intents are inconsistent, *quære*. *Doe d. Gallini v. Gallini*, 4 Law J. (n.s.) Exch. 337, s. c. 3 Ad. & E. 348; 4 N. & M. 893.

A testator directed his executor to permit his wife to enjoy a copyhold estate for life, and afterwards to dispose of it and invest the produce for the purpose of educating the children of H P; he then gave another copyhold for the benefit of the same children, and subsequently gave to his executors all the residue "for the purposes thereinbefore mentioned":—Held, that the children were absolutely entitled to the residue, and that the widow was not entitled to a life interest therein. *Parrott v. Wallace*, 4 Law J. (n.s.) Chanc. 36.

A, by his will, gave, devised, and bequeathed all his estate and effects, both real and personal, which he should die possessed of, to trustees, to pay certain portions of the rents, and invest the residue; and after the death of B, to sell all the real and personal estate, and divide one-third of the produce among all the children of B. After the date of the will, the testator purchased land. B died in testator's lifetime. At the death of the testator, his heir-at-law was one of the children of B:—Held, that the will extended to the land purchased after the date of it, and that the heir, taking benefit as a legatee, must elect. *Churchman v. Ireland*, 1 Law J. (n.s.) Chanc. 172, s. c. 4 Sim. 520.

A will must be construed according to the law of the country where it is made, and the testator is domiciled. The will of a subject of Great Britain

made in India must be construed according to the laws of England.

Upon a question arising in the Court of Session on the doctrines of the law of England, the Court is justified in taking and acting upon the opinions of English lawyers, given upon a case laid before them. Money vested in heritable bonds becomes real estate; and where upon the construction of the will no clear intention can be collected to pass real estate, the heir-at-law taking a benefit under the will is not put to his election, but may take the real estate as heir, and also personal estate under the will. A will by which the testator recites, that "he considers it his duty, while in health, to execute a settlement of all his estate and effects," appointing executors in England and in India; and directing that the residue of his estate in India should be remitted to his executors in Scotland, and that they should divide that residue, and the whole of his property in Europe, equally between his brothers and sisters:—Held, not to pass the heritable bonds. *Trotter v. Trotter*, 4 Bligh, n.s. 502.

A testator bequeathed to his wife all his property, whatsoever it might be and wheresoever it might lie, on condition of her paying 180*l.* a year to her mother for her life; and at his wife's death he gave the whole property to be equally divided among those of his children who might survive her; and if his wife married again, he gave 400*l.* to each of his children, at twenty-four, but if not, he left them to her kind and indulgent care:—Held, that, under this will, the widow of the testator took only a life interest in the property, and, upon the death of all the children in the widow's lifetime, there was an intestacy; and, upon her death, the next-of-kin, according to the statutes, were held to be entitled. *Josita v. Hammond*, 3 Law J. (n.s.) Chanc. 148, s. c. 3 M. & K. 110.

A testator gave the interest of a mixed fund to his wife for life, with remainder to his nephews and nieces; and he declared, that the whole of the property given to his wife for life should, on her decease, after payment of her just debts and funeral expenses, be divided amongst the several persons there mentioned, to whom he had given legacies. The Master of the Rolls declined deciding in the lifetime of the widow what interest she took under the words "after payment," &c. *Collins v. Johnson*, 4 Law J. (n.s.) Chanc. 226.

Testatrix invested the sum of 500*l.* in the purchase of an annuity for the life of M E, which was secured on his estate, and she insured the life of M E for the sum of 500*l.* By her will, the testatrix bequeathed "the sum of 500*l.*, secured on the estate of M E, and by a policy:"—Held, that bonuses which had been added to the policy, did not pass under this bequest. *Simpson v. Mountain*, 4 Law J. (n.s.) Chanc. 221.

A testator gave a real personal estate in trust, for the separate use of his wife for life, with remainder to his children, and in case all his children died under twenty-one, then unto his wife, to will as she might think right. The children all died under twenty-one:—Held, that the wife took an absolute interest, and not a life estate, with power of appointment by will. *Lomas v. Matthews*, 4 Law J. (n.s.) Chanc. 238.

A testator bequeathed the residue of his property,

to trustees, upon trust as to one-third part of the interest, to apply the same for the maintenance of the children of his son George, till they shall severally arrive at the age of twenty-one years; one other third part of the interest for maintenance of the children of his son Thomas, till twenty-one; and the other third part upon the like trust, in favour of his son Jacob's children till twenty-one. And as the said children should severally arrive at the age of twenty-one, he directed his trustees to transfer the whole produce of such residue to all and every the children of his sons, George, Thomas, and Jacob, equally share and share alike. Then followed a proviso, that if any of the children of his sons, George, Thomas, and Jacob, should die under twenty-one, their shares of the principal should go to the survivors of such children of his said sons respectively:—Held, that the trusts declared of the principal of the residue, were to be considered as referable to each third, as a distinct fund; and that the time of division of each third was to be ascertained separately, by the eldest child of each family attaining twenty-one. *Schlenker v. Schlenker*, 3 Law J. (n.s.) Chanc. 43.

Gift in remainder "in case A B should die under twenty-one without issue, or, leaving issue, all of them should die before twenty-one:"—Held, on appeal, confirming the decision of the Master of the Rolls, not to take effect on A B dying unmarried and above twenty-one. *Leonard v. Flight*, 4 Law J. (n.s.) Chanc. 225.

A testator, after giving specific and pecuniary legacies, willed that A and B should divide, equally, any monies which might remain to his account after payment of his debts and pecuniary legacies. The testator, at the date of his will, and at his death, had money accounts subsisting between him and his bankers, and other persons:—Held, that the bequest did not pass his residuary estate, but only the balances due on those accounts, subject to the debts and legacies. The Court of Chancery is not bound by the decision of the Ecclesiastical Court, as to the effect of a bequest. *Hastings v. Hane*, 6 Sim. 67.

W G, by his will dated 1775, devised his estates to his nephew for life, with remainders to his first and other sons in tail male. T G, the nephew's eldest son, after his father's death, suffered a recovery, and limited the estates to himself for life; remainder, subject to a term for securing a jointure and raising portions for his younger children, to his first and other sons in tail male. S F, by his will dated 1804, devised his estates to trustees, in trust for the second and subsequently born sons of T G in tail male; provided that if the lands devised by W G to T G in tail male, should descend to or devolve upon any son of T G or any heir male of such son, and the person on whom those lands should descend or devolve, should under the trust of his S F's will, be tenant in tail male of his estates, so as to be then actually in the possession or receipt of the rents and profits thereof; then his estates should be in trust for the person who would be entitled to his estates under his will, if the person on whom W G's estates had so descended or devolved were dead without issue. T G had three sons, the eldest died in his lifetime; then T G died:—Held, that as W G's estates came to T G's second son, encumbered with the term, S F's estates did

not go over under the shifting clause. *Fazakerley v. Ford*, 4 Sim. 390.

In 1775, W G devised certain estates to T H, afterwards T H G, for life, with remainder, subject to an annuity in favour of his T H G's widow, (if any), to the use of the first and other sons of the said T H, afterwards T H G, successively in tail male. Under that devise, T G became tenant in tail in possession, and he having suffered a recovery, by marriage settlement, (to which S H F, afterwards mentioned, was a party,) in 1801, settled the estates to the use of himself for life, with remainder (subject to a certain rent-charge for his widow for her life, and a term of years for raising portions for younger children,) to the use of his first and other sons successively in tail male;—that settlement contained a power for the trustees therein named, to sell and exchange the estates or any part thereof, and directed the money to arise from such sales to be laid out in lands, to be settled to the same uses. In pursuance of such power, several sales and exchanges were effected by the trustees; and, with some parts of the monies arising from such sales, estates were purchased by them, and other parts of the monies remained uninvested in lands, but placed out at interest on securities. By will, in 1804, S H F devised his estates in trust for the second son of T G in tail, and by a shifting clause provided, that in case the estates devised by the will of W G should descend to or devolve upon the person then actually in possession, or entitled to the rents and profits of the estates devised by his will, that such estates should be held in trust for the next person entitled under the trusts in his will contained. S H F died in 1818, at which time the plaintiff was the second son of T G. In 1816, the eldest son of T G died, an infant, and unmarried. In May 1829, W, who was the plaintiff, having attained his age of twenty-one years, entered into possession of the estates devised by the will of T G, not sold under the power contained in the settlement of 1801; and also of the estates purchased or received in exchange under that power; and in August 1829, suffered a recovery of the estates devised by the will of S H F. Upon a case submitted for the opinion of the Court of King's Bench by the Lord Chancellor, in which the question made was, whether under the will and codicil of S H F, the plaintiff H H F is now entitled in possession to the estates thereby respectively devised:—Held, by Denman, C.J.; Parke, J., and Patteson, J., upon the supposition, that, according to the practice of the Court of Chancery, monies produced by the sale of settled estates under a power of sale and exchange, not yet actually invested in land, are yet to be considered as actually so invested, that the lessor of the plaintiff was entitled in possession to the estates devised by the will of S H F; Taunton, J., upon the same supposition, being of a contrary opinion. *Fazakerley v. Ford*, 2 Law J. (n.s.) K.B. 111, s.c. 2 N. & M. 1.

Testator gave the interest of 1,000*l.* to a married lady, to be paid to her so long as she should continue unmarried after the death of her husband:—Held, that she was not entitled until the death of her husband. *Biggs v. Browne*, 4 Law J. (n.s.) Chanc. 246.

A devise which, taken alone, would convey the legal estate, may be qualified and controlled by a subsequent devise to trustees inconsistent with that estate, if such qualification be necessary to enable the trustees to perform the duties of the trust.

Accordingly, a testator gave a freehold house, called Plasbach, to his grand-daughter M R, and if she died without issue, to W R, "to be freely possessed and enjoyed, his heirs and assigns for ever"; he then made several devises and bequests to his grandchildren, and gave to his wife "the sum of 20*l.* yearly, and every year, as long as she lives, to be paid out of the freehold estate and the lease of Penlan, by trustees hereinafter named; and at the same time, notwithstanding there will be nothing to the grandchildren as long as their grandmother lives," and appointed two persons "as trustees, to look in, that justice should be duly administered between the said parties": M R died during the life of the testator, leaving no issue:—Held, that the legal estate did not vest in W R, but passed, by implication, to the trustees, inasmuch as they could not otherwise execute the trust for payment of the annuity to the testator's widow. *Anthony v. Rees*, 1 Law J. (n.s.) Exch. 44, s.c. 2 C. & J. 76; 2 Tyr. 100.

A testator gave all interest and dividends of all such stock as he might have in the public funds to one for life, and gave "the principal money so invested" to others in remainder; he possessed a sum of 220*l.* long annuities at his death:—Held, a specific gift of the long annuities for life; and that the parties in remainder were not entitled to have the long annuities converted, and the produce invested for their benefit, in a fund which was not perishable. *Walker v. Tillott*, 4 Law J. (n.s.) Chanc. 232.

A testator, by will, bequeaths 300*l.* a year to A B for life, and if A B "dies without issue," then the principal over to other persons:—Held, that the limitation over on A B dying without issue, was void, as being too remote; for the words "dying without issue" must be construed to mean a general failure of issue, and not a dying without issue living at the death of A B; and that A B took an absolute interest. *Lepine v. Ferard*, 1 Law J. (n.s.) Chanc. 150, s.c. 2 R. & M. 378.

A testator inserted in his will a proviso, that in case certain contingent property and effects in expectancy should fall in during his wife's life, his trustees should settle real estates, which the testator had previously devised among the children, to his eldest son for life, with remainder to his children in tail.

Evidence being tendered to shew what these expectancies were, it was held, that the proviso was void for ambiguity, and no evidence could be admitted to explain the intention. *King v. Badesley*, 3 Law J. (n.s.) Chanc. 206, s.c. 3 M. & K. 417.

A testator, after giving a life interest in the residuum of his property to his daughter for life, with remainder to her children, proceeded—"And in case my said daughter should die under the age of twenty-one, without issue, or, leaving issue, all of them should die before the age of twenty-one years, then upon trust to pay and apply the residue amongst my next-of-kin." The daughter attained

twenty-one, and died unmarried:—Held, that the gift over to the next-of-kin did not take effect, but that the representatives of the daughter were entitled to the residue as undisposed of. *Leonard v. Flight*, 4 Law J. (N.S.) Chanc. 89.

The testator bequeathed the residue of his estate to A B, in trust, to apply the income for the maintenance of C D until he attained the age of thirty, and then in trust to pay him the principal, with power to advance any part of the principal in the meantime—there was no gift over:—Held, that C D was absolutely entitled to receive the money on his attaining twenty-one. *Bailey v. Smith*, 4 Law J. (N.S.) Chanc. 249.

A testator directs two trustees to invest, out of the residue of his real and personal estate, 4,000*l.*, upon trust for his grand-daughter for life, &c. By his codicil, he says—"Whereas I have given to (the two trustees) 4,000*l.* navy 5*l.* per cent. annuities, in trust for my said grand-daughter; and being desirous that such trust should be executed by three persons, I hereby appoint &c. (another trustee); and it is my will that my said trustees should transfer the said stock to my said grand-daughter, free from all deductions." The testator, at the date both of the will and of the codicil, had 10,000*l.* navy 5*l.* per cent. annuities.

On a demurrer to a bill filed to obtain a declaration that the grand-daughter was entitled to the stock absolutely,—held, that she was not so entitled. *Barry v. Crundall*, 4 Law J. (N.S.) Chanc. 264.

Conditional bequest "to the fellows and demies of Magdalen College, Oxford," upon the happening of a particular event,—held, void for uncertainty, the language of the condition, and the description of the legatees, being so loose and obscure, that the Court was unable judicially to collect the intention of the testator with respect either to the individuals who were to take, or the time and manner of their taking. *Attorney General v. Sibthorp*, 2 R. & M. 107.

Testator bequeathed a sum of 6,000*l.* in trust for his daughter's life; "and on her decease, I give the said 6,000*l.* to the children, or their descendants, of T F, in such proportions to each as my daughter may direct." The daughter died without having made any appointment:—Held, that the children of T F were entitled to the fund to the exclusion of their issue. *Jones v. Torin*, 6 Sim. 255.

Devise of all testator's freehold and real estates in the county of L and city of L. Testator had no estates in the county of L, but a small estate in the city of L, inadequate to meet the charges in the will, and estates in the county of C, not mentioned in the will:—Held, that the devisee could not be allowed to shew, by parol evidence, that the estates in the county of C were devised to him in the draft of the will; that the draft was sent to a conveyancer, to make certain alterations, not affecting the estates in the county of C; that by mistake he erased the words county of C; and that testator, after keeping the altered will by him for some time, executed it without adverting to the alteration as to the county of C. *Miller v. Travers*, 8 Bing. 244, a. c. 1 Mo. & Sc. 342.

Testator bequeathed his real and personal estate to trustees, in trust to pay an annuity to his wife,

and to raise and pay, to each of his children; 2,000*l.* on their attaining twenty-one, and to accumulate the surplus income of the trust property during the life of his wife, and, after her death, to sell the property, and divide the proceeds amongst his children on their attaining twenty-one; and in case all his children should die in the lifetime of his wife, or under twenty-one, and without leaving issue, then, after his wife's death, to sell the trust property, and divide the proceeds amongst certain other persons:—Held, that or ought to be read as and; and that the children, having attained twenty-one, were absolutely entitled to the property, though their mother was living. *Miles v. Dyer*, 5 Sim. 435.

Testator having a foreclosed mortgage in fee of certain farms in Lancashire, gave, amongst other things, to his wife for life, "the interest or proceeds of certain farms in the county of Lancaster, mortgaged to me for 2,500*l.*;" and after her decease, "one-third part of the sum of 2,500*l.* principal money disposed of in mortgage of the farms aforesaid," to his daughter Harriet; and he declared, that after his wife's decease, his daughter Elizabeth should inherit and enjoy the bequests aforesaid, in the same proportion as her sister Harriet; and that his son should, in like manner, inherit and enjoy one-third part of the aforesaid bequests, upon the same conditions as his daughters:—Held, that the farms passed, as real estate, to the testator's wife for life, with remainder to his son and daughters, as tenants in common in fee. *Le Gros v. Cockersall*, 5 Sim. 384.

Testator having estates in Jamaica and England, by his will directed his English estates to be sold, and 10,000*l.* to be paid, out of the produce, to the plaintiff. He afterwards sold his English estates, and, by an *unattested* codicil, recited that he had so done, and directed that, notwithstanding, the 10,000*l.* should be paid to the plaintiff, and charged all his estates with the payment thereof. He then made another codicil, which was duly attested, and in which he referred to his will, and ratified and confirmed all the provisions and bequests which he had thereby made in the plaintiff's favour:—Held, that the Jamaica estates were liable to the payment of the 10,000*l.* *Gordon v. Lord Reay*, 5 Sim. 274.

When a testator limits his residuary property to one for life, with remainder over, it is *prima facie* to be intended that the testator means that the property which is given to the tenant for life is to pass to those entitled in remainder; and if any part of the property be of a wasting nature, as long annuities, or leasehold, it must be immediately sold and converted into permanent property, unless, upon the whole context of the will, it shall appear that the testator had not that intention.

Where the testator gave the residue of his estate, real and personal, to his executors, upon trust to permit his wife to receive the rents, profits, and annual proceeds thereof to her sole use during her life; and after her decease, upon trust to sell his freehold house in Oxford Street, and also his leasehold house, by auction; and the testator desired that E A should be employed as auctioneer, to convert the whole of his estate into money for the purpose therein mentioned:—it was held, that the



widow was entitled to enjoy for her life the income of the testator's long annuities. *Alcock v. Soper*, 2 M. & K. 699.

A testatrix bequeathed the sum of 100*l.*, to be put out on good security by her executors thereafter to be nominated, and the interest to be annually paid by her executors to A B, of W, and his successors, so long as the said A B and his successors should teach, in the said town of W, the gospel of Christ, under the name of orthodoxy. The evidence shewed, that A B, in the lifetime of the testatrix, preached to a congregation, in W, of Calvinists, or, as they called themselves, Orthodox Independents:—Held, that the minister for the time being of the congregation at which A B preached in the lifetime of the testatrix, was entitled, so long as he preached the doctrines preached by A B in the lifetime of the testatrix, to the interest of the legacy. *Attorney General v. Molland*, 1 Yo. 562.

Testator directed his trustees to sell his real and personal estate, and to apply the produce in paying his debts, and the legacies thereafter given. The testator afterwards gave legacies by codicils, one of which was duly attested:—Held, that only the legacies in the will were payable out of the real estate. *Strong v. Ingram*, 6 Sim. 197.

A testator bequeathed 2,000*l.* consols to trustees, upon trust to pay the interest to his daughter S, to her separate use, during her life, the principal to go to her heirs, or any other she might choose to will it to. S married, and, by a deed in the Scotch form, and executed in Scotland, reciting the will, she granted and assigned the 2,000*l.* consols, from and after her decease, to and in favour of her husband and his son by a former marriage:—Held, that the words "to will it" meant to dispose of it by will, and that the disposition of the fund by the deed, in the Scotch form, was not a valid execution of the power. *Paul v. Hewetson*, 2 M. & K. 434.

A testator gave to his wife all and every part of his property in every shape, and without any reserve, for her life, and at her death, the property so left to be divided, one half among certain persons mentioned, the other half to be at the sole disposal of his wife. Part of the testator's property was leasehold:—Held, that the persons to whom a moiety of the testator's property was given over, were not entitled to have the leasehold property sold, but that the widow was entitled to enjoy it for her life. *Collins v. Collins*, 2 M. & K. 703.

Testator gave his real and personal estates to his wife for life, remainder to his great-nephew, F W, son of his late nephew, and expressed it to be his particular wish and request that his wife, together with F W's grandfather, should superintend and take care of his education, so as to fit him for any respectable profession or employment:—Held, that F W was entitled to be maintained and educated, during his minority, in the manner described, out of the income of the testator's estates. *Foley v. Parry*, 5 Sim. 138, s. c. 2 M. & K. 138.

A testator, seized of freeholds and copyholds in fee, and leaseholds for lives, devised "all his real estate, whatsoever and wheresoever:—Held, that the copyholds and leaseholds for lives, as well as the freeholds in fee, passed, notwithstanding some parts of the will were inapplicable to them.

Testator gave his son, in case he should live to attain twenty-one, such part of his real estate as his son should choose, but not exceeding the yearly value of 350*l.*; and to his daughter, such part of his real estate as should remain after his son should have made his choice, or of the whole of his real estate, in case his son should not live to choose his part, as she should choose, but not exceeding the yearly value of 360*l.*:—Held, that the son was entitled to priority of choice on attaining twenty-one, and that there was to be no apportionment, although he might not leave for the daughter lands of the yearly value of 360*l.* *Weigall v. Brome*, 6 Sim. 99.

Testatrix devised all her messuages situate in Denmark Court. She had five houses in the Court, and another which fronted towards the Strand, and formed one side of a covered passage leading to the place where the five were situate, and which had attached to the back of it an outbuilding abutting on ground in Denmark Court:—Held, that the five houses only passed. *Newton v. Lucas*, 6 Sim. 54.

Where real and personal estates are given together for life, and so limited over, that a child of the tenant for life would take a vested interest in the real estate at its birth, and in the personal estate at twenty-one, being a son, or at twenty-one or at marriage being a daughter, and there is a gift over in the event of the tenant for life dying without issue, it is to be intended a dying without such issue as would take by force of the prior limitations.

A testatrix, after bequeathing divers annuities and legacies, and amongst others, a sum of stock to M M, to vest at twenty-one or marriage, devised and bequeathed a West Indian plantation, and all the residue of her money in the funds, after payment of the annuities and legacies thereinbefore bequeathed, and also her plate, books, and certain portraits, to E G T and M T for their lives equally, and after the death of either, the whole to the survivor for life; and after the decease of the survivor, then unto such children of M T as she should by deed or will appoint; and in default of appointment, then the plantation, and the residue of the money in the funds, to be equally divided among the said children, and their heirs, and if but one child, the whole to such child, and his or her heirs; the funded property to be an interest, vested in them, being sons, at twenty-one, and being daughters, at twenty-one or marriage; but in case M T should die without issue of her body lawfully begotten, the testatrix devised the plantation equally among all the children of A W and their heirs; and in case M T should die without issue as aforesaid, she then bequeathed her said residue of her money in the funds, and all her said plate, books, and portraits, unto J M for life, and after his decease, to his eldest son for ever; but in case J M should die under age, and without issue, then the said residue of her money in the funds, plate, books, and portraits, unto M M absolutely. All the rest and residue of her estate and effects the testatrix gave and bequeathed unto E G T and M T absolutely. M T having survived E G T, and died without having been married,—it was held, that J M took a life interest in the funded property; that J M took no interest in the plate, books, and portraits,

the limitation over of those articles being too remote; that the stock legacy to M M, which had lapsed by her death under age and unmarried, passed under the residuary bequest of the funded property for the benefit of J M, and did not sink into the general residue. *Malcolm v. Taylor*, 2 Russ. & M. 416.

Testator bequeathed his residuary estate to trustees, in trust for his wife for life, and, after her decease, "to preserve the then remaining part of my estate for the grandchildren of my brother C, to be by them received in equal proportions when they shall severally attain the age of twenty-five years; and when the youngest shall have attained the age of twenty-five years, and he or she shall have received their final dividend or share of my estate, the trust shall cease." Testator left his widow and brother surviving. Eight grandchildren of the brother were in existence at the widow's death, and several were born afterwards:—Held, that the bequest was not void for remoteness, but that those only of the grandchildren who were in existence at the widow's decease were entitled to share in the testator's residuary estate. *Kevern v. Williams*, 5 Sim. 171.

Testator gave annuities out of any money arising from whatever dividends he might die possessed of in the Bank of England, and the residue of the said dividends to his brother A, to enable him to assist such of the children of his brother F as he should find deserving of encouragement; and, upon the demise of the annuitants, or any of them, the testator gave each annuitant's proportion of the before-mentioned dividends to his brother A, to be at his disposal, but the principal to remain in the Bank:—Held, that no trust was created for the children of F, but that A took absolutely the capital of the testator's stock, subject to the annuities. *Benson v. Whittam*, 5 Sim. 22.

Testator gave a sum of stock to his wife for life, and after her death to his sons and daughter; and he directed the interest of his daughter's share to be paid to her for her separate use for life, and, at her decease, the capital to be divided amongst such children as she should have living at his decease, the shares of sons to be paid at twenty-one, and of daughters at twenty-one or marriage, provided their mother was then dead, otherwise her children's shares were not to be paid to them until her decease; but if the testator's daughter had no children living at her decease, her share was to be equally divided amongst such of his sons as should be then living; and if any of his said sons and daughter should die before his wife, and without leaving issue, their shares were to be divided amongst his other children:—Held, that the daughter's children living at the testator's death took absolute vested interests at twenty-one, though their mother was still living; and that her interest in the share of one of the testator's sons, who died in the lifetime of his widow, was not subject to the same trusts as her original share, but vested in her absolutely. *Gibbons v. Langdon*, 6 Sim. 260.

Testator gave one-third of his residue to his niece, which he desired might be settled, by his executors, on her, for her separate use, for her life, but to devolve to her issue at her death, and failing issue, then to revert to his nephew. The Court

directed the third to be settled in trust for the niece, for her separate use, for life, and, after her death, in trust for her issue then living; and if there should be no such issue, then in trust for the nephew. *Stonor v. Curwen*, 5 Sim. 264.

Testatrix directed the interest of her residuary estate to be applied in defraying the expenses of the education of her nephews, George and Charles, and the principal to be applied in binding them apprentices at the age of fourteen, or to be reserved till they attain twenty-one, to commence business. "In the event of George and Charles (both or either of them) being settled before this will comes in force, I provide that the next boy (James or Henry) have the benefit, and so on." George and Charles survived the testatrix, but died under twenty-one:—Held, that James and Henry were entitled to the residue. *Prestwidge v. Groombridge*, 6 Sim. 171.

A testator directs the produce of his real estates to be invested by his executors, in their own names, in 4l. per cent. consols. He then directs them to transfer the 4l. per cent. consols, and 3l. per cent. consols, then standing in his name, to the said accounts in their own names, and afterwards disposes of "the said 4l. per cent. trust stock." This disposition, under the special provisions of the will, includes the 3l. per cent. consols which were standing in his name at the making of the will. *Jagges v. Johnson*, 2 M. & K. 64.

Testator devised an estate to trustees in trust for R T for life; and after the death of R T, in trust to convey the estate unto, between, or amongst all and every and such one or more of the child or children of R T, who should be living at his decease, and the issue of such of them as should be then dead leaving issue, such issue to take between or amongst them the share which their parent or parents would have been entitled to if then living. R T survived the testator, and died leaving several children, and the issue of another child who was dead at the date of the will:—Held, that such issue were entitled to take amongst them an equal share of the estate with the surviving children. *Titherleigh v. Harbin*, 6 Sim. 329.

A testator devised as follows: "I give all my personal leasehold mortgages and freehold estates, goods, ready money, chattels wheresoever, to my brother, T D, in trust for my nephew and nieces, J D, A D, M A D, and E D, when the younger shall come of age; also, if my brother, T D, should have children, then his children to have equal share with my four before-mentioned nephew and nieces, he, my brother, T D, to pay for their education and maintain them, if any is wanted, he paying himself for any trouble he may be at, and he living at free cost in the house I now occupy, keeping Sarah, my servant, if they can agree, and if not, to give her 1s. per week for life":—Held, that under this devise the nephew and nieces of the testator named in the will were entitled to the rents and profits of the estate when the youngest came of age; but in the event of any child or children born to T D, such child or children, if more than one, would be entitled to share equally with the other nephew and nieces in the future rents and profits from the time of their respective births; and that to such child or children the provision as to educa-

tion and maintenance would also apply, as well as to the nephew and nieces named in the will.—Held, also, that the testator did not intend that his brother, T D, should give up the house on the youngest niece attaining twenty-one. *Darker v. Darker*, 2 Law J. (n.s.) Exch. Eq. 28, a.c. 1 C. & M. 850; 8 Tyr. 241; 2 Dowl. P.C. 88.

Testatrix gave a weekly sum to A for his life, or until he should attempt to assign, &c. the same; and she directed a sum of stock to be set apart to answer the payments; and she gave to A the power of leaving the stock, after the payments to him should cease, to and for the benefit of his wife and children, as he should, by will duly executed, give and bequeath the same. A died, having made an invalid appointment of the stock:—Held, that there was an implied gift to his wife and children, in default of appointment. *Brown v. Pocock*, 6 Sim. 257.

A testator bequeathed leasehold property to his daughter for her own and sole use, free of controul of any present husband, or any husband to come. The daughter was unmarried at the date of the will, and at the death of the testator. She married without a settlement, and having, shortly afterwards, separated from her husband, she filed a bill against him, claiming to be entitled to the leasehold property bequeathed to her separate use:—Held, that she was so entitled; and a conveyance to the plaintiff, to her sole and separate use, was directed accordingly. *Anderson v. Anderson*, 2 M. & K. 427.

The testator began his will by directing, that all his just debts, funeral, and other incidental expenses, should be paid with all convenient speed after his decease. By a codicil, he devised a particular estate, upon trust, in the first place, to pay the annuity to his wife, and, after certain payments, to apply the surplus to the discharge of his simple contract debts:—Held, that the real estate was not charged with payment of debts.

*Quare*—whether the introductory words, "with-out more, would have charged the real estate. *Douce v. Lady Torrington*, 2 M. & K. 600.

Testator gave all his real and personal estate, after payment of debts and legacies, to his wife for life; and directed, that, at the end of twelve months after her death, 1,000*l.* should be laid out in trust for his daughter, for life, and, after her decease, to divide the capital amongst her children, when they should attain twenty-one. One of the children attained twenty-one, and died in the lifetime of testator's widow:—Held, that the representatives were entitled to a share of the 1,000*l.* *Cousins v. Schroder*, 4 Sim. 28.

If the general intention of a testator can be collected upon the whole will, particular terms used, which are inconsistent with that intention, may be rejected, as introduced by the testator's mistake or ignorance of the force of the words used.

Where the latter part of a will is inconsistent with the prior part, the latter part will prevail. *Sherratt v. Bentley*, 2 M. & K. 149.

A testator gave a sum of 5,000*l.*, in the event of the death of his nephew, J W, without leaving issue, to be equally divided among all the brothers and sisters of J W who should be living at the time of his death, and the children then living of

any of his brothers and sisters who should have previously departed this life, but so that the children of such deceased brother and sister should take only the share which their parent would have taken if living:—Held, that a child of a brother of J W, which brother was dead at the making of the will, took no share of the 5,000*l.* *Wagh v. Wagh*, 2 M. & K. 41.

Testator, after directing all his debts to be paid, devised his real estates to several different persons, and charged certain of them with specific sums:—Held, that those estates, as well as the others, were charged with the debts.

A bequest of "all my household furniture, implements of trade, cattle, sheep, and all the rest and residue of my monies, securities for money, and personal estate whatsoever and wheresoever, not hereinbefore disposed of," is a residuary bequest. *Taylor v. Taylor*, 6 Sim. 246.

If upon the whole will it plainly appear that the testator meant to pass leasehold property under the description of real estate, the Court will give effect to his intention. *Goodman v. Edwards*, 2 M. & K. 759.

Testator gave the interest of a fund to his wife for life, and, after her death, to such of his four daughters as should be then living, in equal shares, during their respective lives; and from and after the several deceases of his four daughters, he gave one-fourth of the capital to their respective children. One of the daughters died before the widow, leaving a child:—Held, that the child became entitled, on the widow's death, to have one-fourth of the capital transferred to her. *Woodstock v. Shillito*, 6 Sim. 416.

A testator, after several devises and bequests, gave, devised, and bequeathed all his messuages, chattels real, ready money, securities for money, debts, and personal estate, to A and B, their heirs, executors, administrators, and assigns, upon certain trusts:—Held, that the legal estate in the premises mortgaged to the testator in fee, passed to A and B, the trusts declared not being repugnant to that construction. *Mather v. Thomas*, 6 Sim. 115.

Testator directed his real estates to be settled on certain persons in strict settlement, and that there should be inserted, in the settlement so to be made, powers of leasing, sale, partition, and exchange; "and my will is that, in such intended settlement, shall be inserted all such other proper and reasonable powers, as are usually inserted in settlements of the like nature:"—Held, that a power to appoint new trustees, was a proper and reasonable power to be inserted in the settlement. *Lindow v. Fleetwood*, 6 Sim. 152.

Devise of all testator's estates, and all his farming stock, ready money, bills, bonds, notes and other securities for money, and all the residue of his personal estate, to trustees, their heirs, executors, &c., in trust to sell his real estates, and to sell, get in, and convert into money all his personal estate, will pass a mortgage in fee. *Ex parte Barber*, 5 Sim. 451.

Testator bequeathed his residuary estate to trustees, in trust, as to one-third, for his daughter for life, and, after her decease, in trust for her children, and to be paid to them on attaining twenty-five; but if his daughter should leave but one child her sur-

living, then the whole third to go to and become the property of such only child upon its attaining twenty-five, and be transmissible to its executors; but in case his daughter should leave no child her surviving, or in case she should leave a child who should not attain twenty-five, then over:—Held, that the bequest to the children was void, for remoteness. *Hunter v. Judd*, 4 Sim. 455.

Testator devised his real estate to trustees, upon trust that his daughter M should, until twenty-one, if sole and unmarried, receive thereof an annuity of 60*l.*, and that she should thereafter and until thirty-one, if sole and unmarried, receive a further annuity of 40*l.*; but in case his said daughter should marry without the consent of his trustees, then she should only receive an annuity of 50*l.*, and the said estates should immediately upon such marriage be in trust for the children of M, under such limitations as in the will mentioned; and for default of such issue, in trust for the testator's sister S. Provided, that if M should marry with the consent of the trustees, the estates should be in trust for her and her husband for their joint lives and the life of the survivor, with remainder to the children of the marriage, under the same limitations as before. M married with the consent of the trustees, and died without issue:—Held, that the remainder to S was not conditional, depending on M's marriage without consent; consequently, that notwithstanding M's marriage with consent, the remainder to S took effect. *Tolderoy v. Colt*, 5 Law J. (N.S.) Exch. Eq. 25, s.c. 1 Y. & C. 240.

A testator, after giving all his real and personal estate to trustees, to sell and invest, &c., directed them to pay out of the interest thereof 50*l.* per annum, for the maintenance and education of his nephew, and to accumulate the remainder of the interest, to be held upon the same trusts as he had *thereinafter* declared of the principal for the benefit of his nephew and his nephew's children. Then the testator directed the trustees to advance to his nephew, when he should attain twenty-one, 1,500*l.*, for which he was to pay interest, which interest he declared should accumulate, and be held upon the same trusts as he had *thereinbefore* declared respecting the principal for the benefit of his nephew and his nephew's children—(none such having been declared):—the Court held, the nephew entitled to the interest of the fund during his life. *Hines v. Nunn*, 3 Law J. (N.S.) Chanc. 88.

Testator bequeathed 700*l.* to his daughter's husband, his executors, &c., in trust, to pay the interest to his daughter, for her separate use for life, and after her death, to such persons as she should appoint by will, and in default of appointment, to her personal representatives. The daughter died without having made any appointment:—Held, that her next-of-kin, to the exclusion of her husband, were entitled to the 700*l.* *Robinson v. Smith*, 6 Sim. 47.

Testator gave all his property to trustees, in trust, to invest it in securities at interest, for the use of his nephew, to be paid at such time and in such manner as the trustees should think fit; and when the nephew should attain twenty-one, that the trustees should pay him the amount of the interest or proceeds of the money come to their hands, as they might think most for his advantage, in weekly

or quarterly payments, for his life:—Held, that the nephew took an absolute interest in the property. *Billing v. Billing*, 6 Sim. 232.

A testator, by his will, gave to Caroline, described as his natural daughter, a sum of stock and his house and land at C, with a direction, that, if she married, the property should be settled solely upon herself and children; but in case of her death without lawful issue, the money so left to her to be equally divided betwixt his nephews and nieces who might be living at the time, and the land at C to his nephew J H:—Held, that Caroline took an absolute interest in the stock. *Campbell v. Harding*, 2 R. & M. 390.

Testator bequeathed the remainder of his property to his sister, A B, to dispose of amongst her children as she might think proper:—Held, that A B took no interest in the residue. *Blakeney v. Blakeney*, 6 Sim. 52.

It is a rule of the courts, in construing written instruments, that when an interest is given, or an estate conveyed in one clause of the instrument in clear and decisive terms, such interest or estates cannot be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate.

A testator recites, *seriatim*, in his will, the interests he had in several leaseholds for lives, and after each recital he devises the rents and profits of each leasehold to his wife and a married daughter; and to each of his sons and unmarried daughters, severally and respectively; devising to his son R part of the profit rent of Blackacre during the term of the lease, which was for the lives of the testator, and of R, and another; and devising to his unmarried daughters *nominatim* different parts of the rents of Whiteacre, in addition to equal shares given to them by the preceding clause, in the rents of another estate: "and further, if any of the above legatees should die, or die unmarried, he left the property bequeathed to them to be divided equally among the survivors of them:"—Held, that the devise to R, in Blackacre, was for the whole term of the lives of the *cestuis que vie*, and was not, on R's dying unmarried, cut down to an estate for his life only, by the clause of the survivorship, but that the words of the clause applied to the last-mentioned unmarried daughters only. *Thornhill v. Hall*, 2 C. & F. 22, s.c. 8 Bligh, N.S. 88.

J L devised his manors and hereditaments to trustees, upon trust, to convey the same to the use of J H L (his eldest son) for life, with remainder to trustees to preserve contingent remainders; with remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of J H L, severally and successively in seniority of age and priority of birth, in tail male; remainder to the use of the devisor's second and other sons successively in tail male; remainder to the use of J H L's first, second, third, fourth, fifth, and all and every daughter and daughters successively, in tail general; remainder to the use of the devisor's eldest daughter, M S L, for life; remainder to trustees to preserve, &c.; remainder to the use of the first, second, third, fourth, fifth, and all and every other

son of M S L successively, in tail male; remainder to her first, second, and other daughters successively, in tail general; with divers other like remainders to the devisor's other daughters and their issue, and various intermediate terms in trust. There was no express limitation to J H L's first son, nor any provision for him made or referred to in the will; but the trust of the first term directed to be contained in the settlement to be made by the trustees was declared to be, in case there should be no son of J H L, for raising portions for his daughters, except an eldest or only daughter; and the trusts of the other terms were to be for raising portions for the younger children of the successive tenants for life, in case there should be no issue of the body of J H L; and a power was directed by the devisor to be inserted in the settlement, to enable J H L to charge the devised estates with portions for his children, other than an eldest or only son:—Held, that the first son of J H L was entitled to have an estate tail in the devised manors and hereditaments, expectant on the death of his father, limited to him in the conveyance directed to be made by the trustees. *Langston v. Langston*, 2 C. & F. 194, a. c. 8 Bligh, n.s. 167.

## WINE.

Excise survey of,—discontinued. 5 & 6 Will. 4, c. 39; 13 Law J. Stat. 70.

Wine and spirits, &c.,—amendment of laws relating to, in Ireland. 3 & 4 Will. 4, c. 68; 11 Law J. Stat. 116.

## WITNESS.

- (A) ATTENDANCE.
- (B) COMPETENCY.
  - (a) *Relative Situation.*
  - (b) *Interest.*
  - (c) *Infamy.*
  - (d) *Want of Understanding.*
  - (e) *Waiver and Removal of Objection to.*
- (C) CREDIT.
- (D) COMMISSION, AND MANDAMUS TO EXAMINE.
- (E) EXAMINATION.
  - (a) *At Law.*
  - (b) *In Equity.*
  - (c) *When in Custody.*
- (F) INTERROGATORIES.
- (G) DEPOSITIONS.
- (H) PROTECTION AND PRIVILEGES.
- (I) EXPENSES.

## (A) ATTENDANCE.

[See ATTACHMENT—HABEAS CORPUS—NEW TRIAL—SUBPŒNA.]

When a witness is subpœnaed to attend at the sittings, and the cause is made a remanet, the subpœna must be re-sealed and re-served; and if the witness is only served with a notice to attend at the last sittings, the Court will not grant an attachment. *Sydenham v. Rand*, 8 Doug. 429.

In order to obtain an attachment for disobedience to a subpœna requiring the attendance of a witness

at the Quarter Sessions, the original subpœna must be shewn at the time of serving a copy. *Rex v. Wood*, 1 Dowl. P.C. 509. [Littledale.]

A witness may be called on his subpœna before the jury are sworn, and an action lies against him for his non-attendance, if, in consequence thereof, the plaintiff is obliged to withdraw his record.

In case for not attending as a witness pursuant to a subpœna, a distinct allegation of a good cause of action in the original suit held unnecessary after verdict; and that the averments, that the defendant could have given material evidence for the plaintiff—and that without his evidence the plaintiff could not safely proceed to trial—and that by reason of his non-attendance, and because the plaintiff could not safely proceed to trial without his testimony, he was forced and obliged to, and did withdraw the *Nisi Prius* record,—were sufficient.

To sustain an action for not attending as a witness, pursuant to a subpœna, the original subpœna need not be shewn to the witness, (unless possibly where he demands to see it,) and, therefore, where it is alleged that the subpœna was “made known to the defendant,” and the evidence was, that it was “made known” only, and conduct money taken by the defendant, that part of the allegation, as to shewing the subpœna, may be rejected.

A witness was subpœnaed, in an action for use and occupation, to give evidence as to the use and occupation, and also to rebut a set-off expected to be relied on by the defendant. When the cause was called on, the counsel on both sides were absent, but the attorney for the plaintiff proved he could have handed over a draft brief to other counsel, and swore that he withdrew the record solely on account of the absence of the witness, although another witness could have proved the use and occupation:—Held, that an action was maintainable against the witness, for not obeying his subpœna. *Mullett v. Hunt*, 2 Law J. (n.s.) Exch. 287, a. c. 1 C. & M. 752; 3 Tyr. 876.

Where an application is made for an attachment against a witness for not appearing at the trial, in obedience to his subpœna, the Court will not grant it, if the Judge who presided at the trial, be in court, and state that his testimony was not material. *Dicas v. Lawson*, 4 Law J. (n.s.) Exch. 80, a. c. 1 C. M. & R. 934; 5 Tyr. 235.

An attachment will not lie for disobedience of a subpœna *ad testificandum*, if at the time of service the original subpœna was not shewn to the witness, although the party making the service was not required to shew it. *Wadsworth v. Marshall*, 2 Law J. (n.s.) Exch. 10, a. c. 1 C. & M. 87; 3 Tyr. 228.

It is not indispensably necessary that, when a witness is called on his subpœna, the officer of the court should hold the writ in his hand; it is sufficient that the writ should be exhibited in court, and the officer call him three times.

A witness is bound to attend in court himself, pursuant to his subpœna; and it is no excuse for not attending that the person whom he employed as his agent, to watch the proceedings of the court, neglected to give him notice in due time. *Rex v. Fenn*, 3 Dowl. P.C. 546.

The wife of a publican, living sixty miles from Lancaster, was subpœnaed to give her evidence at the assizes there, and 2*l.* 2*s.* was given to her

for expenses. She did not make any objection to the amount, as being insufficient. On shewing cause against a rule for an attachment against her, it appeared that she had an infant in bad health at the breast, and that the inside fare of the coach from Liverpool (the road through which town was the most convenient route to Lancaster from the place where she resided,) was 11. 1s. The Court thought that she might reasonably require an inside place, and that the money was insufficient: and they refused to make the rule absolute for an attachment against her.—*Semble*, that the affidavit for an attachment for not appearing as a witness in pursuance of a subpoena, need not shew that the witness was called in court on the subpoena, especially if the witness never did attend the assizes. *Dixon v. Lee*, 1 C. M. & R. 646, s. c. 5 Tyr. 180.

A subpoena duces tecum, without being *ad testificandum* also, held good, and the party is bound to obey it, by producing the document, and is not thereby made a witness. *Evans v. Moseley*, 3 Law J. (N.S.) Exch. 132, s. c. 2 Dowl. P.C. 364.

In the statute 45 Geo. 3, c. 92, s. 3, for enforcing the appearance of persons served with subpoena in one part of the United Kingdom, to give evidence in another, the "parts" signified are England, Scotland, and Ireland.

Where a person has been served with a subpoena, not issued from the Crown Office, to appear and give evidence at Quarter Sessions, and makes default, the Court of King's Bench cannot attach him for contempt, either by its general authority, or by virtue of the above statute. *Re v. Brounell*, 3 Law J. (N.S.) M.C. 118, s. c. 1 Ad. & E. 598.

The Court of King's Bench has no power to grant an attachment against a witness for disobeying a subpoena issued out of the Court of Quarter Sessions. *Re v. Room*, 3 N. & M. 725.

A rule for an attachment against a witness will be discharged with costs, if it is denied that the original was shewn at the time of service. No conduct money need be tendered to a witness in town in a town cause. *Jacob v. Hungate*, 3 Dowl. P.C. 457.

An attachment for a contempt in disobeying a subpoena to attend as a witness at the trial of an indictment, should be moved for in the term next ensuing the trial. Therefore, where an indictment was tried on the 11th December, and a rule *nil* for an attachment against a party for such disobedience was moved for and obtained in Easter term, the Court discharged the rule, on the ground that the application had been too long delayed. *Re v. Stretch*, 5 N. & M. 178, s. c. 3 Ad. & E. 503.

The declaration in an action for disobeying a subpoena, contained no allegation that the plaintiff had originally a good cause of action, but contained an allegation that the defendant was a material witness, and by reason of his absence, and on no other account whatever, the plaintiff was nonsuited:—Held, that the omission of such allegation, at all events, could not be taken advantage of in arrest of judgment. *Masterman v. Judson*, 1 Law J. (N.S.) C.P. 86, s. c. 8 Bing. 224; 1 Mo. & Sc. 367.

#### (B) COMPETENCY.

##### (a) Relative Situation.

In an action by a woman suing as a feme sole,

her husband is an incompetent witness for the defendant to prove her marriage. *Bentley v. Cook*, 3 Doug. 422.

##### (b) Interest.

[See BILL OF EXCHANGE—BANKRUPT, Evidence—NEW TRIAL.]

Witnesses interested solely on account of the verdict, are admissible, and their names may be indorsed on the record. 3 & 4 Will. 4, c. 42, ss. 26, 27; 11 Law J. Stat. 98.

Inhabitants rated, or liable to be rated for the highways, are incompetent witnesses for the district indited for the non-repair of a highway. *Re v. Bishop Auckland*, 1 M. & Ro. 286. [Bolland]

The stat. 3 & 4 Will. 4, c. 42, s. 26, does not make the drawer of an accommodation bill a competent witness for the defendant in an action by the indorsee against the acceptor. The defendant, therefore, cannot examine him without a release. *Burgess v. Cuthill*, 6 C. & P. 282, s. c. 1 M. & Ro. 315. [Lyndhurst]

In an action against a carrier for negligence in carrying a parcel, the carrier's servant is not made a competent witness for the defendant, by the stat. 3 & 4 Will. 4, c. 42, s. 26, and cannot be examined without a release. *Harrington v. Caswell*, 6 C. & P. 352. [Patteson]

In an action on the case for injuring the plaintiff's wall by improperly digging a cellar near it, the workman who dug it is not made a competent witness for the defendant, by the stat. 3 & 4 Will. 4, c. 42, s. 26, and must therefore be released by the defendant before he can be examined. *Mitchell v. Hunt*, 6 C. & P. 351. [Patteson]

In an action by the indorsee against the acceptor of a bill of exchange, alleged to be an accommodation bill, the drawer was called as a witness for the defendant. His name was ordered to be indorsed on the record, under 3 & 4 Will. 4, c. 42, s. 27, and his evidence admitted. *Faith v. McIntyre*, 7 C. & P. 44. [Parke]

In an action for use and occupation, C, who was called as a witness for the plaintiff, stated that the plaintiff had let the premises to him, and that his tenancy was still undetermined. It was proposed, on the part of the plaintiff, to ask C whether he had not let the defendant into possession:—Held, that this could not be asked, unless C were released by A, and that stat. 3 & 4 Will. 4, c. 42, ss. 26, 27, did not apply in this case. *Hodson v. Marshall*, 7 C. & P. 16. [Denman]

In an action for damage done to the plaintiff's horse and cart, by the negligent driving of the defendant's servant, the plaintiff's servant, who was driving his cart at the time of the accident, is not a competent witness for the plaintiff without a release, and the stat. 3 & 4 Will. 4, c. 42, s. 26, has made no alteration in the law on this point. *Harding v. Copley*, 6 C. & P. 664. [Denman]

In an action for negligently driving the defendant's carriage against that of the plaintiff, the latter cannot examine his servant, who drove his carriage, without releasing him. *Wake v. Lock*, 5 C. & P. 454. [Denman]

An inhabitant of a parish was held a good witness on a conviction under 5 Anne, c. 14, for keeping a lurcher to kill game, if it do not appear that he

is an inhabitant paying scot and lot; and the Court would not presume he was such an inhabitant. *Rea v. Cottrell*, 4 Doug. 360.

The rated inhabitants of a district indicted for non-repair of a highway, are not rendered competent witnesses for the defence by statute 54 Geo. 3, c. 170, s. 9. *Rea v. Bishop Auckland*, 1 Ad. & E. 744.

In an action against an executor, a legatee under the will is, *prima facie*, a competent witness for the defendant. *Nowell v. Daniel*, 2 Law J. (N.S.) K.B. 178.

In an action for the recovery of tolls, a witness is competent to prove for the defendant that he has used the market or right of way, for which the tolls are sought to be recovered, within six years, when no toll was demanded, or, if demanded, payment was refused; although the verdict, if for the plaintiff, may be given in evidence against such witness on a future occasion, in an action for the recovery of the same tolls. *Lancum v. Lovell*, 2 Law J. (N.S.) C.P. 46, s. c. 9 Bing. 465; 2 Mo. & Sc. 843; 6 C. & P. 459.

The evidence of a witness who has entered into an agreement to bear part of the costs, will be rejected as illegal for maintenance, and the 3 & 4 Will. 4, c. 42, s. 26, will not remove the incompetency. *Jesus College, Oxford, v. Gibbs*, 4 Law J. (N.S.) Exch. Eq. 42, s. c. 1 Y. & C. 146.

In trespass to land, the seisin of A was in issue. It appeared that A had conveyed the land first to the plaintiff, and afterwards to the defendant, without covenanting for good title. The defendant had mortgaged the land to A to secure the purchase-money:—Held, that A was a competent witness for the defendant to prove his own seisin and to defeat his previous conveyance, because his security would not be affected by the result of the action, and he was not shewn to be substantially one of the parties thereto. The objection, as to his defeating his own deed, went to his credibility, not his competency. *Simpson v. Pickering*, 4 Law J. (N.S.) Exch. 20, s. c. 1 C. M. & R. 527; 5 Tyr. 148.

In an action of replevin, the defendant made cognizance as bailiff of A, and another cognizance as bailiff of B:—Held, that upon the defendant consenting to abandon the cognizance as bailiff of B, B was a competent witness to prove the issue on the other cognizance. *King v. Baker*, 4 Law J. (N.S.) K.B. 41, s. c. 2 Ad. & E. 333; 4 N. & M. 228.

If a right of way be pleaded for the inhabitant householders of M to fetch water, an inhabitant householder of M may be examined in support of this plea under the stat. 3 & 4 Will. 4, c. 42, s. 26. *Knights v. Woore*, 7 C. & P. 258. [Williams]

A witness cannot be rejected, unless he has a direct and immediate interest in the result of the cause in which he is called to give evidence, nor unless the verdict in that case can be given in evidence for him in another suit. The rules of law in England and Scotland are the same on this subject. *Rakston v. Rowat*, 1 C. & F. 424.

The first vendor of a horse warranted sound is not competent to prove soundness for his vendee, in an action brought against him on a subsequent sale with warranty. *Biss v. Mountain*, 1 M. & Ro. 302. [Alderson]

A had let a horse and gig to B for a journey. B afterwards desired C to drive it back for him,

and returned it to A; as C was doing so, the defendant negligently drove his gig against the horse of A, and killed it:—Held, that, in an action brought by A for the injury to his reversionary interest in the horse, C was not a competent witness for the plaintiff without a release. *Heming v. English*, 6 C. & P. 542. [Williams]

An occupier of lands in the parish, but who had been examined as a witness on both sides, proved the handwriting of the plaintiff (the vicar) to receipts for alleged moduses. An objection to his evidence, on the ground of interest, was overruled. *Thompson v. Perryman*, 1 Y. 698.

In an action against executors for a debt of the testator, a person entitled to an annuity under the will, is not disqualified by interest from giving evidence for the defendants. *Nowell v. Davies*, 5 B. & Ad. 368, s. c. 2 N. & M. 754.

On indictment for perjury committed by A on the trial of an action against B and others, B is not incompetent merely because he has not paid the debt and costs, and has filed a bill in equity; but it seems that if he expects that A will be a witness against him in a similar action coming on for trial soon after the indictment, this is such an immediate interest as will disqualify him. *Rea v. Hulme*, 7 C. & P. 8. [Denman]

In an action for a libel against the printer of a newspaper, one of the proprietors of the newspaper is a competent witness for the defendant, as he is not liable for contribution. *Moscati v. Lawson*, 7 C. & P. 32. [Alderson]

In an action by a landlord, who is a tenant for life, against a tenant from year to year, for waste, the remainder-man in tail is a competent witness for the plaintiff. *Leach v. Thomas*, 7 C. & P. 327. [Patteson]

If a witness is incompetent, on the ground that he has made himself liable to pay the attorney, a release to him by the attorney of "all fees, costs, and charges," is sufficient to render him competent. *Dee d. Dally v. Allbutt*, 6 C. & P. 131. [Gurney]

In an action for work and labour, the defendant pleaded, that the "promise was made to the plaintiff and J S, and not with the plaintiff alone." Replication, that the "promise was made to the plaintiff alone, and not to the plaintiff and J S:—Held, that J S was a competent witness for the defendant to prove, that the contract was entered into by the defendant with the plaintiff and himself jointly. *Davies v. Evans*, 6 C. & P. 619. [Parke]

In an action by the assignees of a bankrupt, in which the bankruptcy is in dispute, a son of the bankrupt, who was held out as a partner with him, but who was, in fact, not so, is not a competent witness for the assignees. *Holland v. Reeves*, 7 C. & P. 36. [Alderson]

#### (c) Infamy.

A person rendered infamous by conviction of a crime, is not, by the law of Scotland, restored to competency as a witness by having suffered the punishment, nor otherwise than by a pardon from the Crown. *Ritchie v. Mackay*, 4 Bligh, N.S. 536.

#### (d) Want of Understanding.

Before a child is examined as a witness, the Judge must be satisfied that the child feels the binding

obligation of an oath from a general course of religious education; and the effect of the oath on the conscience of the child should arise from a religious feeling of a permanent nature, and not from instruction recently communicated for the purpose of a trial. Therefore, where it appeared, that, up to a very recent period, a girl, aged eight years, was totally ignorant of religion, but had some religious instruction given to her with a view to her being examined, but at the trial shewed, that she had no real understanding on the subject of religion or a future state, the Judge would not allow her to be examined. *Rex v. Williams*, 7 C. & P. 320. [Paterson]

(e) *Waiver and Removal of Objection.*

[See STAMP, Deed.]

In an action against B and C to recover the balance of a banking account, which commenced in 1822, and ended on the 1st of November 1831, the right of the plaintiffs to recover depended on the rate of interest, which they were entitled to charge by the understanding between the parties during their transactions together. The defendants, to prove their case on this point, proposed to call D, who stated on the *voir dire*, that he was a partner with B and C from 1822, to the 23rd of June 1831, and that the partnership accounts as between himself and them were still unsettled. Between the witness's retirement and November 1831, considerable sums had been paid in and drawn out by the defendants, but the general balance had not been materially altered. Since witness's retirement, B and C had asked time of their creditors to pay their debts. General releases *inter alia* of "all demands" from B and C to D, and from D to B and C, were executed:—Held, that, by these releases, D was rendered a competent witness. *Wilson v. Hirst*, 4 B. & Ad. 760, s. c. 1 N. & M. 742.

A person, liable by bond for the costs of the action, may be rendered competent by depositing the penalty of the bond as security for the costs with the Court. *Lees v. Smith*, 1 M. & Ro. 329. [Denman]

One of the bail was called as a witness for the defendant, and objected to; but, on a sum equal to double the amount sworn to being deposited with the marshal of the Lord Chief Baron, his Lordship struck the witness's name out of the bail-piece, and he was examined. *Pearcy v. Fleming*, 5 C. & P. 503. [Lyndhurst]

At a trial, an interested witness was examined, on the attorney for the party examining him undertaking to give him a release. After the trial, the attorney refused to release the witness:—Held, that the witness might compel the attorney to give him a release; but that this refusal was no ground for the Court granting a new trial. *Heming v. English*, 6 C. & P. 542. [Williams]

A, having a cause of action against B, is discharged under the Lords' Act; but does not execute any assignment, alleging, that he has no property. After his discharge, he gives B a release: this release is good; and, therefore, if in an action by A against C, it appearing that A might sue B, if he did not recover against C, A may, notwithstanding this discharge, release B, and make him

a competent witness. *Briant v. Eicke*, 5 C. & P. 44. [Tenterden]

Upon the trial of an ejectment, brought by churchwardens and overseers to recover a house, alleged, on the part of the lessor of the plaintiff, to be a parish house, a rated inhabitant of the parish is a competent witness for the plaintiff, under the statute 54 Geo. 3, c. 170, s. 9. *Doe d. Higgs v. Cockell*, 6 C. & P. 525. [Alderson]

In an action against an overseer defending on behalf of the parish, an inhabitant is not rendered competent for the overseer by the statute 54 Geo. 3, c. 170. *Tothill v. Hooper*, 1 M. & Ro. 392. [Denman]

A general release by a creditor to a bankrupt, is not sufficient to render the bankrupt a competent witness for the creditor, where the result of his testimony would give the creditor a right to prove under the commission. The creditor ought also to give a release to the assignee of all claim on the bankrupt's estate, and the bankrupt ought to release his claim to a surplus. *Perryman v. Steggel and Straight*, 1 Law J. (N.S.) C.P. 115, s. c. 8 Bing. 369; 1 Mo. & Sc. 540.

(C) CREDIT.

The tone and character of depositions are often better criteria of judging the credit due to witnesses, than minute variations between witness and witness. *Constable v. Tufnell*, 4 Hag. Ec. 507.

The counsel for the prosecution, in a case of felony, opened that he should call A and B as witnesses, the former being a King's evidence. Both before and after those persons were called, the prisoner's counsel were allowed to ask the other witnesses, whether A and B were not persons of very bad character. *Rex v. Nichols*, 5 C. & P. 600. [Parke]

(D) COMMISSION AND MANDAMUS TO EXAMINE.

[See ISSUE, Practice.]

A commission to examine witnesses may be granted for the trial of an issue directed by the Court of Chancery, *Bordeau v. Rowe*, 1 Bing. N.C. 721, s. c. 1 Sc. 608.

Under what circumstances the Court will refuse to give the costs of a commission to examine witnesses to the party obtaining the commission, and to whom that examination is beneficial, although the opposite party cross-examine.

*Quere*—whether the inadmissibility of the deposition at the trial, by reason of the incompetency of the witness, would make any difference in the decision, as to the costs of the commission; *semble*, not. *Bridges v. Fisher*, 4 Law J. (N.S.) C.P. 117, s. c. 1 Bing. N.C. 510; 1 Sc. 485.

The Court of Exchequer have power under 13 Geo. 3, c. 63, s. 44, to award a writ of mandamus for the examination of witnesses in India. *Savage v. Binny*, 3 Law J. (N.S.) Exch. 219, s. c. 2 Dowl. P.C. 643.

The Court will grant a commission to examine witnesses, without the clause requiring the commissioners to take an oath, if, from the circumstances, it appears that the commission cannot be made available unless that clause be omitted.

Thus, where a commission to examine witnesses had issued, directed to certain individuals at Ham-



burgh, who were unable to enforce the attendance of some material witnesses; and it was stated, on affidavit, that if a commission was directed to the Judges of the Court of Commerce there, without such a clause, they, in all probability, would act, and would exercise their power to compel the witnesses to attend and give evidence upon oath, this Court granted the commission, without the clause requiring the commissioners to be sworn. *Clay v. Stevenson*, 4 Law J. (N.S.) K.B. 212, s.c. 5 N. & M. 318; 3 Ad. & E. 807.

An application under the 1 Will. 4, c. 22, for an examination of a witness resident out of the jurisdiction of the Court, must be made as early as possible after issue joined. *Brydges v. Fisher*, 4 Mo. & Sc. 458.

By the 1 Will. 4, c. 22, the Court has power to issue a mandamus to examine a witness in India wheresoever the cause of action may have arisen. *Bain v. De Vetry*, 3 Dowl. P.C. 516.

A rule for a mandamus to examine witnesses in India, under the 13 Geo. 3, c. 68, s. 45, is *in vi* in the first instance. *Grimes v. Patterson*, 3 Dowl. P.C. 35.

A rule of court for the examination of witnesses on interrogatories in a foreign country is not an absolute stay of proceedings, but only a limited one. *Forbes v. Wells*, 3 Dowl. P.C. 318.

On an application by the defendant for a commission to examine witnesses abroad, the Court refused to make it a part of the rule to call upon the plaintiff to produce a bill of exchange in his possession at the time of executing the commission. *Cunliffe v. Whitehead*, 3 Dowl. P.C. 684.

The 1 Will. 4, c. 22, s. 4, which gives power to the Court to issue commissions in certain cases for the examination of witnesses, does not apply to indictments. *King v. Lady Briscoe*, 1 Dowl. P.C. 520.

The costs of executing a commission in a foreign country, under 1 Will. 4, c. 22, s. 4, are costs in the cause, unless some special ground is laid for ordering otherwise. *Prince v. Sams*, 4 Dowl. P.C. 6.

Where a witness resides abroad at such a great distance, that a commission sent out to examine him would necessarily occasion great delay, it is not a matter of course to grant such a commission on the application of the defendant; but it must be made out to the satisfaction of the Court, that the evidence of the witness would be admissible and of service to the defendant when obtained; and, therefore, where in an action on a bill by the indorsee against the acceptor, the defendant applied for a commission to examine the drawer in Upper Canada, to shew that there was nothing due from the defendant to him, and it was sworn, that it was believed that the plaintiff had not given value; but, upon a former hearing before a Judge at chambers, it appeared to him, that the plaintiff had given value, the Court refused to interfere. *Lloyd v. Key*, 3 Dowl. P.C. 253.

A mandamus cannot be issued into Scotland, under the 1 Will. 4, c. 22, s. 1, for the examination of witnesses there; but a commission may be issued for that purpose under the 4th section. *Wainright v. Bland*, 3 Dowl. P.C. 658.

The Court will not stay the issuing of a commission to examine witnesses abroad, on the ground of the plaintiff being indebted to the defendant for

certain costs in equity. *Oughan v. Parish*, 4 Dowl. P.C. 29.

It is not necessary that the affidavit in support of a motion for a commission to examine witnesses abroad, should state either the names of the witnesses, or the matters to which they are to be examined, in a case where it is evident that such examination is necessary. *Carbonell v. Bessell*, 5 Sim. 686.

## (E) EXAMINATION.

### (a) *At Law.*

A witness on cross-examination may admit not having mentioned a fact on a former examination, though that examination is in writing, and not produced. *Ridley v. Gyde*, 1 M. & Ro. 197. [Tindal]

If on cross-examining a witness, an irrelevant question be put, you cannot produce evidence to disprove his answer, but must take it for better or worse. *Ex parte Arnsby*, 2 D. & C. 212.

A person attending a trial in obedience to a *subpoena duces tecum*, with a document, may be required to produce the document without being sworn as a witness.

Thus, in an action against a sheriff for penalties under 32 Geo. 2, c. 28, the plaintiff, by a *subpoena duces tecum*, may compel the officer who has executed the writ to produce the warrant, without swearing him as a witness, and thus giving the defendant an opportunity of cross-examination. *Summers v. Mossley*, 3 Law J. (N.S.) Exch. 128, s.c. 2 C. & M. 477; 4 Tyr. 158.

A person called to produce a document, and sworn by mistake, and to whom a question is put which he does not answer, is not liable to be cross-examined. *Rush v. Smith*, 3 Law J. (N.S.) Exch. 355, s.c. 1 C. M. & R. 94; 4 Tyr. 675.

It is not necessary that a witness producing a document under a *subpoena duces tecum* should be sworn. *Perry v. Gibson*, 3 Law J. (N.S.) K.B. 158, s.c. 1 Ad. & E. 48; 3 N. & M. 462.

In an action for money had and received against an auctioneer to recover back a deposit on failure of making a good title, one of the witnesses on cross-examination stated, that there was an agreement in writing between the parties:—Held, that a question put to the witness, whether that agreement related to the deposit, was a good and legal question. *Curtis v. Greated*, 3 Law J. (N.S.) K.B. 126, s.c. 1 Ad. & E. 167; 3 N. & M. 449.

Where, after examination of witnesses to a fact on behalf of a prisoner, the Judge (there being no counsel for the prosecution) calls back and examines a witness for the prosecution, the prisoner's counsel has a right to cross-examine again, if he thinks it material. *Rex v. Watson*, 6 C. & P. 653. [Bosanquet and Taunton]

On the trial of an indictment for arson, a witness for the prosecution was himself in custody on a charge of felony. The counsel for the prisoner wished to ask him, "Have you not said that you committed the offence for which you are now in custody?"—Held, that this question ought not to be put. *Rex v. Pegler*, 5 C. & P. 521. [Park]

A witness is not only not bound to answer a question, the answer to which would criminate him, but he is not bound to answer any question, the

answer to which would tend to criminate him. A witness is therefore not bound to answer whether he wrote an advertisement referring to libellous letters, which the prosecutor had received; and, though he is bound to answer whether he knows in whose handwriting it is, he is not bound to name the person, as it may be himself. *Rex v. Slaney*, 5 C. & P. 213. [Tenterden]

A witness was asked, on cross-examination, whether he had not become bail for a witness previously examined. He replied, "yes, and that he believed it was on a charge of keeping a gaming-house." In order to prevent any impression against the character of the party so accused, the Court, at the suggestion of counsel, allowed such party to be called up again, and asked whether the charge was, in fact, true or false. *Rex v. Noel*, 6 C. & P. 336. [Gaselee and Taunton]

Where a witness for the prosecution, in a case of felony at the Old Bailey, on being asked to repeat an answer, which she had previously given, before the whole of it had been taken down, omitted what the prisoner's counsel thought an important part of it, and denied that she had ever uttered such part, the Judges allowed the shorthand writer of the Court, who had taken down the answer, to be examined as a witness, to shew whether the words had been used or not. *Rex v. Slater*, 6 C. & P. 334.

Questions may be put on the *voir dire* to a witness by the party who calls him, in order to shew his competency, though no question has been asked by the opposite counsel to shew a disqualification, the objection being founded on the opening speech. *Perryman v. Steggall*, 5 C. & P. 197. [Gaselee]

All the witnesses are ordered out of court. A witness for the prosecution remained in court. The Judge will not allow him to be examined. *Rex v. Wyld*, 6 C. & P. 380. [Park]

It is no ground for rejecting a witness's evidence, that he remained in court after an order for all the witnesses to leave the court; it is merely a matter of observation on his evidence. *Cook v. Nethercote*, 6 C. & P. 741. [Alderson]

If a witness, on the *voir dire*, be asked, "if he is liable to pay the attorney," and he says that "he is not," a letter written by him may be put into his hand; and after he has looked at it, the question may be put again. *Homan v. Thompson*, 6 C. & P. 717. [Parke]

If a party robbed go within a few hours after the robbery to a constable, and mention the name of the person who robbed him, the party robbed may be asked, at the trial, whether he named any person to the constable; but ought not to be asked what name he mentioned; and the constable may be asked, whether, in consequence of the party robbed mentioning a name to him, he went in search of any person, and, if so, who that person was. *Rex v. Wink*, 6 C. & P. 397. [Patteson]

Where a witness gives evidence destructive of the case which he was called to prove, the party calling him may, in order to neutralize his evidence, shew that he had, before the trial, given to the attorney an account of the transaction entirely different from that sworn to by him at the trial. *Wright v. Beckett*, 1 M. & Ro. 414. [Denman]

A party cannot call evidence to discredit his own

witness; therefore he cannot contradict him as to a collateral fact. He may, however, call a witness to contradict him in a fact material to the issue in the cause. *Friedlander v. the London Assurance Company*, 2 Law J. (N.S.) K.B. 16, s.c. 1 N. & M. 30; 4 B. & Ad. 193.

*Semble*, that the respondents, who produce the pauper as a witness, may call evidence to contradict him as to a particular fact to which he has sworn.

But they must do so at the risk of the pauper being thereby entirely discredited, and, if his evidence be material, of failing to make out a case against the appellants. *Rex v. Braley*, 1 Law J. (N.S.) M.C. 2.

A party may call other witnesses to disprove a part of the testimony of a witness he has called, without being obliged to repudiate the whole of such testimony. *Bradley v. Ricardo*, 1 Law J. (N.S.) C.P. 36, s.c. 8 Bing. 57; 1 Mo. & Sc. 133.

Where a witness, upon cross-examination, throws out matter not relevant to the issue, the counsel on the opposite side ought to request the Judge to expunge it from his notes; but if he omits to do so, and the witness is re-examined upon that matter, he cannot move for a new trial on the improper reception of evidence. *Blewitt v. Tregunning*, 4 Law J. (N.S.) K.B. 234, s.c. 5 N. & M. 234.

If a witness, called for the plaintiff, be asked, on the part of the defendant, whether the plaintiff had any conversation with him on a particular subject, the plaintiff's counsel may examine as to every part of the same conversation; but, if the witness state that the plaintiff had no such conversation with him, this does not let in the plaintiff's counsel to examine as to anything else that the plaintiff said. *Dicas v. Lord Brougham*, 6 C. & P. 249. [Lyndhurst]

If the counsel for the prosecution decline calling a witness whose name is on the back of the indictment, it is in the discretion of the Judge who tries the case, whether the witness shall or shall not be called for the prisoner's counsel to examine him before the prisoner is called on for his defence. *Rex v. Bodle*, 6 C. & P. 186. [Gaselee]

If the witness be so called, the Judge will allow the examination of the witness to assume the shape of a cross-examination, but will not allow the prisoner's counsel to call any witnesses to contradict him. *Ibid.*

If a witness is called, and his examination is stopped by the Judge, after one immaterial question only, the opposite party cannot cross-examine him. *Creedy v. Carr*, 7 C. & P. 64. [Gurney]

#### (b) In Equity.

The Court will, on special circumstances, order a witness, who has been examined as a witness in the cause before the examiner, to be examined after the hearing, before the Master, on the same matter, where it is essential for the purposes of justice; but the circumstances must be very special. *Rosley v. Adams*, 2 Law J. (N.S.) Chanc. 143, s.c. 1 M. & K. 543.

Examination of parties on interrogatories in respect of partnership accounts. *Ward v. Fitz Hugh*, 3 Law J. (N.S.) Chanc. 236.

A plaintiff may read, as his evidence, any part of

the cross-examination of the plaintiff's witnesses. *Goodyear v. Robinson*, 4 Law J. (N.S.) Chanc. 174.

(c) *When in Custody.*

A was to be tried for felony at the Assizes for the county of W, and B, a material witness for A, was committed to the W city prison for further examination on a charge of felony:—Held, that, before the trial of A, the governor of the W city prison ought to allow A's attorney to see B in his presence. *Res v. Simmonds*, 7 C. & C. 176. [Parke]

(F) INTERROGATORIES.

Where the examination on interrogatories of an absent witness is read on the part of the plaintiff, the whole, including the answers to the cross-interrogatories, must be read as part of the case. *Temperley v. Scott*, 5 C. & P. 341. [Tindal]

On an application under the 1 Will. 4, c. 22, s. 4, to have a witness, within the jurisdiction of the Court, examined on interrogatories, the name of the person before whom the examination is to take place must be mentioned before the rule *nisi* will be granted. *Doe d. Thorn v. Phillips*, 1 Dowl. P.C. 56.

(G) DEPOSITIONS.

[See EVIDENCE, Depositions.]

[See *Pirie v. Iron*, 8 Bing. 143, s.c. 1 Mo. & Sc. 223, as to the practice in examining witnesses before the Prothonotary, under 1 Will. 4, c. 22, s. 10.]

The Court permitted the examination of a witness before the Prothonotary, under the stat. 1 Will. 4, c. 22, (on payment of costs) upon the affidavit of his medical attendant, who swore that he was in a precarious state, and could not attend at the trial without great danger. *Pond v. Dimes*, 3 Mo. & Sc. 161.

Whether pregnancy, with immediately expected delivery, be a sickness or infirmity, authorizing the examination of a witness by the Prothonotary, under 1 Will. 4, c. 22, s. 10—*quære*.

If such pregnancy be a sickness or infirmity contemplated by that statute, it must be shewn by affidavits of competent persons, that the delivery will probably happen about the time fixed for the trial of the cause, so as to render the attendance of the witness dangerous. *Abraham v. Newton*, 1 Law J. (N.S.) C.P. 91, s.c. 8 Bing. 274; 1 Mo. & Sc. 384.

(H) PROTECTION AND PRIVILEGES.

[See ARREST, Privilege from.]

A witness coming from abroad to give evidence in a cause here, without being served with a subpoena, is privileged from arrest. *Walpole v. Alexander*, 3 Doug. 45.

A witness subpoenaed in a criminal prosecution, tried at the King's Bench Sittings, and committed for contempt for striking the defendant, has the same privilege in returning home after the expiration of his imprisonment as if he had not been committed. *Res v. Wigley*, 7 C. & P. 4. [Coleridge]

A witness from Gravesend, having attended the Court of Review, pursuant to a summons, being ar-

rested for debt in Pancras Lane, City, while waiting for the conveyance home, was discharged; although he had, on leaving the Court of Review, gone to Catherine Street, Strand; but without costs against the officer, he not having been shewn the summons to attend the Court of Review. *Ex parte Clarke*, 2 D. & C. 99.

A party, who was in town, having been subpoenaed as a witness in a cause in the Exchequer, and whose examination had begun, was taken upon an attachment for not having put in his answer, in a suit in which he was defendant. Motion, that he should be turned over to the Fleet, refused. *In re Thomas*, 4 Law J. (N.S.) Chanc. 32.

A person, who is arrested whilst privileged as a witness, cannot maintain an action against the plaintiff, who has sued out the process, and delivered it to the sheriff to be executed, without any knowledge of the privilege when he so delivered it. *Stokes v. White*, 3 Law J. (N.S.) Exch. 321, s.c. 1 C. M. & R. 223; 4 Tyr. 786.

(I) EXPENSES.

In a policy cause, the Prothonotary on taxation allowed subsistence to the master of the ship insured, a material witness, from the time of subpoena to the time of the trial, but refused to allow for his subsequent detention, pending a rule for a new trial, in which the Court at an early stage intimated, that the only point would be one to which his evidence would not apply; the witness resided in England, was not examined, was a master in the Royal Navy, and did not shew the permission of the Admiralty for his engaging in the merchant service:—The Court refused to disturb the Master's allowance. *Mount v. Larkins*, 1 Law J. (N.S.) C.P. 89, s.c. 8 Bing. 195; 1 Mo. & Sc. 165, 357.

The Prothonotary, on taxation of costs, is justified in allowing a captain of a ship, who is a witness in the cause, expenses for subsistence according to his station, for the whole time during which he is detained to give evidence. *Temperley v. Scott*, 1 Law J. (N.S.) C.P. 111, s.c. 8 Bing. 392; 1 Mo. & Sc. 601.

In an action of slander, in which no justification was pleaded, and no special damage was alleged, the plaintiff having recovered a verdict, the Prothonotary allowed for the expense of witnesses necessary to prove an inducement explanatory of the slander, and his professional reputation:—and held, that he had exercised a proper discretion in making such allowance. *Andrews v. Thornton*, 1 Law J. (N.S.) C.P. 126, s.c. 8 Bing. 64, 431; 1 Mo. & Sc. 159, 670.

Since 1 Will. 4, c. 22, which enables parties to examine witnesses abroad on interrogatories, if witnesses are brought over to this country, the Master is not compelled, as by the previous practice of the Court, to award their expenses on taxation, but will allow them or not, according to his discretion, in each case. *M'Alpine v. Powles*, 2 Law J. (N.S.) Exch. 272, s.c. 1 C. & M. 795; 3 Tyr. 871; 2 Dowl. P.C. 299.

A master of a vessel detained here as a necessary witness, was allowed in the taxation of costs the expenses of his living here, and his travelling expenses, and disallowed a claim of 7*l.* per month

for wages, which if he had sailed he would have been entitled to:—Held, that the allowance was proper. *White v. Brazier*, 3 Dowl. P.C. 499.

On the trial of an indictment for manslaughter, the surgeon will only be allowed for his attendance on the trial, and not for his fee for opening the body by order of the coroner. *Rez v. Taylor*, 5 C. & P. 301. [Littledale]

The Judge, on a trial for murder, has no power to allow the expenses of the witnesses for their attendance at the coroner's inquest. *Rez v. Rees*, 5 C. & P. 302. [Littledale]

A prosecutor and his witnesses were bound by recognizance, to prosecute and give evidence at the assizes; they attended there and preferred an indictment, which was found. The prisoner had been by mistake discharged by proclamation at an adjourned sessions, which had preceded the assizes, and had absconded. The Judge allowed the expenses;—but, *semble*, that if the prosecutor and witnesses had merely appeared at the assizes, and had not preferred any indictment, the Judge would have had no power to allow any expenses. *Rez v. Robes*, 5 C. & P. 552. [Taunton]

A party who is bound over to prosecute at a superior court, by a court of Quarter Sessions, is entitled to his expenses under the statute. *Rez v. Paine*, 7 C. & P. 135. [Denman]

#### WOOD.

Provision for the better collection of duties on; 5 & 6 Will. 4, c. 40; 13 Law J. Stat. 71.

#### WOODS AND FORESTS.

Commissioners' powers enlarged in respect to land revenues in Scotland. 3 & 4 Will. 4, c. 69. 11 Law J. Stat. 116.

#### WOOLLEN TRADE.

Repeal of 13 Geo. 1, c. 23; 3 & 4 Will. 4, c. 28; 11 Law J. Stat. 82.

#### WOOLLEN MANUFACTURES.

[See TRESPASS—CONVICTION.]

#### WORDS.

Meaning of,—See TITHES.

#### WOOLWICH DOCKS.

Commissioners for executing office of High Admiral, empowered to acquire certain lands for securing and improving. 3 & 4 Will. 4, c. 65; 11 Law J. Stat. 114.

#### WORK AND LABOUR.

[See INQUIRY, Writ of—PRINTER.]

In an action for work and labour, the Court will compel the plaintiff's attorney to give a note in writing of the plaintiff's trade and residence, and also give a view of the plaintiff. *Collinson v. Gill*, 4 Doug. 206.

In an action on a special contract for work, and for work, labour, and materials generally, the defendant may give evidence, that the work was ill done; and the plaintiff, on such evidence, can only recover the value of the work, labour, and materials on the common counts. *Chapel v. Higges*, 3 Law J. (N.S.) Exch. 38, s. c. 2 C. & M. 214; 4 Tyr. 43.

Defendants engaged plaintiff to write work for a certain sum, for a particular publication. After the plaintiff had done a portion of it, the defendants abandoned the publication:—Held, that the defendants had broken their contract; and that the plaintiff might recover for the work and labour he had done. *Planché v. Colburn*, 1 Law J. (N.S.) C.P. 7, s. c. 8 Bing. 14; 1 Mo. & Sc. 51.

The hirer of a carriage by the year under a written agreement, binding the carriage maker "to keep the same in perfect repair without any further charges whatever," is not liable for repairs made necessary by accident, and not by the wilful default of the hirer. *Reading v. Menham*, 1 M. & Ro. 234. [Denman]

When a tradesman finishes work differing from the specification agreed on, he is not entitled to the actual value of the work, but only to the agreed price *minus* such a sum as it would take to complete the work according to the specification. *Thornton v. Place*, 1 M. & Ro. 218. [Parke]

A ship outward bound with goods, being damaged at sea, put into a harbour to receive some repairs which had become necessary for the continuance of her voyage, and a shipwright was engaged, and undertook to put her into thorough repair. Before this was completed, he required payment for the work already done, without which he refused to proceed; and the vessel remained in an unfit state for sailing:—Held, that the shipwright might maintain an action for the work already done, though the repair was incomplete, and the vessel thereby kept from continuing her voyage at the time when the action was brought. *Roberts v. Havelock*, 3 B. & Ad. 404.

In an action for work and labour on an implied contract, the defendant, on the plea that he was never indebted, may go into evidence to prove that the work was done under such circumstances as to shew that there was no implied contract to pay anything, but upon this plea the defendant cannot go into evidence of misconduct, except such as goes to shew that there was no implied contract to pay. *Cooper v. Whitehouse*, 6 C. & P. 545. [Alderson]

#### WOUND.

[See GRIEVOUS BODILY HARM—MALICIOUS INJURY.]

An injury by a hammer flung at a person, whereby the skin is divided, is a wound within 9 Geo. 4, c. 31, s. 12. *Rez v. Withers*, 1 M. C.C. 294.

In criminal cases, the definition of a wound is an injury to the person by which the skin is broken. *Moriarty v. Brooks*, 6 C. & P. 684. [Lyndhurst]

The continuity of the skin must be broken, to constitute a wound within the meaning of 9 Geo. 4, c. 31, s. 12. *Rex v. Wood*, 1 M. C.C. 278.

In an indictment under Lord Lansdowne's Act, 9 Geo. 4, c. 31, ss. 11 and 12, the question of whether in case death had ensued, it would have amounted to murder, is a question of law to be decided by the Judge; and it is not for the jury to pronounce their opinion upon, aided by the Judge's observations. *Rex v. Benson*, 7 C. & P. 142. [Parke]

In an indictment for wounding with intent to murder, &c. the instrument or means by which the wound was inflicted need not be stated; and, if stated, do not confine the prosecutor to prove a wound by such means. A wound from a kick with a shoe will be within the 9 Geo. 4, c. 31, s. 12. On an indictment which charges the wound to have been inflicted by striking with a stick, and kicking with the feet, proof that the wound was caused either by a blow from a stick, or a kick, will be sufficient though it be uncertain by which of the two it was. *Rex v. Briggs*, 1 M. C.C. 318.

A game-keeper accompanied by his assistant, met four poachers on the highway, one carrying a gun, another a gun-barrel, and the other two bludgeons. There had been previously two shots fired. The game-keeper said to his assistant, "Mind the gun;" and the assistant laid hold of it, and then the game-keeper called to another person. Upon this three of the poachers knocked him down and stunned him; and when he came to himself, he saw all of them near him, and one said, as they passed "Damn them, we have done them both," and one turned back and cut him on the left leg, and all then ran away. It was objected, first, that the wounding in the leg was the act of one alone, and there was no evidence to shew which of them it was. Secondly, that, from the expressions used, it was evident that both were thought to be dead; and that there could be no intent to murder, &c. Thirdly, that the prisoners being on the highway, the game-keeper and his assistant had no right to interfere with them. The prisoners were convicted, and the Judges held the conviction right. *Rex v. Warner*, 5 C. & P. 525. [Bolland]

## WRECK.

In an action of trespass, to try the right of a lord of a manor to wreck, an ancient document was offered in evidence from the lord's muniments, purporting to be a survey of the lands of the manor by certain tenants, wherein they stated that the lord was entitled to wreck, but it was rejected:—Held, that it was properly rejected, the lord's right to wreck being a matter of which the tenants could have no knowledge. *Talbot v. Lewis*, 4 Law J. (N.S.) Exch. 9, a.c. 1 C. M. & R. 495; 5 Tyr. 1.

An ancient survey of a manor made before commissioners appointed by the lord of the manor, and a jury of the tenants of the manor, is admissible as evidence to shew the boundaries of the manor; but is not admissible as evidence of the lord's title to wreck.

If Spanish dollars more than one hundred years old be found in the sands of a sea-shore, it will be presumed that they came there by the loss of some vessel which was wrecked, although no part of any vessel be found near them. *Talbot v. Lewis*, 6 C. & P. 603. [Parke]

## WRIT OF RIGHT.

[See PRACTICE, Declaration—SPECIAL VERDICT.]

One of the knights summoned to try a writ of right not attending, the Court refused to substitute another, without the consent of the parties; it not appearing that the absence of the knight was occasioned by the act of God. *Carne dem., Nicholl ten.*, 1 Sc. 68.

The Court allowed the tenant in a writ of right to withdraw his demurrer, and plead *de novo*. *Twining dem., Leondes ten.*, 2 Bing. N.C. 133, a.c. 2 Sc. 260.

*Seemle*—in a writ of right the tenant must begin, although he make tender of the demi-mark. *Spiers v. Morris*, 2 Law J. (N.S.) C.P. 153, a.c. 9 Bing. 687; 3 Mo. & Sc. 118, 124.

The Court of Common Pleas would not stay the proceedings in a real action, until the costs of former ejectments, tried in the Court of King's Bench, and of certain proceedings in the Court of Chancery, brought and instituted by the demandant, for the recovery of the same premises, were paid. *Bowyear dem., Bowyear ten.*, 2 Law J. (N.S.) C.P. 87, a.c. 9 Bing. 670; 3 Mo. & Sc. 65.

If, in a writ of right, the demandant alleged and relied upon the seisin of his ancestor, he must establish such seisin by proof of the ancestor's taking the esples and profits of the property in question.

The admission of a party in possession of premises, that he holds them as tenant; and his declaration as to the person of whom, as landlord, he holds them, were admissible in evidence to prove the fact of the tenancy, and the identity of the landlord. *Carne dem., Nicholl ten.*, 4 Law J. (N.S.) C.P. 89, a.c. 1 Bing. N.C. 430; 1 Sc. 466.

A writ of summons of the four knights to choose the grand assize would not be set aside for irregularity, by reason of an alteration of the return day, after it has been issued, where it had not been executed. *Miller v. Miller*, 4 Law J. (N.S.) C.P. 259, a.c. 2 Bing. N.C. 66; 2 Sc. 116.

In a writ of right, it was not sufficient for the demandant, in stating his pedigree, to say that he was cousin and heir of the person last seized, but he must also set out how he was such cousin and heir. When such omission occurred and advantage was taken of it by special demurrer, the Court would not permit the demandant to amend. Amendments in the count of a writ of right were not favoured, though the Court did not go the length of saying that circumstances might not occur in which amendments might be allowed. *Worley dem., Blunt ten.*, 2 Law J. (N.S.) C.P. 73, a.c. 9 Bing. 535; 2 Mo. & Sc. 779.

In a writ of right, when the tenant, upon the return of the writ, cast his essoin, he could not call upon the demandant to adjourn it to a more remote period than the fourth return day inclusive, the time fixed by the 24 Geo. 2, c. 48, s. 3. The 1 Will. 4, c. 3, s. 2, which regulated the returns of

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